REFORMING FAIR & EQUITABLE TREATMENT PROVISIONS IN BANGLADESH'S BILATERAL INVESTMENT TREATIES: A PATH TOWARDS BALANCING NATIONAL SOVEREIGNTY WITH FOREIGN INVESTORS' COMMERCIAL INTERESTS

by

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Declaration

I declare that this thesis was composed solely by myself and is being submitted for the degree of PhD at Canterbury Christ Church University. Except where stated otherwise by reference or acknowledgment, the work presented is entirely my own.

It has not been submitted before for any degree, examination or professional qualification in any other University or Institution. I confirm that I have exercised reasonable care to ensure that the work is original and does not, to the best of my knowledge, break any UK law or infringe any third party's copyright or other Intellectual Property Rights.

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Abstract

This thesis provides a comprehensive examination of the Fair and Equitable Treatment (FET) provisions within Bangladeshi Bilateral Investment Treaties (BITs) and their implications for foreign investment. It critically assesses the effectiveness of current FET provisions in striking a balance between Bangladesh's national sovereignty and the commercial interests of foreign investors. Through an extensive literature review, analyses of discrepancies in the wording and levels of protections in existing FET provisions, case study analyses and comparative examinations of other countries' FET provisions in BITs, this thesis exposes the vulnerability of Bangladesh's current BIT framework.

Ambiguous FET provisions and weak BIT practises have led to a sharp rise in the number of investment disputes filed by foreign investors against Bangladesh in recent years. Notable cases including *Saipem, Niko, Chevron, Scimitar* and *NEPC* reveal how weakly protected FET provisions and ineffective BIT practises have allowed foreign investors to file cases against Bangladesh for substantial claims. This has been worsened by Bangladesh's casual BIT signings, lacking proper negotiation and foresight on foreign investment claim ramifications. These claims are not only having a damaging impact on Bangladesh's economy but are limiting its regulatory freedom. Balancing fewer arbitration cases with the need for foreign investment is crucial for the country's economy and sustainable growth.

Comparing India and the US's FET strategies in BITs, this thesis argues that adopting India's approach of removing FET provisions entirely could be detrimental for Bangladesh's foreign investment attraction. The US model, which balances national and foreign investors' interests through institutional strengthening and safeguarding FET provisions, is more suitable. However, this requires the establishment of a robust institution with a reviewing council in Bangladesh tasked with developing, monitoring and reviewing their BIT framework in line with international standards.

Drawing upon all findings from the analyses of the discrepancies in FET provisions, exploratory case studies and comparative analysis, a series of pragmatic recommendations

are proposed to tackle the legitimacy crisis of current FET provisions within Bangladeshi BITs. These specifically encompass the formation of an independent institution with council, developing a model BIT with safeguarded FET provisions and reforming domestic laws on foreign investment. These recommendations take Bangladesh's developing status into account and address the full spectrum of issues previously raised.

This thesis provides the first in-depth academic examination of FET issues within Bangladeshi BITs. While it offers foundational principles for the reformation of Bangladesh's foreign investment framework, it also calls for broader, global research to ascertain the most effective FET standards for other developing nations. The findings and recommendations laid out herein not only offer a roadmap for Bangladesh but also serve as inspiration for other developing countries grappling with similar challenges in the evolving landscape of foreign investment and international arbitration.

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Abbreviations & Acronyms

AA	Arbitration Act
AAA	American Arbitration Association
ACA	Arbitration and Conciliation Act
ACC	Bangladesh Anti-Corruption Commission
ACCI	Agrabad Chamber of Commerce & Industry
ACIEP	Advisory Committee on International Economic Policy
ADR	Alternative Dispute Resolution
AFCFTA	Investment Protocol of the African Continental Free trade Agreement
APTA	Asia-Pacific Trade Agreement
ARIA	Arab Regional Investment Agreement
AUD	Australian Dollars (currency)
BAA	Bangladeshi Arbitration Association
BAPEX	Bangladesh Petroleum Exploration and Production Company Limited
BDT	Bangladeshi Taka (currency)
BECB	Bangladesh Energy Regulatory Commission
BELA	Bangladesh Environmental Lawyers Association
BERC	Bangladesh Energy Regulatory Commission Act
BGT	Biwater Gauff (Tanzania)
BIAC	Bangladesh International Arbitration Centre
BIDA	Bangladesh Investment Development Authority
BIMSTEC	Bengal Initiative for Multi-Sectoral, Technical and Economic Cooperation
BIPA	Bilateral Investment and Protection Agreements

BIT	Bilateral Investment Treaty
BOI	Board of Investment in Bangladesh
BPDB	Bangladesh Power Development Board
BPG	Best Practice Guide
BRC	Bangladesh Regulatory Commission
CAFTA-DR	Dominic Republic- Central American
CECAs	Comprehensive Economic Cooperation Agreements
CETA	Canada Comprehensive Economic and the Trade Agreements
CFR	Constitutional Fundamental Rights
CJEU	Court of Justice European Union
CPR	International Institute for Conflict Prevention and Resolution
CSR	Corporate Social Responsibility
DCCI	Dhaka Chamber of Commerce & Industry
EC	Energy Charter
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
EUR	Euros (currency)
FAA	Federal Arbitration Act
FBCCI	Federation of Bangladesh Chambers of Commerce & Industry
FBI	The U.S. Federal Bureau of Investigations
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment

FET	Fair and Equitable Treatment
FICCI	Foreign Investors' Chamber of Commerce and Industry
FPIPPA	Foreign Private Investment Promotion and Protection Act
FPS	Full Protection and Security
FTA	Free Trade Agreement
GBP	UK Pounds (currency)
GDP	Gross Domestic Product
IACA	Indian Arbitration and Conciliation Act
IACAC	Inter-American Commercial Arbitration Commission
ICC	International Chamber of Commerce
ICC-B	Chamber of Commerce-Bangladesh
ICCB	International Chamber of Commerce Bangladesh
ICDR	The International Centre for Dispute Resolution
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation
IIA	International Investment Agreement
IISD	International Institute of Sustainable Development
IMF	International Monetary Fund
IPFSD	Investment Policy Framework for Sustainable Development
ISDS	Investor State Dispute Settlement

ITA	Investor Treaty Arbitration
ITO	International Trade Organisation
JAMS	Judicial Arbitration and Mediation Services
JIS	Joint Interpretive Statements
LCI	Law Commission of India
LCIA	London Court of International Arbitration
LDA	Louis Dreyfus Armateurs
MCCI	Metropolitan Chamber of Commerce & Industry
MFN	Most Favoured Nation
MFT	Most Favoured Treatment
MIA	Model International Agreement
MIGA	Multilateral Investment Guarantee Agency
MST	Minimum Standard of Treatment
NAFTA	North American Free Trade Agreement
NCDRC	National Construction Dispute Resolution Committee
NPM	Non-Precluded Measures
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
Petrobangla	Bangladesh Oil Gas and Mineral Corporation
PIL	Public Interest Litigation
PPP	Public Private Partnership
RCMP	The Royal Canadian Mounted Police
SAFTA	South Asian Free Trade Agreements

SCB	Supreme Court of Bangladesh
Tk	Taka [Bangladeshi Currency]
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission On International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
US	United States [of America]
USA	United States of America
USD	US Dollars (currency)
USMCA	United States-Mexico-Canada Agreement
USTR	United States Trade Representative
WB	World Bank
WIC	World Investment Court
WTO	World Trade Organisation

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Chapter 1: Introduction

1.1 Background of the Study

Modern bilateral investment treaty (BIT) provisions are designed to encourage, promote and protect international investment and also promote international unity and solidarity.[1] For this reason, BITs have become the most recognised and popular mechanism for international investment in the current world.[2] The unique provisions of BITs, containing contemporary features of treatment, are the main reason for their vast acceptance and popularity.[3] However, some open-ended and vague provisions and phrases including Fair and Equitable Treatment (FET), Full Protection of Security (FPS) and Most Favoured Nations (MFN) along with controversial arbitral tribunal interpretations have caused a series of problems in recent times with foreign investors suing host countries for considerable financial gain, essentially questioning the effectiveness of BITs.[4]

In the context of BITs, 'Fair and Equitable Treatment' (FET) is a key principle included in many BITs and other international investment agreements. FET provisions are designed to ensure that foreign investors are treated fairly and equitably when investing in a foreign country. While the wording and interpretations of a country's FET provisions can vary from one BIT to another, they include obligations on the host country to provide a series of important protections for foreign investors.

Providing a stable and predictable regulatory environment for foreign investors is one such obligation included in FET provisions, meaning that the host country should not introduce sudden and unexpected changes to its laws and regulations that may negatively impact the investments of foreign investors. FET provisions also stipulate that foreign investors should not be subjected to arbitrary or discriminatory actions by the host country's government, meaning that they should be treated in a non-discriminatory manner when

[1] Rumana Islam, 'Different Constructions of the FET Standard in Investment Treaties', *The Fair and Equitable Treatment (FET) standard in international investment arbitration: developing countries in context* (Springer 2018).
[2] Tom Mortimer and Chrispas Nyombi, *Rebalancing International Investment Agreements in Favour of Host States* (Wildy, Simmonds & Hill Publishing 2018).
[3] Islam (n 1).
[4] Ibid 45.

compared with domestic investors. FET provisions also aim to ensure due process and protection of investments, meaning that host countries are required to provide a fair and transparent legal process in the event of disputes. Furthermore, if a host country expropriates an investment, FET provisions commonly state that it should provide prompt, adequate and effective compensation to the affected foreign investor. These obligations specify that the host state must act consistently, reasonably and transparently in a clear harmless manner without ambiguity and discrimination to guarantee due process in decision making processes and respect investors' legitimate expectations.[5] FET is an absolute standard of protection which guarantees legal protections for an investor to invest in a foreign country.[6]

FET provisions have become an inevitable part of foreign investment agreements over the past few decades due to its increasing popularity from guaranteeing such important obligations to protect foreign investors from unjustified expropriation by the host state.[7] In addition to protecting the foreign investor, the claimant's success rate over investor-state disputes is considerably high.[8] Consequently, a recent statistic shows that nine out of ten of all global BITs contain an FET provision as a core principle.[9] However, despite its encouraging and beneficial features, it also exposes several uncertainties and risks. A series of problems have arisen due to vague wordings of FET in BITs, especially when tribunals put forward either too narrow or broad interpretations on a state's obligations. Despite defining the state's obligations, FET provisions never clarify the ways in which they can be enforceable, especially in developing and underdeveloped countries like Bangladesh. Another problem arises from the FET provisions themselves because their wording is often

[5] Islam (n 1).
[6] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2009).
[7] Mohammad Belayet Hossian, Asmah Laili Bt Yeon and Ahmad Shamsul Bin Abd Aziz, *FDI and Dispute Settlement Arrangements in Bangladesh: Issues and Challenges*, vol 11 (Cambridge University Press 2021).
[8] Mortimer and Nyombi (n 2).
[9] Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, vol 70 (Oxford Publishing Limited (England) 2000).

inconsistent and unclear, therefore never clarifying how investment protection and public interests can be best balanced.[10]

There is a long ongoing debate about FET containing a list of protections which are essentially too vague and have no clear means of practical implementation.[11] Professor Muchilinski has contended that the notion of fair and equitable treatment lacks precise delineation, thereby providing a broad foundation for constructing arguments that assert inadequate treatment of foreign investors.[12] Furthermore, arbitral tribunals often resort to intricate terminologies in their attempts to define FET, resulting in interpretations that may either be excessively narrow or excessively broad, thereby complicating its understanding and discerning the potential consequences that may follow.[13]

Given that fairness and equity are often considered to be the most important elements of the Bangladeshi legal system, a provision like FET in BITs and international investment will always be vital for Bangladesh. Recently, however, Bangladesh is facing serious challenges in dealing with BIT disputes, especially in balancing Bangladesh's national interests with commercial interests of foreign investors.[14] These recent challenges are largely attributed to inadequacies of FET provisions, which lack sufficient protections, exhibit weaknesses and have become outdated and impractical. There is also further issue with Bangladesh signing individual BIT agreements in a haphazard manner with lack of meaningful negotiations, leading to potential consequences and negative implications.

This issue has been asserted by Hossain, renowned Bangladeshi legal scholar, arbitrator and former advisor to the prime minister. Hossain stated that Bangladeshi governments tend to sign BITs without adequately considering the implications or potential consequences.[15] Hossain claimed that government stakeholders had little awareness of the

[10] Chrispas Nyombi & Tom Mortimer, 'Tackling the Legitimacy Crisis in International Investment Law Through Progressive Treaty-Making Practices' (2017) 20 *International Arbitration Law Review* 165.
[11] Vasciannie (n 8).
[12] Peter Muchlinski, *Multinational Enterprises and The Law* (1st edn, Oxford University Press 1995) 625.
[13] Prabhash Ranjan, 'India and Bilateral Investment Treaties—a Changing Landscape' (2014) 29 *ICSID Review* 419.
[14] Hossian, Yeon and Aziz (n 6).
[15] Audiovisual Library of International Law, 'Lecture Series - Dr. Kamal Hossain' (*2011*) <https://legal.un.org/avl/ls/Hossain_D.html#> accessed 14 July 2021.

signed BITs and lacked documentation or notes to evidence that meaningful negotiations had taken place. He further observed that Bangladesh's involvement in negotiations had been minimal, primarily limited to proofreading without substantial input. As a result, these treaties have granted significant protection to foreign investors, including direct access to international arbitration, exposing the host state to substantial economic liabilities. This poor execution of BITs without prior knowledge of their contents has raised doubts about the sanctity of treaties entered into by the Bangladeshi government.[16]

Although such a lack of documentation was historically common during BIT signings worldwide, Hossain's remarks underscore the outdated approach taken by Bangladesh in signing BITs. While the historical signing of BITs lacked documentation to substantiate meaningful negotiations, as they were initially rooted in early friendships and not seen as having a substantial impact on establishing rights and obligations for foreign investors, the landscape has since evolved. Although there were very few cases brought against countries by foreign investors in the past, the significant rise in investor-state disputes since 2010 has meant that meaningful negotiations are now a crucial part of signing BITs. To qualify as a meaningful negotiation, there should be a substantive and fair exchange of ideas, concessions and compromises between the parties involved. Each party should actively engage to ensure that the final agreement reflects their own interests, concerns and a balanced resolution, fostering a mutually beneficial relationship. It has become commonplace and essential to take notes and produce documentation as evidence that such a meaningful negotiation has occurred during the signing of a BIT. This is a particularly important point to note for the recommendations in later chapters of this thesis.

Bangladesh has recently faced numerous legal challenges by foreign investors, who sought substantial financial compensation, citing weak and ambiguous FET provisions as the grounds for their claims.[17] A series of cases have been filed against Bangladesh at the

[16] ibid.
[17] Afzalur Rahman, 'Impact of Foreign Direct Investment on Economic Growth: Empirical Evidence from Bangladesh' (2015) 7 *International Journal of Economics and Finance*.

International Centre for Settlement of Investment Disputes (ICSID), alleging violations of FET provisions. Notably, cases involving *Saipem,*[18] *Niko,*[19] *Chevron,*[20] *Scimitar*[21] and *NEPC*[22] centre around issues related to Bangladeshi Natural Gas and Energy Production, with parties asserting claims based on FET breach.[23] In such cases, foreign investors have sued Bangladesh for millions of US dollars for any instance of losses or minimal inconveniences, claiming them to constitute breaches of FET provisions whilst disregarding their own accountability.[24]

Inadequate FET provisions are permitting investors to exploit FET to their advantage through arbitral tribunals where the FET provisions are interpreted too narrowly or broadly. These interpretations often neglect Bangladesh's status as a developing country, disregarding a range of developmental issues and challenges that Bangladesh faces in the context of international investment disputes.[25] Such challenges encompass limited resources, administrative capacity, technology, and infrastructure, as well as economic and social obstacles like political instability, social unrest, conflicts and their aftermath, social and political transitions and economic crises.[26] The author argues that these factors should be duly considered by arbitral tribunals when interpreting the FET standard going forward.

Moreover, under existing FET provisions, foreign investors are enjoying the luxury of challenging Bangladesh’s sophisticated policies and regulations which conflict with investor

[18] Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award (30 June 2009).
[19] Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration and Production Company Limited ("BAPEX") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/18, Award (25 February 2019).
[20] Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh, ICSID Case No ARB/06/10, Award (17 May 2010).
[21] Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation, ICSID Case No. ARB/92/2, Award (4th May 1994).
[22] NEPC Consortium Power Limited v. Bangladesh Power Development Board (II), ICSID Case No. ARB/18/15, Award (12 April 2021).
[23] Discussed in chapter five.
[24] Rahman (n 15).
[25] ibid, pp 256.
[26] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (3rd edn, Hart Publishing 2016).

interests. This includes serious matters such as tax policies, fiscal policy, investment policy, environment policies, health policies and natural gas distribution among others.[27]

The Bangladesh government needs to pay serious attention to these important issues before they reach a critical stage. Considering that 36% of the population lives below the poverty line, the country cannot afford to pay substantial compensation to foreign investors due to the weaknesses in its current FET provisions within the BIT framework.[28] This situation further exacerbates the challenges faced by Bangladesh in ensuring fair treatment for foreign investment and safeguarding the interests of all stakeholders involved.[29] However, while decreasing the number of arbitral cases against Bangladesh is vital, continuing to attract and promote foreign investment remains equally important for both Bangladesh's economy and sustainable development.[30]

Despite Bangladesh facing such substantial losses in arbitration tribunals, it is concerning to observe the lack of expert scholars who have thoroughly examined these issues or provided any substantial recommendations to address the situation. To address this significant research gap, this thesis argues that current problems can be addressed by reforming FET provisions in Bangladesh's BITs. This will be achieved by conducting an extensive literature review, identifying deficiencies in the current FET provisions, comparing Bangladesh's FET provisions with other countries' approaches and utilising the findings from these analyses to propose concrete recommendations and a model BIT framework to address these issues. Therefore, this thesis intends to propose realistic and pragmatic recommendations for improving future FET provisions whilst also emphasising the need for Bangladesh to balance its national sovereignty with foreign investors' interests.

[27] Muhammad Nasrullah Nakib, 'Regulating Foreign Direct Investment for Development: Bangladesh in Context' [2014] *Researchonline,Macquarie University*.
[28] ibid 28.
[29] Vasciannie (n 8).
[30] ibid 68.

1.2 Global Challenges with FET Provisions in BITs

The problems associated with FET provisions in BITs extend beyond Bangladesh and are a global issue, with a particularly detrimental impact on developing countries.[31] Various countries such as Bolivia, Ecuador, Venezuela and Russia have encountered issues with excessive protections afforded to investors under these provisions, leading to their withdrawal from international arbitration bodies like ICSID and the Energy Charter.[32]

Several countries including Indonesia, Morocco, India, Poland, Peru and South Africa, have contemplated leaving ICSID permanently, driven by apprehensions that investors can bring substantial claims without adequately proving the breach's severity. These nations also cite other factors supporting their potential departure from ICSID. Among these is the lack of an appeal mechanism review arbitral awards, even if they contravene public policy. Another reason is that ICSID rules tend to favour developed nations, overlooking the specific challenges and broader concerns encountered by developing and underdeveloped countries.

For example, India's recent dissatisfaction of the ICSID convention stems from issues related to lack of faith, inconsistency, unpredictability and lack of transparency in the system. India paid $8 million USD per case on average in the last five years, excluding White Industries (an Australian corporation) to which they paid compensation of $9.8 million USD.[33] In 2016 alone, at least seven claims were brought against India; five involving FET provisions.[34] The increasing number of claims, particularly involving FET provisions, further demonstrates the detrimental impact on developing and under-developed countries' economies.[35]

[31] Mortimer and Nyombi (n 2).
[32] ibid 136.
[33] Ranjan (n 13).
[34] ibid 146.
[35] Discussed in chapter six.

Other countries are also encountering significant problems with FET as seen in the important cases of Biwater Gauff (Tanzania),[36] Philip Morris v. Uruguay,[37] Philip Morris v. Australia[38] and Vattenfall v. Germany.[39] In such cases, good faith regulations and undisputable public policy concerns were challenged by foreign investors claiming a breach of FET, raising further questions about the effectiveness of FET provisions within BITs particularly when they contradict with national sovereignty and commercial interests, potentially posing threats to justice.[40]

To enhance the effectiveness and workability of the BITs, reform is necessary to address issues stemming from uncertainty, inconsistency and vague language in FET provisions. The sub-principle of legitimate expectation in FET can hinder host governments from implementing investment-related policy reforms for public interest. The Investment Policy Framework for Sustainable Development (IPFSD) has identified problems with FET provisions and proposed reform options, including the exclusion of the FET clause from BITs.[41]

The existing Investor-State Dispute Settlement (ISDS) system provides foreign investors with excessive protections, resulting in numerous multi-million or billion-dollar claims against host countries. In response to this concern, Transatlantic Trade and Investment Partnership (TTIP) has suggested alternative approaches to ISDS and dispute settlement mechanisms. The discussions led to the proposal for the establishment of an international Investment Court with an appellate body, with the objective of achieving a balance between commercial and public interests.[42]

[36] Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, ICSID Case No ARB/05/22, (Award 24 July 2008).
[37] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016).
[38] Philip Morris v. Australia, PCA Case No. 2012-12, Award (17 December 2015).
[39] Glamis Gold Ltd. v. United States of America, UNCITRAL (NAFTA), Award (8 June 2009).
[40] ibid para 46.
[41] United Nations UNCTAD, 'Investment Policy Framework' (*United Nation's Conference on Trade and Development (UNCTAD)*, 2015) 1 <https://investmentpolicy.unctad.org/investment-policy-framework> accessed on 16 July 2021.
[42] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Bloomsbury Publishing 2020).

These preceding discussions clearly indicate that arbitral claims filed by foreign investors against developing countries like Bangladesh have substantial economic and regulatory ramifications, impacting policy space, judicial roles and corruption control.[43] This thesis intends to put forward recommendations for Bangladesh to improve their FET provisions and BIT framework, seeking a balance between national sovereignty and commercial interests whilst continuing to attract foreign investment to stimulate economic growth and sustainable development. These proposed recommendations have the potential to not only benefit Bangladesh but also other developing countries around the world.

1.3 Bangladesh's Attitude Towards Foreign Investment

Bangladesh is one of the leading foreign investment friendly countries in south Asia. This is demonstrated by Bangladesh's signing of 34 BITs to date, with 25 of them presently in force.[44] The country does not only support and stimulate international investment for its own interests but also encourages crucial matters such as building special relationships with the international community to promote international unity and solidarity.[45]

Despite its relatively small size, covering only 57,570 square feet, Bangladesh stands out as the third-largest signatory country of BITs in South Asia.[46] Given that international investment plays a vital role in Bangladesh's economy, the country has always been keen to pay extra attention to their investment climate. Under a new foreign investment policy mechanism, the country guarantees a strong local market and growth; a large and low-cost labour force; fiscal incentives; export competitiveness; easy access to the global market; public private partnership (PPP); and export processing zones.[47]

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[43] ibid.
[44] United Nations UNCTAD, 'Bangladesh Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' (2023) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh> accessed 26 July 2021.
[45] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010).
[46] Hossian, Yeon and Aziz (n 6).
[47] ibid 45.

The primary factor contributing to Bangladesh's attractiveness to international investment is its adoption of lenient, accommodating and foreign investor-friendly international mechanisms, which serve to facilitate and favour foreign investors.[48] Within its BIT agreements, Bangladesh commits to a series of ambitious protections, including FET, FPS and MFT, in a bid to entice foreign investment without necessarily considering potential implications for public policy concerns and host state sovereignty matters.[49]

Bangladesh has not only negotiated BITs with several different countries but has also successfully negotiated several regional trade and economic agreements with neighbouring countries, including the South Asian Free Trade Agreement (SAFTA), the Asia-Pacific Trade Agreement (APTA), the Bay of Bengal Initiative for Multi-Sectoral and the Technical and Economic Cooperation (BIMSTEC).[50] Bangladesh have recently proposed a bilateral free trade agreement (FTA) with Sri Lanka which, following ongoing negotiations, could be another positive movement for the country's economy. All of the aforementioned agreements demonstrate the positive attitude that Bangladesh holds towards BIT agreements.[51]

Bangladesh is eager to attract foreign investors due to the numerous benefits it can bring including stimulating economic growth, creating jobs, transferring technology and knowledge, accessing new markets, fostering infrastructure development, generating increased tax revenue, improving the balance of payments, enhancing competitiveness and strengthening diplomatic and trade relations.[52] Foreign investment injects capital, technology, and expertise into local industries, leading to increased productivity and job opportunities, while also facilitating access to international markets for domestic companies.[53] Additionally, foreign investors contribute to infrastructure projects, generate tax revenue and foster knowledge spillovers, further promoting innovation and competitiveness in the domestic

[48] ibid 235.
[49] Umme Humayara Manni and Munshi Naser Ibne Afzal, 'Effect of Trade Liberalization on Economic Growth of Developing Countries: A Case of Bangladesh Economy' (2012) 1 *Journal of Business Economics and Finance* 37.
[50] Hossian, Yeon and Aziz (n 6).
[51] ibid, pp 346.
[52] Rahman (n 15).
[53] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (3rd edn, Hart Publishing 2016).

market. Ultimately, encouraging foreign investment significantly contributes to economic development and a more globally interconnected and prosperous nation.[54]

1.4 The Contribution of Foreign Direct Investment to Bangladesh's Economy

Figure 1. Bangladesh Foreign Direct Investment

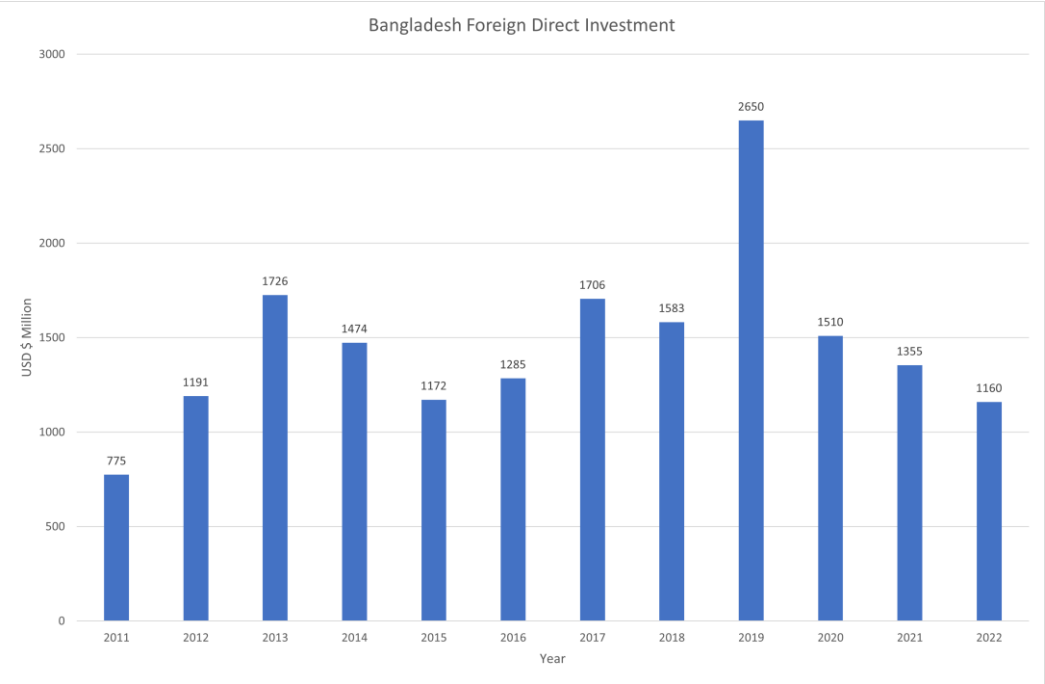

Figure 1. shows a consistent trend of growth in Bangladeshi Foreign Direct Investment (FDI) between 2011 to 2019; it is important to note that the significant decrease since 2019 has been due to the COVID-19 pandemic, Russia-Ukraine War and global rises in inflation.[55] The contribution of foreign investment to the economy was greatest in 2019 at $2650 million.[56] The growth of Bangladeshi FDI increased by an average of 10% each year from 2008 to 2016. From 2016 to 2019, foreign investment increased by an average of 35% per year which has significantly contributed to the sharp rise of Gross Domestic Product (GDP) per capita in Bangladesh.[57]

[54] Umme Humayara Manni and Munshi Naser Ibne Afzal, 'Effect of Trade Liberalization on Economic Growth of Developing Countries: A Case of Bangladesh Economy' (2012) 1 *Journal of Business Economics and Finance* 37.
[55] Bangladesh Bank, 'Bangladesh Foreign Direct Investment | 2002-2020 Data' (*Trading Economics*, 2020) <https://tradingeconomics.com/bangladesh/foreign-direct-investment> accessed 14 July 2022.
[56] ibid 256.
[57] ibid 463.

Bangladesh has a rapidly developing, market-based economy in south Asia.[58] Before the pandemic, despite facing challenges like natural disasters, political instability, poor infrastructure and slow implementation of economic reforms, Bangladesh's economy grew at an average annual rate of 5-6% since 1996, as per the Bangladeshi Foreign Investment Guide 2018 statistics.[59] This growth in economy is particularly notable and the International Monetary Fund (IMF) report 2016-2018 confirms that its consistent economic growth of up to 2% helps to sustain Bangladesh as the second fastest growing major economy.[60]

According to the IMF, Bangladesh was ranked as the 41st largest economy in the world in 2022.[61] Bangladesh moved up to being the 42nd largest economy in the world in 2021 to 41st position in 2022, despite ongoing challenges due to rising inflation and the Russia-Ukraine war. Furthermore, UNCTAD's latest 2022 World Investment Report shows that FDI inflows to Bangladesh increased by 12.9% to USD 2.89 billion in 2021 (compared to USD 2.56 billion in 2020).[62]

1.5 Research Questions

This thesis asks to what extent current FET provisions in Bangladeshi BITs provide an effective legal framework for continuing to promote and attract foreign investment whilst also striking a delicate legal balance between the rights of the host state and those of its foreign investors. The primary research questions are as follows:

i) What are the existing discrepancies in wordings of current FET provisions and what levels of protections do these provide to foreign investors?

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[58] DFDL, 'Bangladesh Investment Guide 2018' (*DFDL*, 2018) <https://www.dfdl.com/resources/publications/investment-guides/bangladesh-investment-guide-2018/> accessed 22 June 2021.
[59] ibid 56.
[60] Arun Devnath, 'Record Exports Seen Rising as Bangladesh Woos U.S. Consumers - Bloomberg' (*Bloomberg*, 24 January 2016) <https://www.bloomberg.com/news/articles/2016-01-24/record-exports-seen-rising-in-this-fast-growing-asian-economy> accessed 22 June 2021.
[61] International Monetary Fund (IMF), 'World Economic Outlook ' (*International Monetary Fund*, 2022) <https://www.imf.org/external/datamapper/NGDPDPC@WEO/OEMDC/ADVEC/WEOWORLD/BGD> accessed 14 July 2022.
[62] United Nations UNCTAD, 'World Investment Report | UNCTAD' (International Tax Reforms And Sustainable Investment., 2022) <https://unctad.org/system/files/official-document/wir2022_en.pdf> accessed 14 July 2022.

ii) How have these different constructions of current FET provisions contributed to the rising number of cases against Bangladesh and why have these been significant for Bangladesh?

iii) How have other relevant countries (the US and India) structured their FET provisions to reduce cases at arbitral tribunals whilst also balancing national sovereignty and commercial interests? What lessons can Bangladesh learn from their approaches?

1.6 Aims & Objectives

The aim of this thesis is to reform FET provisions in Bangladesh's BITs to continue to attract foreign investment whilst balancing Bangladesh’s national interests with the commercial interests of its foreign investors. The research will initially focus on identifying potential threats, obstacles and current issues within Bangladesh's FET provisions. Then, having also drawn valuable insights from other countries' approaches, the thesis will propose practical and feasible recommendations to enhance the effectiveness of Bangladesh's FET provisions and BIT framework.

The objectives of this thesis are as follows:

i) To conduct a comprehensive literature review on FET provisions in BITs with a specific focus on Bangladesh and other South Asian countries. This review will encompass the historical development of FET provisions in BITs, theoretical discussions on the advantages and disadvantages of including FET provisions and an examination of potential features and growing concerns related to conflicts of interests between host states and foreign investors.

ii) To identify and analyse specific discrepancies in the wording and levels of protections afforded by current FET provisions in Bangladesh's BITs.

iii) To investigate how these discrepencies in current FET provisions have contributed to the rising number of cases against Bangladesh, including how arbitral tribunals have interpreted these provisions differently.

iv) To draw insights and lessons from other relevant countries' approaches to FET provisions in BITs, to ensure that proposed recommendations are both practical and feasible for implementation in Bangladesh.

v) To consolidate all of these findings to develop strong and comprehensive recommendations and a model BIT framework for reforming FET provisions in Bangladesh's BITs. The proposed reforms will aim to strike a balance between safeguarding Bangladesh's national interests and considering the commercial interests of foreign investors, while also fostering a favourable environment for foreign investment in Bangladesh.

1.7 Contribution of the Research

Despite the serious legal challenges faced by Bangladesh on grounds of FET breaches due to inadequate FET provisions, there has been a distinct lack of research to address the situation. This thesis addresses this significant research gap by providing the first comprehensive analysis of the discrepancies in Bangladesh's existing FET provisions, investigating their impact on significant cases against Bangladesh, and comparing them with other countries' approaches to balancing national sovereignty and foreign investors' commercial interests to propose robust and realistic recommendations for improving Bangladesh’s FET provisions in BITs.

The primary contribution of this research is to enhance Bangladesh's ability to attract and promote foreign investment while concurrently safeguarding its national interests and ensuring accountability for foreign investors' contributions to the investment process through the implementation of qualified rather than unqualified provisions.

Firstly, this research argues for reconceptualisation of the FET standard to better align with the perspectives of host developing countries and embody the principles of

fairness and equity. By accommodating the unique circumstances and challenges faced by Bangladesh, a reconceptualised FET standard will enhance the overall fairness and equity within the investment dispute resolution framework.

Secondly, this research provides comprehensive and practical recommendations for Bangladesh to improve their FET provisions and BIT framework. One crucial step is the development of a model BIT, which will address existing disparities in wording and protection levels, as well as tackle the issue of signing individual BITs without meaningful negotiations. The establishment of a model BIT is significant as it ensures consistency, transparency and efficient management during the processes of signing, monitoring and reviewing BITs. Moreover, it facilitates the identification and resolution of potential issues before they escalate into detrimental situations.

Thirdly, this research makes a valuable contribution by highlighting the importance of taking a country's developmental status into account when tribunals interpret FET standards. It sheds light on the need to address challenges arising from limited resources, administrative capacity, technology, infrastructure, and various economic and social obstacles, such as political instability, social unrest, conflicts, post-conflict scenarios, social and political transitions and economic crises. The research therefore highlights the need for a more comprehensive understanding of the issues faced by host developing countries and calls for investment tribunals to consider these challenges when interpreting and applying FET standards within their verdicts.

Fourthly, the implementation of the reconceptualisation of the FET standard and the formulation of a model BIT necessitate the establishment of a new, autonomous institution and council in Bangladesh. This newly formed body would be responsible for devising and evaluating an initial model BIT with robust safeguards for FET provisions. Strengthening Bangladesh's institutional capacity in this manner would not only aid in resolving current issues but also proactively address potential challenges in the future.

Finally, in addition to its specific impact on Bangladesh, this research offers a broader contribution by providing a model for reforming FET provisions, which may serve as inspiration for other developing countries facing similar challenges. The issue of inadequate FET provisions is not confined to Bangladesh alone but is a global concern, particularly among developing countries that encounter similar economic and socio-political challenges.

1.8 Chapter Outline

This thesis is comprised of seven chapters.

Chapter 1 provides an overview of the thesis including the background of the study and an overview of the thesis' research questions, aims and objectives and contribution to the research.

Chapter 2 presents an extensive literature review on FET provisions in BITs, specifically centered on Bangladesh and South Asian nations. This covers the historical development of FET provisions, theoretical evaluations of their pros and cons, and an exploration of attributes and emerging concerns surrounding conflicts of interest between host states and foreign investors.

Chapter 3 presents the research design, methods and philosophy used to address the research questions, with relevant justifications including essential elements for legal research and ethical considerations.

Chapter 4 presents a critical analysis of FET provisions in Bangladeshi BITs. This includes an evaluation of the current legal structure governing foreign investment in Bangladesh, along with an in-depth analysis of variations within the FET provisions present in all of Bangladesh's BITs. These variations are then categorised according to recognised levels of protection.

Chapter 5 conducts five case studies to understand why Bangladesh's current FET provisions have allowed foreign investors to initiate legal actions against Bangladesh for alleged breaches of FET. This involves evaluating how problematic FET provisions affect Bangladeshi foreign investment and examining arbitral tribunal interpretations.

Chapter 6 presents a comprehensive comparative examination of two influential jurisdictions, India and the United States (US). Given that both nations have established crucial precedents in addressing issues pertaining to FET provisions within their respective BITs, this chapter draws valuable lessons for Bangladesh and lays the foundation for

ensuring that the recommendations of this thesis are holistic and realistic, tailored to Bangladesh's unique context.

Chapter 7 proposes a series of pragmatic recommendations for restructuring and safeguarding the FET standard in future Bangladeshi BITs. These include forming an arbitration institution with council to review, monitor and update future BITs, developing a model BIT with particular emphasis on safeguarding the FET provision and reforming domestic laws regarding foreign investment in Bangladesh.

1.9 Conclusion

This introductory chapter has provided a solid foundation for the thesis, including a detailed background of the study and an overview of the thesis' research questions, aims and objectives and contribution to the research. It has shed light on the widespread use of FET standards in BITs and the reasons behind its popularity among foreign investors, with a specific focus on its application in Bangladesh. Bangladesh has recently been challenged with several legal challenges from foreign investors who have invoked weak FET provisions as the basis for their claims for substantial financial reparation. This trend is exemplified by cases such as *Saipem, Niko, Chevron, Scimitar* and *NEPC*.[63]

Furthermore, this chapter has highlighted that currently weak and ambiguously worded FET provisions in BITs tend to favour foreign investors' interests at the expense of host nations. Bangladesh is not alone in grappling with these challenges, as many other developing nations globally, as evident in cases such as Biwater Gauff (Tanzania), Philip Morris v. Uruguay, Philip Morris v. Australia, and Vattenfall v. Germany, find themselves facing similar predicaments. This is primarily due to the latitude afforded by current arbitral tribunals and ICSID, which permits foreign investors to challenge good faith regulations and unquestionable matters of public policy.

[63] Discussed in chapter five.

To strengthen the efficacy and functionality of BITs, it is imperative to undertake reforms that address the concerns arising from the vague wording, inconsistency and uncertainty within FET provisions. The preceding discussions in this chapter have unequivocally highlighted the substantial economic and regulatory ramifications of arbitral claims brought by foreign investors against developing nations like Bangladesh. These ramifications extend to policy-making, the role of the judiciary and the fight against corruption.

This thesis aims to propose robust and pragmatic recommendations for Bangladesh to reform its FET provisions and overall BIT framework. The objective is to strike a more harmonious balance between national sovereignty and the commercial interests of foreign investors, all while continuing to foster a conducive environment for foreign investment that stimulates economic growth and sustainable development.

Building upon these foundations, the next chapter will provide an in-depth exploration of the existing literature regarding FET provisions within BITs, particularly focusing on Bangladesh and other relevant South Asian nations. This review will encompass the historical trajectory of FET provisions in BITs, theoretical discussions regarding the advantages and disadvantages of integrating FET provisions and an in-depth analysis into possible attributes and emerging issues related to conflicts of interest between host nations and foreign investors.

Chapter 2: Literature Review

2.1 Introduction

This chapter undertakes a comprehensive literature review on FET provisions in BITs, with a particular focus on Bangladesh and other South Asian countries. The review encompasses the historical evolution of FET provisions in BITs, theoretical discussions analysing the merits and drawbacks of incorporating FET provisions, and an investigation into potential attributes and emerging concerns pertaining to conflicts of interest between host states and foreign investors.

By delving into the theoretical and practical foundations underpinning this thesis, the literature review justifies its scope and relevance. It also evaluates the contributions of prior scholars, thereby identifying gaps in the existing literature that this thesis aims to address. This research endeavors to fill these gaps, thereby advancing the understanding of FET provisions in BITs, in the realm of international investment law.

2.2 The Historical Background of FET Standards in International Investment

International investors have historically been subjected to social-political and economic debates on the method and extent to which they can use their rights abroad. Historical statistics show that early political groups continuously refused legal rights to anyone who came from outside their community.[64] These outsiders, often referred to as aliens,[65] were treated as enemies to the culture, values, and traditions of the specific community. From early times through to the Middle Ages, foreign nationals had no clear legal status, mostly referred as fragments of a disinherited race, thus making adjustment with nationals in relation to social and economic matters difficult.[66] Direct or non-direct discriminatory treatments were commonly used to deprive foreign nationals of rights. Prior to

[64] Alwyn Vernon Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green and Company 1938); Rainer Arnold, 'Aliens' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 1 (Aaland Islands to Dumbarton Oaks Conference 1994) 102.
[65] From the Latin word "alius", meaning "other"
[66] Edwin Montefiore Borchard, *The Diplomatic Protection of Citizens Abroad, or, The Law of International Claims* (Banks Law Publishing Company 1915) 33.

the 18th century, foreign nationals did not have many remedies available for mistreatment; the only remedy available was permanent exclusion of the alien from the community.[67]

Fair and equitable treatment in foreign investment has been a matter of concern since the beginning of Aristotle's era.[68] According to Aristotle, a Sicilian investor was barred from entering into the city due to an allegation that he was posing threat to Syracuses' iron market.[69] Similarly, guaranteed protection for foreign investors is suspected as posing a significant threat to national sovereignty.[70] Nevertheless, since the post-war era, adoption and development of FET provisions in international investment have been enforced as an alternative to foreign aid and loans.[71] While several academic studies support the growing trend of both regulation and liberalisation of foreign investment into national laws and policies, they also suggest that national sovereignty of the host states must not be compromised against foreign investors' commercial interests.[72]

2.2.1 Law of Nations

Since the 18th century, the international community agreed to adopt principles which protected rights of foreign nationals under the emerging basis of customary international law. This idea was strongly supported by international legal scholars who raised their strong voices in support of this development, in particular Emmerich Vattel who stated in the Law of Nations that, "whoever uses a citizen ill, indirectly offends the State, which is bound to protect this citizen".[73] Vattel argued that although states reserve the right to set rules and conditions on the entry clearance of foreigners, the foreigners cannot be treated differently

[67] Evelyn Speyer Colbert, 'Chapter I. Private Reprisals, Particularly as Practiced in England', *Retaliation in International Law* (West Sussex: Columbia University Press 1948) 9–50.
[68] Rafael Leal-Areas, *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (Cheltenham: Edward Elgar 2010) 163.
[69] Steven G. Medema & Warren J. Samuels (eds.) *The History of Economic Thought: A Reader* (London: Routledge 2003) 12.
[70] Wenhua Shan, Penelope Simons, Dalvinder Singh (eds.), *Redefining Sovereignty in International Economic Law* (Oxford: Hart Publishing 2008).
[71] Sornarajah, (n 25) 53.
[72] Lisa E. Sachs and Karl P. Sauvant, 'BITs, DTTs, and FDI flows: An Overview' in Karl P. Sauvant Aand Lisa E. Sachs (Eds.), *The effect of treaties on foreign direct investment: Bilateral investment treaties, double taxation treaties, and investment flows* (Oxford University Press 2009) xxvii.
[73] Emer De Vattel, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (PH Nicklin & T Johnson 1835) 161.

once agreed and satisfied as they are subject to the law of the land and the state is under an obligation to protect the foreigner in the same way as its nationals.[74]

Vattel highlighted that foreigners should hold the citizenship of their own state and were not, “obliged to submit, like the subjects, to all the commands of the sovereign”.[75] In Vattel's opinion, holding a foreign citizenship to another state expanded their property, which was included in the wealth of their home country. For this reason, Vattel disagreed with, “droit d'aubaine” - the right of escheat - if the foreigners die in the host state, where the host state will take ownership of their property.[76] Thus, any unfair treatment to the foreigner and their property was considered an injury to the home state.

2.2.2 The Principle of Diplomatic Protection

Vattel’s views set the key foundation for the international legal principle of diplomatic protection. Many other influential international scholars at that time researched and exposed their concern over the principle of diplomatic protection but two great international law jurists of that time, Hugo Grotius and Francisco de Vitoria, made outstanding contributions to the development of the concept by arguing that international law has a general obligation to protect the rights of aliens to travel and trade.[77] Hugo Grotius argued that foreigners should not be subjected to discrimination at any time, with reference to most favoured nation treatment (MFN):

> ‘[A] common right by supposition relates to the acts which any people permits without distinction to foreigners; for if under such circumstances a single people is excluded, a wrong is done to it. Thus, if foreigners are anywhere permitted to hunt, fish, snare birds, or gather pearls, to inherit by will, or sell property, and even to contract

[74] ibid paras 100-104.
[75] ibid para 108.
[76] Andreas Hans Roth, *The Minimum Standard of International Law Applied to Aliens*, vol 69 (Leiden: AW Sijthoff 1949) 26–27; Borchard (n 76) 35–36.
[77] H Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648-1815); A Contribution to the History of the Law of Nations* (Leiden: Sijthoff 1971) 47–55.

marriages in case there is no scarcity of women, such rights cannot be denied to one people alone, except on account of previous wrongdoing.'[78]

Additionally, Francisco de Vitoria argued that foreigners hold the right to travel, live and trade in foreign territories. Nevertheless, despite similarities in these scholars' views, there was a small difference: while Vattel observed international legal obligations emerging from nationality, de Vitoria and Grotius viewed foreigners' rights as emerging from their status as members of the human race.[79]

Although their approaches were different, these international legal scholars set out the foundation for development of diplomatic protection to protect foreign investment. The principle of diplomatic protection can be traced back to the Middle Ages, especially from the 5-15th century during the progression of European history.[80] The theory of diplomatic protection explicitly meant that injury to a state's national is equivalent to an injury to the state itself, and for that reason the injured state is entitled to claim compensation from the responsible state. This principle has never changed over time and was confirmed in 2006 in the International Law Commission's Articles on Diplomatic Protection, that:

'[D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.'[81]

The present form of diplomatic protection is still used as a key principle to protect foreign nationals' rights; the principle that the home state holds the right to make a claim

[78] See Hugo Grotius and Francis W Kelsey, 'De Jure Belli Ac Pacis Libri Tres' in JB Scott (ed), *II* (Clarendon Press 1925).
[79] FV Garcia-Amador, *The Changing Law of International Claims*, vol 1 (Oceana Publications 1984) 46.
[80] Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 500.
[81] Article 1 of the International Law Commission's (ILC's) Articles on Diplomatic Protection adopted by the ILC's at its 58th session; United Nations General Assembly, 'Report of the International Law Commission | Fifty-Eighth Session' (*International Law Commission*, 2006) A/61/10 16 <http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf>.

against the host state for an injury to its home national. States were keen to use diplomatic protection[82] during the 18th and 19th centuries. This was evident in 1924 in the Mavrommatis Palestine Concessions, where the Permanent Court of International Justice (PCIJ) confirmed that the state reserved the right to use diplomatic protection over its nationals, which has become a fundamental principle of international law. The PCIJ stated that:

> '[I]t is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.'[83]

Prior to the 20th century, state practice on dealing with disputes concerning the host state's unfair treatment of foreign citizens and their property not only included settlement by forceful means and diplomatic protection, but also ad hoc commissions and arbitral tribunals.[84] While diplomatic protection and gunboat diplomacy settlements had been used as methods for political resolution since the 5th century, the idea of commissions and arbitral tribunals are more recent and can be traced back to the 1794 Treaty of Amity, Commerce and Navigation.[85] Such bodies, among others, formed a commission for dispute resolution between British and US nationals during and after the American Revolution.[86] Statistics show

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[82] See Clyde Eagleton, *Responsibility of States in International Law* (New York University Press 1928); Frederick Sherwood Dunn, *The* Protection *of Nationals: A Study in the Application of International Law* (Johns Hopkins Press 1932).

[83] Mavrommatis Palestine Concessions (Greece v. U.K.) [1924] PCIJ Rep Series A No. 2; Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania) [1939] PCIJ Rep Series A/B No. 76; Chittharanjan Felix Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon Press 1967); Richard B Lillich, *International Law of State Responsibility for Injuries to Aliens* (University of Virginia Press 1983).

[84] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

[85] Also known as the 'Jay Treaty' between Great Britain and the United States, November 19 1794: T. Editors of Encyclopaedia Britannica, 'Jay Treaty' (*Encyclopedia Britannica*, 2020) <https://www.britannica.com/event/Jay-Treaty> accessed 27 July 2021.

[86] Barton Legum, 'The Innovation of Investor-State Arbitration under NAFTA' (2002) 43 *Harv. Int'l LJ* 531. The Jay Commissions issued over 500 awards. See A Alexander Marie Stuyt, *Survey of International Arbitrations: 1794-1989* (3rd edn, Martinus Nijhoff Publishers 1990) 2–3. Also see Douglas Johnston, *The Historical Foundations of World Order: The Tower and the Arena* (Martinus Nijhoff 2008) 636.

that over forty arbitral tribunals were established to settle disputes between foreign nationals and host states during the mid-19th to early 20th century.[87] However, it was evident that those commissions handled claims concerning state interest under the diplomatic protection model.[88]

While Vettel's contribution significantly advances the literature on international investment, there are certain gaps in the work. One of the main criticisms of diplomatic protection is it being a one-sided approach which fails to draw a balance between the host state's interests and the foreign national's rights. Later, another leading scholar Adam Smith raised concerns about taking such a one-sided approach to favour foreign investors' interests over host states' interests.

2.2.3 The Wealth of Nations

The concept of fairness in foreign investment emerged from the root idea of international trade and business, of which the British economist Adam Smith is a key founder. According to Smith's international trade theory, the prosperity of a country originates from trading with other countries through exchanging advantages and division of labour. In his observation that, 'no business actor is, or should be, large enough to (control) a larger part of the market activities than his own activities'.[89] He highlighted that businesses or companies should not become excessively large, as larger companies often wield significant economic influence that can sometimes be used in ways contrary to the host country's interests. Employing the concept of the 'invisible hand,' he noted that sizable companies with greater power might tend to involve themselves in a country's political affairs, presenting a challenge that the country needs to manage.

In Smith's perspective, modern investors often have interests that may diverge from those of the general public. They may have motivations to engage in practices that can be

[87] See Brownlie (n 85) 500. See also Jackson Harvey Ralston, *International Arbitration from Athens to Locarno* (OUP 1972).
[88] See Rudolph Dolzer, 'Mixed Claims Commissions', *Encyclopedia of Public International Law* (1992) vol 3, 438.
[89] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (RH Campbell, AS Skinner and WB Todd eds, Clarendon Press 1976) 256.

misleading or even detrimental to the public interest, resulting in instances of deception and oppression.[90] Smith's work clearly reflects his keen interest in issues related to corporate social responsibility (CSR), suggesting that CSR can play a role in achieving a balance between profitability and the welfare of the public. Smith's work underscores the ongoing importance of contemplating the moral responsibilities associated with business operations, with a particular focus on the ethical concerns arising from profit-seeking behavior among capitalists. He characterises them as ‘potential conspirators against the public’ due to, ‘the profit-enhancing impacts of monopolies’. [91]

The main challenge in current global trade and investment lies in the imbalance between commercial and national interests. It is common for foreign investors to target emerging economies to benefit from favourable terms offered by host states. Developing nations are also often eager to welcome foreign investment as a tool for economic progress, seeking external expertise, technology, training and information. Bangladesh, for example, invites foreign firms for oil and gas exploration due to a lack of local infrastructure. However, challenges arise when foreign investors prioritise ownership claims over host countries' goals. The dominance of powerful multinationals often contradicts public interests, jeopardising host countries' sovereignty. It is remarkable that Smith highlighted this in 1776, underscoring the continued relevance of his contribution to this field, despite many changes since then including technology, institutions, socioeconomic factors. The international trade's product exchange remains beneficial for economic welfare due to independent investors, division of labour and diverse factors.[92]

Smith’s literature is of particular relevance to this thesis because it discusses the matter of balancing host state interest with large companies, which directly relates to the concept of balancing public and commercial interest in this thesis. The aim of this thesis in providing recommendations for balancing host state and foreign company interests will address the

[90] ibid 267.
[91] ibid 269.
[92] ibid 278.

gap that Adam Smith left unanswered. Adam Smith's views were further considered by Carlos Calvo, who argued more strongly for protection of national sovereignty over foreign investors' commercial interests.

2.2.4 Calvo Doctrine

In 1860, Carlos Calvo, an Argentinian pro-nationalist, highlighted a key principle in his study which had not been previously discussed. Calvo stated that, 'aliens 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'.[93]

These views were called the Calvo Doctrine, through which arose the Calvo Clause; a contractual clause used by a foreigner or host state to waive any right to diplomatic protection. The clause was inserted to bring equality between foreign and national treatment. The Calvo Doctrine consists of three main pillars: (i) equal treatment for both state nationals and foreign nationals; (ii) the host state's law will be sufficient to protect the right of foreign nationals; and (iii) the host state's courts have exclusive jurisdiction over foreign national disputes in their state.[94] The three pillars represent the principles of equality in law and practice between nationals and foreigners, non-discrimination and non-intervention. Therefore, the doctrine goes against the whole concept of a minimum standard of treatment and the principle of diplomatic protection.[95]

In 1917, the Calvo Doctrine faced challenges after the Russian government decided to issue a decree abolishing private property of all nationals including foreign property following a political revolution.[96] In following the Calvo Doctrine, Western powers found Russia's decree to be a violation of international law. Nevertheless, no formal claims were brought against the Russian government[97].

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[93] Calvo (n 244).
[94] Bernardo M Cremades, 'Resurgence of the Calvo Doctrine in Latin America' (2006) 7 *Business Law International* 53, 54.
[95] Calvo (n 244) 257.
[96] Lipson (n 226) 66–70.
[97] See Andreas F Lowenfeld, *International Economic Law* (Oxford University Press 2002) 392–393.

2.2.5 The Introduction of Minimum Standard Law

Despite Russia's adherence to the Calvo Doctrine, the concept of minimum standards of treatment was making its mark in the international law arena, evidenced by several influential landmark decisions of the US-Mexico General Claims Commission in the 1920s. The claims commission was created in 1923 to resolve claims between US nationals against Mexico and vice versa,[98] and it overruled the Calvo Doctrine outright by confirming the existence of minimum standards of treatment in international law.[99] The commission stated in Harry Roberts that, 'equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated according to ordinary standards of civilization.'[100]

Moreover, in a Norwegian Shipowners' Claims (Norway v US) in 1922, the arbitral tribunal also rejected the Calvo Doctrine by reaffirming the view that international law required 'just compensation" for unforeseeable expropriation. It stated that, "here it must be remembered that in the exercise of eminent domain the right of friendly alien property must always be respected. Those who ought not to take property without making just compensation at the time or at least without due process of law must pay the penalty for their action.'[101] Consequently, the USA paid compensation for the Norwegian ships seized during the First World War.

These international law principles were appreciated by the permanent court of international justice (PCIJ) in three important decisions in the 1920s. First, diplomatic protection was acknowledged as an, 'elementary principle of international law' in the Mavrommatis Palestine Concessions.[102] Secondly, the PCIJ declared in the case concerning Certain German Interests in Polish Upper Silesia (Germany v Poland) that the rights of aliens

[98] Abraham Howard Feller, *The Mexican Claims Commissions, 1923-1934* (Macmillan Company 1935).
[99] See LFH Neer and Pauline Neer (US) v The United Mexican States [1926] IV RIAA 60; Faulkner (US on behalf of) v The United Mexican States [1927] 21 A.J.I.L. 349; The United States of America (George W. Hopkins) v The United Mexican States (Docket No.39) [1926] 21 A.J.I.L. 160; and The United States of America (Way) v The United Mexican States [1929] 23 A.J.I.L. 466.
[100] The United States of America (Harry Roberts) v The United Mexican States [1927] 21 A.J.I.L. 357, 360-361.
[101] Norway (Norwegian Shipowners' Claims) v The United States of America [1922] 1 RIAA 307, 332
[102] Mavrommatis Palestine Concessions (Greece v. U.K.) [1924] PCIJ Rep Series A No. 2.

must be respected.[103] Thirdly, the PCIJ held in the case concerning the Factory at Chorzów (Germany v Poland) that expropriation or illegal seizure of private property must be complemented by compensation.[104] These decisions were a great shock for both Russia and Latin America's resistance towards international minimum standards of treatment.

The idea of treaty based systems containing substantive standards of protection for foreign investors only arose in the 1960s; prior to that, international investment underwent difficult and uncertain times in which foreign investors were expropriated by the host state in most cases.[105] During this time, international protection of foreign investment was mainly governed by imperial submissions, treaties of capitulation, claims commissions and diplomatic protection.[106] Western states formally used diplomatic protection by exercising economic, political and military means during the era of imperialism and colonialism to secure their national interest in foreign territory.[107]

Over time, the concept of minimum standard of treatment was consolidated into a new standard known as FET, which has been incorporated within many BITs and multilateral investment treaties (MITs) around the world. Leading scholar Stephen Vasciannie proposed the first academic definition of the FET standard within international investment law mechanisms, which is still relevant to this day.

2.3 The Fair and Equitable Treatment Standard in International Investment

Stephen Vasciannie's scholarly exploration reveals that FET standard is juxtaposed alongside the most-favoured-nation and national treatment standards, serving as a standard treatment. [108] Vasciannie's work contended that the FET standard is closely interconnected

[103] German Interests in Polish Upper Silesia (Germany v Poland) [1926] PCIJ Rep Series A No 7.
[104] Factory at Chorzów (Claim for Indemnity) (Germany v Poland) [1928] PCIJ Rep Series A, No.17.
[105] Rainer Arnold, 'Aliens' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 1 (North-Holland Pub Co 1992) 102.
[106] See Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 *UC Davis Journal of International Law & Policy* 157. Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, vol 99 (Cambridge University Press 2013) pt 1.
[107] See SN Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 *American Journal of International Law* 863.
[108] In international investment matters, the notion of 'national treatment' may denote two slightly different, though related, meanings. First, 'national treatment', especially when used in international investment instruments, sometimes connotes an attempt to accord treatment to foreign investors which is no less favourable than that

with the 'full protection and security' standard, although he acknowledges that this relationship remains ambiguous and necessitates further legal examination.[109]

Vasciannie's significant contribution lies in clarifying the meaning of FET within the literature. His research presents two distinct viewpoints concerning the interpretation of the term 'fair and equitable treatment' in investment relations. The first approach, known as the plain meaning, entails evaluating whether a foreign investor receives treatment that is both 'fair' and 'equitable,' based on the assurance provided by this standard.[110] According to this approach, treatment is fair when it is, 'free from bias, fraud or injustice; equitable, legitimate... not taking undue advantage; disposed to concede every reasonable claim';[111] and, by the same token, equitable treatment is that which is, 'characterized by equity or fairness ... fair, just, reasonable'.[112]

The plain meaning view is, no doubt, entirely consistent with rules of interpretation in international law.[113] Vasciannie pointed out that the words 'fair' and 'equitable' are subjective and thus lacking in precision. In addition, he observed that the plain meaning does not refer to an established body of law nor existing legal precedents; instead the plain meaning approach presumes the actual fairness to the foreign investor, without reference to any, 'technical understanding of the meaning of fair and equitable treatment'.[114]

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offered to nationals; used in this sense, 'national treatment' refers to a level below which treatment may not fall. Secondly, 'national treatment', especially when used in the legislation of some developing countries, also connotes the idea that foreign investors should receive treatment no more favourable than that which is accorded to nationals; in this sense, 'national treatment' indicates an upper level of treatment for foreign investors: see UN Centre on Transnational Corporations, 'Key Concepts in International Investment Arrangements and Their Relevance to Negotiations on International Transactions in Services' (*United Nations Digital Library*, 1990) <https://digitallibrary.un.org/record/87176?ln=en> accessed 27 July 2021. Unless the context indicates otherwise, 'national treatment' is used in the former sense in this article.

[109] Ibid.

[110] Vasciannie (n 8) 24.

[111] *The Compact Edition of the Oxford English Dictionary* (Oxford University Press 1971). With similar effect, Henry Campbell Black, *Black's Law Dictionary* (6th edn, West Publishing Company 1990) 595 defines 'fair', in the sense relevant for the present purposes, as 'having the qualities of impartiality and honesty; free from prejudice, favouritism, and self-interest. Just; equitable; even-handed; equal, as between conflicting interests.'

[112] *The Compact Edition of the Oxford English Dictionary* (n 43); Black (n 43) 537 defines 'equitable', in the sense relevant for the present purposes, as 'just; conformable to the principles of justice and right.'

[113] On the main rules of treaty interpretation in international law, see Article 31, Vienna Convention on the Law of Treaties, 'United Nations Treaty Series' (1969) 1155 331.

[114] Vasciannie (n 8) 24.

Vasciannie's second approach identified the meaning of fair and equitable treatment to be identical to the international minimum standard in international law.[115] He highlighted that under customary international law, 'foreign investors are entitled to a certain level of treatment, and that treatment which falls short of this level gives rise to liability on the part of the State'.[116] In the second part of his literature, Vasciannie stated the role of FET in BITs, pointing out that although numerous states have not accepted the standard in their political statements, the provision of FET is still included within BIT agreements. Vasciannie supported fellow influential academic Mann's suggestion that the customary law argument must be considered when formulating binding treaties, 'States forego their rhetoric and demonstrate genuine views on the requirements of the law.'[117] In other views, Vasciannie states that despite clear dissatisfaction of accepting the notion of FET due to unequal bargaining power, developing countries are bound to accept because it is international law. Countries are willing to accept the provision in considering political and economic reason to offer the standard in bilateral arrangements, but there is no evidence that they are motivated by a sense of legal obligation.[118] Inequality of bargaining power in BIT provisions may lose some of its strength. He also observed that legislation on foreign investment including Bangladesh[119] and Cape Verde[120], among others, accords fair and equitable treatment to

[115] On the international minimum standard generally, see Brownlie (n 28) 523–528; Clive Parry, 'A British Digest of International Law' (1965) 6 *The Cambridge Law Journal* 290–295; AO Adede, 'The Minimum Standards in a World of Disputes', *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine, and Theory* (1986) 1001–1026; United Nations, 'Yearbook of the International Law Commission' (1957) II 49; For traditional statements on the Western perspective in favour of the international minimum standard see, for instance, American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States* (1965) pt IV 499–501, quoted in William W Bishop and Marjorie M Whiteman, 'Digest of International Law' (1965) 8 *Michigan Law Review* 697.

[116] Vasciannie (n 8) 24.

[117] FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1982) 52 *British Yearbook of International Law* 241, 245.

[118] If one takes the view that a series of bilateral treaties incorporating a particular rule raises a presumption to the effect that the rule has passed into customary law, then it is arguable that this process has occurred with respect to the fair and equitable standard. The better view, however, is that in the absence of positive indications as to *opinio juris* in favour of a particular treaty rule, no presumption arises automatically from the existence of a series of bilateral treaties. The recent jurisprudence of the International Court of Justice supports the notion that, in the multilateral treaty context, independent evidence of *opinio juris* must be identified to sustain the claim that a treaty rule has passed into customary law: see *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark)* [1969] ICJ Rep 44; *Nicaragua v USA (Merits)* [1986] ICJ Rep 97–98. There is no readily apparent basis to support a departure from this approach in the context of bilateral treaties. See also Oscar Schachter, 'Compensation for Expropriation' (1986) 78 *American Journal of International Law* 126–127. Davis R Robinson, 'Expropriation in the Restatement (Revised)' (1984) 78 *Am. J. Int'l L.* 176 (in connection with the legal impact of bilateral investment treaty provisions on compensation for expropriation).

[119] Bangladesh Board of Investment, 'Guide to Investment in Bangladesh' [1989] *Procedure for Foreign Investment*.

[120] Vasciannie (n 8).

foreign investors, but many states provide no such guarantee, even in the current climate of liberalisation.[121]

Vasciannie's research was instrumental in defining the concept of FET because, up until this point, many developing countries had a limited understanding of the significance and advantages of FET, typically incorporating only minimal treatment standards to safeguard foreign investors. As a result of this research, there has been a notable shift in the stance of developing nations, with an increased inclination towards incorporating FET provisions into their domestic legislation.

While Vasciannie's definition of FET has clearly advanced the literature, there are also gaps. One such gap was left when he stated that FET is not equivalent to the contingent standards of national treatment and most-favoured-nation treatment. In Vasciannie's opinion, national treatment is completely different to FET treatment; the state will naturally treat their own nationals more generously than foreigners. Although he suggested that discrimination has to be justifiable in practice, he never clarifies how direct discrimination can be justifiable. Another gap becomes apparent when Vasciannie raises the question of whether FET has become a part of customary international law; he never clarified this answer and only states that, 'the standard has not passed into the corpus of customary international law, essentially because there is insufficient evidence of *opinio juris* on the point.'[122]

2.4 Conceptualisation of FET Provisions in International Treaties

The first formal appearance of 'just and equitable' treatment can be tracked back to the 1948 Havana Charter for an International Trade Organisation (ITO) where it stated that

[121] For instance, Parra examined the national legislation of 51 developing countries, and found that of these only Angola, Bangladesh and Vietnam incorporated the fair and equitable standard: Antonio R Parra, 'Principles Governing Foreign Investment, as Reflected in National Investment Codes' (1992) 7 *ICSID Review - Foreign Investment Law Journal* 428, 435–437. Seventeen countries in the study made no provision for general standards of treatment, while 31 offered national treatment to foreign investors, ibid.
[122] Vasciannie (n 8) 29.

foreign investments should be protected by, 'just and equitable treatment'.[123] Moreover, Article 11(2) provided that:

> '[T]he ITO could collaborate with other inter-governmental organizations as may be appropriate:
>
> (a) make recommendations for and promote bilateral or multilateral agreements on measures designed.
>
> (i) to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another;
> (ii) to avoid international double taxation in order to stimulate foreign private investments;
> (iii) to enlarge to the greatest possible extent the benefits to Members from the fulfilment of the obligatio ns under this Article;
>
> (b) make recommendations and promote agreements designed to facilitate an equitable distribution of skills, arts, technology, materials and equipment, with due regard to the needs of all Members;
>
> (c) formulate and promote the adoption of a general agreement or statement of principles regarding the conduct, practices and treatment of foreign investment.'[124]

This principle then adopted in the economic agreement of Bogotá in the same year which was the first adaptation of the principle in the regional agreement to safeguard foreign investment.[125] Article 22 of the Bogotá agreement provided that:

[123] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 21.
[124] United Nations, 'Havana Charter for an International Trade Organization' (1948) <https://treaties.un.org/doc/source/docs/E_CONF.2_78-E.pdf> accessed 24 July 2021.
[125] Vasciannie (n 8) 99–164.

> '[F]oreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied'.[126]

However, due to unpopularity and lack of support both the Havana Charter and the Bogotá Agreement provisions were unable to come into force. Although the attempt to adopt 'equitable treatment' provision for the protection of foreign investment failed in the first instance, a provision 'equitable' and 'fair and equitable treatment' became popular in the bilateral agreement.

The first appearance of a proper FET provision can be seen in the US treaties on Friendship, Commerce and Navigation (FCN).[127] The main objective of the provision was to protect foreign investors and their investments from states' unjustified actions that violate international norms.[128] Article 1 (1) of the United States and Germany states, 'Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party and to their property, enterprises and other interests.'[129] While the presence of an FET provision in international treaties can be seen as a common treaty making practice of the US, it is worth noting that some treaties including the US treaty with China did not contain any reference to an FET standard.[130] This indicates that political and socioeconomic factors play a vital role in treaty making practices.

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[126] John E Lockwood, 'The Economic Agreement of Bogota' (1948) 42 *American Journal of International Law* 611.
[127] US FCN treaties with Ireland (1950), Greece (1954), Israel (1954), France (1960), Pakistan (1961), Belgium (1963) and Luxembourg (1963), contained the express assurance that foreign persons, properties, enterprises and other interests would receive "equitable treatment" while others including those with the Federal Republic of Germany, Ethiopia and the Netherlands used the terms "fair and equitable treatment" for a similar set of items involved in the foreign investment process. K. Vandevelde suggests that the term "fair and equitable treatment" as used by the US is the equivalent of the "equitable treatment" set out in various FCN treaties; see Kenneth J Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 *Cornell International Law Journal* 201.
[128] J Christopher Thomas, 'Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators' (2002) 17 *ICSID Review – Foreign Investment Law Journal* 21.
[129] Treaty of Friendship, Commerce and Navigation, 29 October 1954, US-Federal Republic of Germany, 273 UNTS 4.
[130] Treaty of Friendship and Commerce and Navigation between the United States of America and the Republic of China, signed at Nanking, 4 November 1946; came into force on 30 November 1948; for text see, (1949) 43(1) The American Journal of International Law 27.

Furthermore, in 1959, a group of experts who were working to draft a convention on investments abroad further developed the FET provision under Article 1 of the convention and stated that, 'each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties'.[131] This effort increased the growing demand to develop an international convention on the protection of private property. As a consequence, in 1967, the Organisation for Economic Cooperation & Development (OECD) introduced its first draft Convention on the Protection of Foreign Property.[132] Article 1 (a) of the convention provides a provision on, 'Treatment of Foreign Property', which stated that, 'Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties…'.[133]

2.5 First Appearances of FET Provisions in Bilateral Investment Treaties

The first ever BIT was signed between Pakistan and Germany in 1959.[134] Although the first treaty made no refence to a FET provision, popularity of FET provisions started to increase during the mid-60s and the inclusion of an FET provision in BITs became an indispensable part of treaty making practices all around the world.[135] The international community's failure to successfully promote multilateral treaties provided an opportunity for BITs to grow in their place.[136] European countries started to see considerable success in negotiating BITs and enjoyed great investment protection.[137] On the other hand, many developing countries incorporated FET provisions within their BITs as a tool to attract foreign

[131] Hermann Abs and Hartley Shawcross, 'The Proposed Convention to Protect Foreign Investment: A Round Table: Comment on the Draft Convention by Its Authors' (1960) 9 *Journal of Public Law* 119.
[132] ibid.
[133] OECD, 'Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention' (1967) 13 <https://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf>.
[134] Pakistan–Germany BIT, signed on 25 November 1959 and entered into force on 28 November, 1962 <http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf> accessed on 22 August 2023
[135] For a listing of several countries that entered into BITs in the 1960s see Vandevelde, 'A Brief History of International Investment Agreements' (n 126) 169–170. Also for a brief account of the development of the American BIT program see Kenneth J Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 Cornell International Law Journal 201, 209
[136] By 1967 it appeared that no country was willing any longer to conclude a US FCN treaty, and thereby the FCN programme in the US expired in that year. See e.g. Kenneth J Vandevelde, United States Investment Treaties: Policy and Practice (Kluwer Law and Taxation 1992) 19–20, See Vandevelde, 'US Bilateral Investment Treaties: The Second Wave' (n 126) 624–625.
[137] Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (n 47) 125 citing Eileen Denza and Shelagh Brooks, 'Investment Protection Treaties: United Kingdom Experience' (1987) 36 International and Comparative Law Quarterly 908; Also see e.g., Salacuse The Law of Investment Treaties (n 38) 88–90.

investments and boost their economies. Subsequently, FET provisions in BITs became widely popular as a fundamental principle for promoting and safeguarding foreign investment.

2.6 The Rapid Rise of FET Provisions in BITs

In the late 1960s, the guiding principle of the OECD Draft Convention on the 'Protection of Foreign Property' became extraordinary popular between developed and developing countries and significantly contributed to the global rise in number of bilateral investment treaties. [138] The majority of BITs were signed in the late 60s and early 70s including Chile and China, Peru and Thailand, Bulgaria and Ghana, the United Arab Emirates and Malaysia, all containing a provision for FET.[139] During that time, only very few countries including Saudi Arabia, Singapore and Pakistan favoured national interests over foreigners' commercial interests and thus refused to include a FET provision within their BIT agreements.[140] The popularity of FET provisions in BITs increased substantially between the late 80s and early 2000s.[141] During this time, all major international agreements including Free Trade Agreements (FTA) between the United States and twenty other countries including Dominic Republic- Central American (CAFTA - DR),[142] the Free Trade Agreement between Australia and Thailand,[143] Multilateral Investment Guarantee Agency (MIGA 1985), [144] Lomé IV the Fourth Convention of the African, Caribbean and Pacific Group of States

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[138] ibid.
[139] United Nations UNCTAD, 'International Investment Agreements Navigator | UNCTAD Investment Policy Hub' (n 59).
[140] Vasciannie (n 8) 99–164.
[141] Srividya Jandhyala, Witold J Henisz and Edward D Mansfield, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55 *Journal of Conflict Resolution* 1047.
[142] See Office of the United States Trade Representative, 'CAFTA-DR (Dominican Republic-Central America FTA) | United States Trade Representative' (2021) <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> accessed 24 July 2021.
[143] Australian Government, 'Thailand-Australia Free Trade Agreement' (*Department of Foreign Affairs and Trade*, January 2005) <https://www.dfat.gov.au/trade/agreements/in-force/tafta/thailand-australia-free-trade-agreement> accessed 24 July 2021.
[144] Multilateral Investment Guarantee Agency (MIGA), 'Establishing The Multilateral Investment Guarantee Agency' (*Convention*, 2010) <https://www.miga.org/sites/default/files/archive/Documents/MIGA Convention (April 2018).pdf> accessed 24 July 2021. Article 12(e) of the Convention stipulates:
(e) In guaranteeing an investment, the Agency shall satisfy itself as to:
(i) the economic soundness of the investment and its contribution to the development of the host country;
(ii) compliance of the investment with the host country's laws and regulations;
(iii) consistency of the investment with the declared development objectives and priorities of the host country; and
(iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment.

(1990),[145] the European Economic Community (EEC), the ASEAN Treaty for the Promotion and Protection of Investments (1987),[146] the Colonia Protocol on Reciprocal Promotion and Protection of Investments signed by MERCOSUR states,[147] the Energy Charter Treaty (1995) now replaced with the International Energy Charter (2015)[148] and the North Atlantic Free Trade Agreement[149] (NAFTA 1994) now replaced by the United States-Mexico-Canada Agreement (USMCA 2020)[150] included a FET provision.[151]

From 2001 to date, the presence of FET provisions in international investment is steady.[152] This is mainly because countries have realised that existing FET provisions are one-sided and predominantly favour foreign investors interests' over states' regulatory power. Thus, there is a growing demand to rebalance existing FET provisions.

2.7 Current Position of FET Provisions in BITs

Nyombi observed that ninety percent of recent arbitration claims alleged a breach of expropriation and violation of FET and MFN standards provided to foreign investors under

[145] Commission of the European Communities, 'Lome IV' (*Commission of the European Communities, Brussels*, 1990) <http://aei.pitt.edu/7561/1/31735055261238-1.pdf> accessed 24 July 2021.
[146] The ASEAN Treaty is the Agreement among the Governments of Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand for the Promotion and Protection of Investments.
[147] MERCOSUR was established in 1991 by the Asuncion Treaty. Its Member States are: Argentina, Brazil, Paraguay and Uruguay. See Claire Felter, Danielle Renwick and Andrew Chatzky, 'Mercosur: South America's Fractious Trade Bloc' (*Council on Foreign Relations*, 10 July 2019) <https://www.cfr.org/backgrounder/mercosur-south-americas-fractious-trade-bloc> accessed 24 July 2021.
[147] United Nations (UN), 'International Investment Instruments: A Compendium Volume II Regional Instruments' (*United Nations Conference on Trade and Development Geneva*, 1996) 527 <https://unctad.org/system/files/official-document/dtci30vol2_en.pdf> accessed 24 July 2021.
[148] Parties to this treaty include Afghanistan, Albania, Armenia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Burundi, Cambodia, Chad, Chile, China, Colombia, Croatia, Cyprus, Czech Republic, Denmark, East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Estonia, European Union and Euratom, Finland, France, G5 Sahel, The Gambia, Georgia, Germany, Greece, Guatemala, Guyana, Hungary, Iran, Iraq, Ireland, Italy, Japan, Jordan, Kazakhstan, Kenya, Republic of Korea, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Mali, Malta, Mauritania, Moldova, Mongolia, Montenegro, Morocco, The Netherlands, Niger, Nigeria, North Macedonia, Norway, Pakistan, Palestine, Panama, Poland, Portugal, Romania, Rwanda, Serbia, Senegal, Sierra Leone, Slovakia, Slovenia, Spain, Swaziland, Sweden, Switzerland, Tanzania, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States, Uzbekistan, Yemen. See Association of Southeast Asian Nations, 'The 1987 ASEAN Agreement for the Promotion and Protection of Investments' (*ASEAN*, 1987) <https://asean.org/?static_post=the-1987-asean-agreement-for-the-promotion-and-protection-of-investments> accessed 24 July 2021.
[149] North American Free Trade Agreements (NAFTA) now replaced by the United States-Mexico-Canada Agreement (USMCA) See Organization of American States, 'North American Free Trade Agreement' (*Foreign Trade Information System*) <http://www.sice.oas.org/trade/nafta/chap-111.asp#:~:text=Article 1105%3A Minimum Standard of,and full protection and security> accessed 24 July 2021.
[150] Office Of The United States Trade Representative, 'United States-Mexico-Canada Agreement' (1 July 2020) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> accessed 24 July 2021.
[151] United Nations (UN) (n 216).
[152] Jandhyala, Henisz and Mansfield (n 210).

BITs and IIA.[153] His article highlighted that existing BITs fundamentally failed to strike a balance between investor-states commercial rights and sovereignty of the host state. The article further argued that, 'the storm has been gathering for decades' as modern investment mechanisms have largely failed to balance the treaty rights in favour of host states. However, the opposition of the public interest and sovereignty argument, such as Ortino, stated that divergent and inconsistent interpretation is common in international investment law, constituting a goldmine for academics and commentators. Ortino examined differing opinions of arbitral tribunals in a different way as a:

> '[c]oncept of investment to determine the scope of investment treaties and jurisdiction of the tribunals, the content of the various substantive protections guaranteed by investment treaties (such as fair and equitable treatment standards or the notion of indirect expropriation) and the role of investment (arbitral) tribunals …'.[154]

Furthermore, Ortino put extra emphasis on clarifying key phrases and provisions such as available remedies, expropriation, FET and MFN. In addition to that, Schreuer, Muchlinski and Ortino agreed that it is extremely important to define and interpret such treaty standards in a consistent and clear manner to evade any further vagueness and uncertainty in future. Although every BIT has its own unique features and provisions, BITs still have a grade of resemblance due to treaty formulation standards which may lead to repeat interpretations of important phrases and provisions.[155]

[153] Chrispas Nyombi, 'EU Reform of International Investment Law in the Shadow of Brexit' (2016) 27 *International Company and Commercial Law Review* 27.
[154] Federico Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) 30 *Leiden Journal of International Law* 71.
[155] Peter Muchlinski, Federico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press 2008).

2.8 Growing Concerns Regarding Conflict of Interests Between Host States and Foreign Investors

Literature on the role of BITs and international investment in host state economies is divided into two groups of scholars. While one group of scholars[156] believe foreign investment plays a vital role for the development or growth of a host state's economy, the other group of scholars[157] disregard this theory, believing that foreign investors often cause hindrances to the flow of a host state's economic growth or development. Many scholars including Salisu[158] and Moran[159] argue that the inclusion of foreign money in a host state's economy contributes in boosting the income level of its citizens.[160] In addition, foreign investors often bring new technology, ideas and trends in the host country which help to improve the living standards of people and reduction of poverty levels in developing countries.[161] Two other Asian scholars Yussof and Ismail[162] support the views of Salisu and Moran. They further observe that international investment creates a competitive environment with local investors, improving the quality of products and services and reducing prices by challenging monopolies.[163] Competitive markets open up better job opportunities by considering innovative training and skills for their workforces. Two great scholars Brooks and

[156] Sanjaya Lall, 'Vertical Inter-firm Linkages in LDCs: An Empirical Study' (1980) 42 *Oxford Bulletin of Economics and Statistics* 203; Michael U Klein, Carl Aaron and Bita Hadjimichael, *Foreign Direct Investment and Poverty Reduction* (World Bank Publications 2015); David W Loree and Stephen E Guisinger, 'Policy and Non-Policy Determinants of US Equity Foreign Direct Investment' (1995) 26 *Journal of International Business Studies* 281; Linda S Goldberg and Michael Klein, 'Foreign Direct Investment, Trade and Real Exchange Rate Linkages in Developing Countries' in Reuven Glick (ed), *Managing Capital Flows and Exchange Rates: Perspectives from the Pacific Basin* (Cambridge University Press 1998) 73; Beata S Javorcik and Mariana Spatareanu, 'To Share or Not To Share: Does Local Participation Matter for Spillovers from Foreign Direct Investment?' (*Rutgers University Newark*, 2006) <https://ideas.repec.org/p/run/wpaper/2006-001.html> accessed 25 July 2021.

[157] Xiaolun Sun, 'Foreign Direct Investment and Economic Development | What Do the States Need To Do?' (*Foreign Investment Advisory Service for the Capacity Development Workshops and Global Forum on Reinventing Government on Globalization, Role of the State and Enabling Environment, United Nations*, 2002) <https://docs.igihe.com/IMG/pdf/unpan006348.pdf> accessed 24 July 2021; Nuzhat Falki, 'Impact of Foreign Direct Investment on Economic Growth in Pakistan' (2009) 5 *International Review of Business Research Papers* 110.

[158] Vudayagiri N Balasubramanyam, Mohammed Salisu and David Sapsford, 'Foreign Direct Investment as an Engine of Rowth' (1999) 8 *Journal of International Trade & Economic Development* 27.

[159] Theodore Moran, 'FDI and Development: What Is The Role of International Rules and Regulations?' (2003) 12 *Transnational Corporations* 1.

[160] ibid.

[161] Balasubramanyam, Salisu and Sapsford (n 266).

[162] I Yussof and R Ismail, 'Human Resource Competitiveness and Inflow of Foreign Direct Investment to the ASEAN Region' (2002) 9 *Asia-Pacific Development Journal* 89.

[163] ibid.

Fan[164] highlight that international investment has established itself as one of the main sources of introducing latest technology, facilities and progress in developing countries.[165]

The opposing group of scholars[166] disagree with the view that international investment increases a host country's economy. Bin Atan[167], Dunning and Blomstrom[168] have strongly criticised the role of international investment, labelling it as risky and destructive for the domestic economy. Such critics of foreign investment believe and claim that foreign investment is a big threat to domestic investment as it invests for a limited time only. They argue that, apart from a very small contribution, international investment is unable to play a key role in the expansion of the whole economy.[169] Scholars including Fraser[170] and Falki[171] have also supported this view, highlighting that although international investment contributes in certain areas it contains serious risks of destabilizing the economy of the host developing country.

Despite this, recent statistics indicate that the inclusion of attractive provisions in BITs have had positive impacts; it is considered as a pioneer in the growth and development of developing countries' economies.[172] The provision of BITs and agreements play a motivational role to attract, promote and expand international investment.[173] Ortino observes that the main purpose of inserting such provisions in treaties is not only aimed at providing protection to foreign investment as assumed by some arbitral tribunals. He highlights that

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[164] Douglas H Brooks, Emma Xiaoqin Fan and Lea R Sumulong, 'Foreign Direct Investment in Developing Asia: Trends, Effects, and Likely Issues for the Forthcoming WTO Negotiations' (*ERD Working Paper Series No. 38*, 2003) <https://www.think-asia.org/bitstream/handle/11540/1524/wp038.pdf?sequence=1> accessed 25 July 2021.
[165] ibid.
[166] Sun (n 233); Falki (n 265).
[167] Ghazali bin Atan, 'The Effects of DFI on Trade, Balance of Payments and Growth in Developing Countries, and Appropriate Policy Approaches to DFI' [1996] *Third World Network, Penang*.
[168] John H Dunning, Bruce Kogut and Magnus Blomström, *Globalization of Firms and the Competitiveness of Nations* (Lund University Press 1990).
[169] Julia M Fraser, 'Lessons from the Independent Private Power Experience in Pakistan' (*Energy and Mining Sector Board Discussion Paper No. 14*, 2005) <https://documents1.worldbank.org/curated/en/729661468285358780/pdf/337700rev0Less1rivate0Energy1SB1N14.pdf> accessed 25 July 2021.
[170] ibid.
[171] Falki (n 265).
[172] Jung Wan Lee, Gulzada S Baimukhamedova and Sharzada Akhmetova, 'The Effects of Foreign Direct Investment on Economic Growth of a Developing Country' (2009) 12 *Allied Academies International Conference* 22.
[173] Jimmy J Zhan, 'FDI Statistics: A Critical Review and Policy Implications' (*World Association of Investment Promotion Agencies (WAIPA)*, 2006) <https://www.yumpu.com/en/document/read/35119002/fdi-statistics-a-critical-review-and-policy-implications-waipa> accessed 25 July 2021.

including such provisions in treaties and agreements is also to, 'intensify economic cooperation, encourage/promote international capital flows and increase the prosperity of both contracting parties'.[174] Additionally, Ortino emphasises the significance of 'long term purpose' of investment; the long-term purpose of investment treaties are sustainable as long as they contribute to the prosperity or development of the signatory states.

2.8.1 Investment Treaty Arbitration and Public Law

Another leading international scholar, Professor Gus Van Harten, has taken a stand against the whole idea of investment treaty arbitration. Van Harten identified some of the key problems of existing investment treaty arbitration systems, including FET in BITs.[175] In his work, he began by outlining the long-standing conflict between capital-exporting and capital-importing states over foreign investment protection.[176] He then addressed the growing concerns surrounding and growing BITs. Van Harten presented three claims in his literature. First, the introduction of investment treaty arbitration is a ground-breaking development in international settlement. Second, investment treaty arbitration is a type of public law. Third, investment treaty arbitration systems need reform.[177]

In his work, Van Harten highlighted that investment treaty arbitration builds up the regulatory relationship between the state and individual rather than a mutual relationship between parties. The reason behind terming this relationship regulatory is because state conduct is measured against standards of treatment, which Van Harten later terms a form of global administrative law. In Van Harten's view, the investment regime needs states to comply with specific norms that provide for expansive conceptions of state liability when compared to domestic administrative law.[178]

[174] Ortino (n 258).
[175] Van Harten (n 5).
[176] ibid.
[177] ibid.
[178] Gus Van Harten, *Sovereign Choices and Sovereign Constraints* (Oxford University Press 2014).

Van Harten claimed that the current investment treaty arbitration system deeply conflicts with principles of judicial accountability, openness, coherence and independence.[179] According to his observations, the system is unaccountable because there are no ways for public judges to review investment treaty awards for errors of law. Thus, he argues that since arbitration is private, the transparency of its procedure is questionable due to a lack of public access. The system lacks coherence because it produces inconsistent decisions. In addition to that, it can be argued that the incapacity to review arbitral awards essentially makes it impossible to form a uniform jurisprudence.[180]

Van Harten not only identified the problem of existing mechanisms but also proposed a solution to the problem, rightly stating that accountability, openness and coherence could be addressed by proper changes to the system of investment treaty arbitration. He suggests that an appeal mechanism for errors of law could be introduced to check and balance the existing system. Van Harten raised concerns about the existing method of appointing authorities in institutions including the ICSID and the International Chamber of Commerce (ICC) because they are dominated by western countries. He stated that only the public courts should have power to interpret the law binding the sovereign state.[181]

Van Harten viewed investment treaty arbitration as an inter-state bargain under public international law. He argued that, 'it is consistent with a public international law approach to characterize investment treaty arbitration as an exceptional remedy and to reserve its use for treaty violations'.[182]

Van Harten further argued that the current mechanism of investor state arbitration is not suitable for international business which poses many threats to business regulation. One of the threats of investor claims are their costs which are often too high, inconsistent and uncertain. He made it clear that his criticisms on investor state arbitration are not an attack on the whole arbitration system, but rather suggested more clarity to the existing system with

[179] ibid.
[180] ibid.
[181] Van Harten (n 5).
[182] ibid.

respect to the dispute resolution process.[183] Throughout his whole work, it is clear that Van Harten is very much in favour of accountable and independent court systems.

Van Harten submited reform proposals towards the end of his investigation in investment treaty arbitration. Given his strong position against the structural defects of existing systems, he recommends replacement from private arbitration to public courts. He suggested that the establishment of an international investment court with comprehensive jurisdiction is likely the best solution of all existing problems in investor claims.[184]

With respect to investor-state arbitration, Van Harten stated creation of a natural standing appellate body with jurisdiction may eradicate the problem concerning accountability, openness, coherence and independence. Additionally, an independent appellate body with review mechanisms can also solve the problem of review awards for errors of law.[185] Compared to public international law, investment treaty arbitration is newer and a developing area of international law, thus it is not ideal to find a conclusion in this area of law. In his conclusion, Van Harten agreed with Professor Vaughan Lowe's statement in the book's preface, 'readers may not agree with all of his views and conclusions, but as tribunals struggle with these crucial issues they can only be helped by the clarity and insights of this robust and timely study'.[186]

Van Harten's comprehensive work undeniably advances the literature, particularly in his proposition to replace private arbitration with an international investment court and establish an independent appellate body for existing international investment arbitration systems. While these proposals are undoubtedly intriguing and thought-provoking, they remain incomplete, giving rise to several unanswered questions. Primarily, the formation of the proposed international investment court poses uncertainties regarding its establishment, operational leadership, global acceptance, and popularity. Moreover, the process of judge appointment for such a court necessitates further elaboration. Similarly, the proposal for an

[183] ibid.
[184] Van Harten (n 115).
[185] ibid.
[186] ibid.

independent appellate body lacks clarity on its composition and the identities of its prospective members. Addressing these crucial aspects is imperative for a more comprehensive understanding and evaluation of Van Harten's innovative suggestions.

2.8.2 International Investment Law: Reconciling Policy and Principle

The literature on international investment law in South Asia has been significantly enriched by the contributions of Professor Subedi, who is widely regarded as a pioneering scholar in this field.[187] In the context of this thesis, Subedi's work holds particular relevance as it not only adds to the existing literature but also directly addresses the core arguments concerning the FET provision in BITs. Subedi's work strives strike a balance between commercial and public interests.

Within the realm of ISDS mechanisms, several issues have been identified, with a primary concern being the lack of equilibrium. Currently, the ISDS system grants investors the exclusive right to initiate private actions seeking redress under the majority of IIAs, BITs, and FTAs. In contrast, host countries lack the same privilege, leaving them unable to initiate the ISDS mechanism in disputes involving investors.[188] This lopsided nature of the ISDS process has led to dissatisfaction among certain countries, as demonstrated by the withdrawal of Bolivia, Venezuela, and Ecuador from the ICSID.[189] These countries cited an alleged lack of balance between public and private interests as a reason for their withdrawals from ICSID. Such growing discontent has also been evident during discussions held at the United Nations Conference on Trade and Development (UNCTAD).

> '[C]ountries and regions [are] consider[ing] new approaches to investment policymaking. Reacting to of the growing unease with the current functioning of the global IIA regime, together with today's sustainable development imperative and the evaluation of the investment landscape, at least 50 countries and regions have been

[187] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (3rd edn, Hart Publishing 2016).
[188] Subedi (n 70).
[189] Ibid.

engaged in reviewing and revising their IIA models and formulating new IIA strategies'.[190]

The demand to review and revise existing IIAs not only came from legal scholars and practitioners but also national and international civil society, environment protection organisations, human rights, global poverty reduction and international economic and social justice groups. The author highlighted various public and private institutions which have made attempts to address certain aspects of investment, for example Professor John Ruggie who was appointed by the United Nations as the special representative of the secretary general to develop a set of principles to deal with issues surrounding business and human rights.[191] Ruggie's proposed principles are based on three main pillars, '1) the state duty to protect against human rights abusers by third parties including business, 2) the corporate responsibility to respect human rights and 3) greater access by victims to effective remedy, both judicial and non-judicial'.[192]

Amnesty International is also concerned about these issues and runs an international campaign to adopt a set of principles on guidelines for foreign investors.[193] A Canadian based International Institute of Sustainable Development (IISD) is at the forefront on the debate on balancing investment protection with environmental protection and has proposed a Model International Agreement (MIA) on investment for sustainable development to this effect. Such provisions in favour of the environment have a certain impact on new BITs and FTAs, as evident in the Canada-Peru BIT and the African, Caribbean and Pacific (ACP) – EU agreement on economic partnership.[194] The inclusion of such provisions are also extended in

[190] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (3rd edn, Hart Publishing 2016).
[191] Report of the special representative of secretary general on the issue of human rights and transnational corporations and other business enterprises: John Gerard Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Project, Respect and Remedy" Framework' (*United Nations Digital Library*, 2011) <https://digitallibrary.un.org/record/705860?ln=en> accessed 27 July 2021.
[192] ibid.
[193] Amnesty International, 'Human Rights Principles For Companies' (1998) <https://www.amnesty.org/download/Documents/148000/act700011998en.pdf> accessed 24 July 2021. See also Amnesty International, 'Public Statement | 2005 UN Commission on Human Rights: Amnesty International Welcomes New UN Mechanism on Business and Human Rights' (2005) <https://www.amnesty.org/download/Documents/88000/ior410442005en.pdf> accessed 24 July 2021.
[194] Howard Mann and others, 'IISD Model International Agreement on Investment for Sustainable Development | Negotiators' Handbook | Second Edition' (*International Institute for Sustainable Development*, 2006) <https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf> accessed 24 July 2021.

the UK's Companies Act 2006 of which a duty to pay attention to the environment is another example.[195]

Subedi pointed out that international investment arbitration is currently facing a significant backlash, and two other scholars, Schultz and Dupont, agree with this view. [196] They all recognized that there is a considerable amount of criticism and opposition towards existing international investment arbitration system.[197] They agreed that until the mid to late 1990s, investment arbitration was primarily utilised as a neocolonial tool to advance the economic interests of developed nations and enforce the rule of law in non-democratic states with weak legal systems. This approach is now being questioned.

Additionally, Subedi highlighted a report in The Guardian, a prominent British newspaper, which characterizes ISDS as a full-frontal assault on sovereignty and democracy. Subedi further emphasised that the growing dissatisfaction with current ISDS mechanisms is not limited to developing countries alone; even developed nations are expressing concerns about these systems.[198]The article refers to Roberts' views and states that:

> '[W]hen capital-exporting states originally drafted investment treaties, they viewed them as exclusively or primarily aimed at protecting the rights of their investors abroad and thus demonstrated little concern about the breadth of interpretive authority being delegated to investment tribunals or the absence of clear language protecting regulatory powers'.[199]

According to Subedi, states should move on and adopt new provisions to their BITs that focus on protecting the environment, promoting human rights, reducing poverty, and

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[195] Andrew Keay, 'Section 172 (1) of the Companies Act 2006: An Interpretation and Assessment' (2007) 28 *Company Lawyer* 106.
[196] Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 *European Journal of International Law* 1147.
[197] Ibid.
[198] George Monbiot, 'The Real Threat to the National Interest from the Rich and Powerful' 15 *The Guardian* (15 October 2013).
[199] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *American Journal of International Law* 45, 78..

implementing elements of corporate social responsibility. These safeguarding and defence mechanisms has been adopted by India under their new 2015 Indian Model BIT.

Subedi highlighted that states are adding new provisions to BITs, focusing on environmental protection, human rights, poverty reduction, and corporate social responsibility. Some developing counties including India incorporate these provisions, aiming to clarify previously vague issues. The revised model BITs address problematic principles like FET and MFN treatment, seeking to strike a balance between investor protection and national sovereignty by limiting the scope for ICSID-style arbitration.[200] The new style model BIT requires foreign investors to respect and recognise the rights, traditions and customs of local communities of the host state.[201] Subedi emphasises that the concept of FET is a crucial principle in foreign investment law, deeply embedded in customary international law. [202] However, like other scholars, he acknowledges that FET is not a straightforward concept and can be challenging to define precisely, leading to various interpretations.[203]

Furthermore, Subedi raises concerned about certain arbitral tribunals' interpretations of FET, specifically citing cases like El Paso and Argentina. [204] He criticised the introduction of the concept of 'creeping' analysis in applying the FET standard, as this approach appears to be problematic in his view.[205] In the case of Genin and Estonia[206] the arbitral tribunal stated that a violation of FET could be established by, ‘acts showing wilful negligence, insufficiency of action falling below international standards, or even bad faith’.[207] The UNCTAD report highlighted a series of problems in relation to the FET standard, stating that, although the concept of FET is now a common features in international investment agreements, different formulations are used in connection with the standard:

[200] Republic of India (n 55).
[201] Srividya Jandhyala, ‘Bringing the State Back In: India’s 2015 Model BIT | 17 August 2015’ [2015] *Columbia FDI Perspectives | Perspectives on Topical Foreign Direct Investment*.
[202] Subedi (n 174).
[203] ibid, 146.
[204] El Paso Energy International Company v. Argentine Republic, ICSID Case No ARB/03/15, Award (31 October 2011).
[205] El Paso Energy International Company v. Argentine Republic, ICSID Case No ARB/03/15, Award (31 October 2011).
[206] Genin v Esthonia, ICSID Case No ARB/99/2, Award (25 June 2001).
[207] ibid para 35.

'[A]n examination of the relevant treaties suggests at least four approaches in practice, namely:

i. An approach that omits reference to fair and equitable treatment.
ii. An approach in which it is recommended that state should offer investment fair and equitable treatment, but such treatment is not required as a matter of law (the hortatory approach).
iii. A legal requirement for states to accord investment 'fair and equitable' treatment, 'just and equitable' treatment or 'equitable' treatment.
iv. A legal requirement for states to accord investment fair and equitable treatment, such as most-favoured-nation and national treatment.'[208]

Subedi noted that the FET principle appears to be primarily associated with the duty not to deprive justice in criminal, civil, or administrative proceedings. This obligation is in line with the principle of due process, which is a fundamental aspect of legal systems used across the globe.[209] However, in reality, various arbitral tribunals have given broader interpretations to the FET principle, which the author contends might not always reflect its true intent.[210]

Subedi demonstrated a comprehensive understanding of the current issues surrounding the international investment mechanism. He considers the FET provision to be of utmost importance, yet also problematic. While his critical analysis and constructive evaluation of the FET principle contribute significantly to the literature, this thesis identifies some gaps in his work. While Subedi criticised how tribunals interpret the FET principles, he does not propose potential solutions to address the existing problem. Additionally, despite emphasising the importance of investment harmony, economic justice, sustainable development, protection of human rights, and environmental preservation, he does not provide a clear path for implementing these ideals in practice.

[208] UNCTAD, 'Fair and Equitable Treatment' [1999] *UNCTAD Series on Issues in International Investment Agreements* 1–2.
[209] Subedi (n 174).
[210] ibid.

2.8.3 The International Law on Foreign Investment

Sornarajah, a prominent Asian scholar, conducted an in-depth investigation that explores the contentious landscape of contemporary foreign investment law. His scholarly work illuminated the rising calls for reform within the existing international law on foreign investment, bringing attention to the need for critical examination and potential restructuring.[211] Sornarajah emphasised the pressing necessity of incorporating human rights, environmental protection and national sovereignty considerations into BIT provisions. He argues that this demand compels the inevitable revision of BIT provisions in practical implementation.[212]

Sornarajah identified the FET standard as a vague phrase, open to different interpretations. In his views the content of the standard has caused many problems and anxiety.[213] Sornarajah observed that:

> '[I]t was at one stage thought that the standard was a higher standard than the international minimum standard, but, in NAFTA legislation, the wide interpretation given to the formula resulted in the NAFTA Commission issuing an interpretative note declaring that fair and equitable standard was no more than the international minimum standard of customary international law'.[214]

Sornarajah stated that this view was recently adopted in the free trade agreement between Singapore and the United States. Additionally, the model investment treaties of both the United States and Canada repeated the same approach in which FET is equivalent to the international minimum standard of treatment. Sornarajah further stated that FET is not only losing its shape but also its practical purpose and is slowly becoming an indispensable part of the international minimum standard of treatment.

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[211] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, Cambridge University Press 2017).
[212] ibid.
[213] ibid.
[214] Sornarajah, *The International Law on Foreign Investment* (n 193).

Sornarajah's analysis reveals the FET standard as a vague and susceptible-to-interpretation phrase. He identified the content of this standard as a source of numerous problems and concerns. Initially, there was a belief that FET represented a higher standard than the international minimum standard. However, the wide interpretation of the formula in NAFTA legislation led to the NAFTA Commission clarifying that the fair and equitable standard merely aligns with the international minimum standard of customary international law. This perspective has been recently adopted in the free trade agreement between Singapore and the United States, and the model investment treaties of both the United States and Canada follow a similar approach, equating FET with the international minimum standard of treatment.[215]

Moreover, Sornarajah observes that FET has been losing its distinctiveness and practical relevance, gradually merging into an indispensable part of the international minimum standard of treatment. To address arbitral tribunals' broad interpretations that have resulted in several decisions based on FET breaches, the new Indian Model BIT 2015 has deliberately omitted FET provisions. Instead, it adopts an ‘enterprise-based’ definition, safeguarding all investments made by the affiliates of a foreign company that has invested in India through a single enterprise. [216] This shift is intended to protect the host nation from unforeseen complications.

Additionally, Sornarajah underscores the significance of contextual considerations when evaluating the fairness aspect of FET. He posits that notions of fairness should be contingent upon the specific circumstances in which they are assessed, and it becomes crucial to consider whether state interference is in response to the malpractices of multinational corporations. [217] Therefore, the evaluation of the FET standard is not

[215] Islam
[216] Biswajit Dhar and KS Chalapati Rao, ‘India’s FDI Inflows: Trends and Concepts’ (*Munich Personal RePEc Archive*, 2011) <https://mpra.ub.uni-muenchen.de/29153/1/MPRA_paper_29153.pdf> accessed 25 July 2021.
[217] Biswajit Dhar and KS Chalapati Rao, ‘India’s FDI Inflows: Trends and Concepts’ (*Munich Personal RePEc Archive*, 2011) <https://mpra.ub.uni-muenchen.de/29153/1/MPRA_paper_29153.pdf> accessed 25 July 2021.

unidirectional, and arbitral tribunals are urged to ensure a reasonable interpretation of FET in light of the contextual circumstances.[218]

Sornarajah notes that the discretions of arbitral tribunals have elicited public concern. In response, states have adopted two prevalent approaches to the evolution of the FET standard. Some have chosen to withdraw their membership from ICSID and the New York Convention. Conversely, others have opted to maintain a treaty-based system but have called for the reestablishment of equilibrium within the system. The latter approach typically involves advocating for a balanced framework that effectively harmonizes investment protection and regulatory space.[219]

Despite Sornarajah's significant contribution on identification of several crucial issues prevailing in the present treaty-based agreements governing foreign investment mechanisms, the predicament concerning the FET remains unresolved. While Sornarajah notably emphasized the escalating call for a balanced FET principle, particularly in navigating the delicate balance between commercial interests and public policy, his scholarly work does not proffer a specific pathway to effectuate such a harmonious approach.

2.8.4 Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law

Dumberry is a leading scholar who has made a significant contribution to the discussion on whether the FET standard has evolved into a rule of customary international law. [220] Recent cases demonstrate that the FET provision has become a crucial concern for host countries' investment mechanisms. The problem often arises due to the ambiguous wording of FET provisions, leading tribunals to interpret a state's obligations broadly, such as acting consistently, reasonably, and transparently in a manner that is clear, non-prejudicial, without

[218] Peter Muchlinski, '"Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 *International & Comparative Law Quarterly* 527.
[219] Sornarajah, *The International Law on Foreign Investment* (n 193).
[220] Patrick Dumberry, 'The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105' [2013] *Kluwer Law International*.

ambiguity or discrimination, and guarantees due process in decision-making mechanisms while respecting investors' legitimate expectations.[221]

These interpretations have sparked controversial questions regarding whether the FET standard is an independent and distinct level of protection to be granted to foreign investors or merely a reference to the Minimum Standard of Treatment (MST) under customary international law.

According to the Dumberrys' perspective on the historical significance of BITs, the FET standard should be regarded as an independent and standalone treaty standard with a meaning that is autonomous from the MST. Dumberry also delves into the question of whether FET has attained the status of a customary international law rule. On the other hand, Tudor, another prominent scholar, suggests that the FET standard became a customary norm of its time. [222]

Dumberry's research, conducted independently, involved an examination of 1964 BITs available in the UNCTAD treaty database. The findings revealed that merely fifty BITs did not include an FET clause, and 25 others only mentioned the FET standard in their preambles. This indicates that less than 5% of BITs lack a formal and binding FET provision for investment. The author identifies two reasons for the absence of FET obligations in certain BITs. Firstly, some states deliberately exclude FET provisions during negotiations before signing the BIT agreement, reaching a mutual understanding on the matter. Secondly, it is surprising to note that Japan omitted the FET provision in all its BITs, without clear reasons, even though all these Japanese BITs were agreed upon with developing states.[223] Dumberry highlighted that this absence of FET provisions in BIT agreements with developing

[221] ibid.
[222] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008). In the case of the FET standard, the situation as it stands today is that most developed and developing countries do recognize in their domestic laws that FET is to be applied to foreign investors. This is the case even though the term FET itself may not be employed as such but the content of FET, namely procedural and substantive guarantees for foreign investors, is found in national provisions').
[223] ibid.

countries is not an isolated occurrence, as approximately 10% of BITs with Romanian, Albanian, Greek, and Senegalese investment agreements also lack FET clauses.

Dumerry proposed a two-stage test for a treaty-based rule to evolve into a new rule of customary international law. Firstly, it has to be proved that a significant number of states have entered into numerous BITs that contain the exact provision (or very similarly drafted clauses). According to the International Court of Justice (ICJ), the requirement is that:

> '[S]tate practice, including that of States whose interest are specially affected, should [be] both extensive and virtually uniform in the sense of the provision invoked, thus, the practice of States who are *parties* to BITs must be uniform, consistent and representative'.[224]

Second, it needs to be shown that 'States (including those *not* party to these BITs) have also adopted in their own practice (outside the treaty) the type of conduct prescribed in these instruments. Thus, what matters is the existence of a consistent practice of States *outside* the treaty framework'.[225]

Tudor and other scholars have put forth arguments suggesting that the FET provision has evolved into a customary international law rule, primarily based on a few controversial decisions made by arbitral tribunals.[226] In contrast, Dumberry counters these claims and contended that these controversial decisions were limited to cases within the North American Free Trade Agreement (NAFTA) tribunals, where the actual content of the BITs was not thoroughly discussed.[227] Dumberry made his stance clear and asserts that while the practice of states including FET clauses in their BITs is widespread, representative, and prevalent, it does not meet the level of uniformity required for the standard to be considered a fully

[224] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark)* [1969] ICJ Rep 44, 43.
[225] Richard R Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965) 41 *British Yearbook of International Law* 296–297.
[226] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008)
[227] Dumberry (n 156).

emerged customary rule.[228] Therefore, the first stage for any treaty-based standard to transform into a customary rule has not been met.[229]

While Tudor claimed that the FET standard can be found in the domestic laws of both developed and developing states[230], others, like Vasciannie, emphasise that the 'overwhelming majority' of these states do not offer FET protection to foreign investors. [231] Supporting this, a study conducted in 1992 examined national legislations in 51 developing countries and revealed that FET was incorporated only three times. [232]

However, more recent research conducted by Dumberry on a similar topic within existing developing countries shows a different trend. States are consistently and uniformly providing FET protection to foreign investors outside the framework of BITs. [233] Furthermore, Dumberry's research did not find any arbitration case where a tribunal upheld the existence of an FET obligation in situations involving a BIT that lacked an FET clause or in the absence of any BIT altogether.[234] As a result, the second condition for the transformation of treaty-based provision into customary rule has therefore not been met.[235] Dumberry concluded his article by refereeing Schachter's inspirational words that, 'the repetition of common clauses in bilateral treaties does not create or support an inference that those clauses express customary law' because, 'to sustain such a claim of custom one would have to show that apart from the treaty itself, the rules in the clauses are considered obligatory'.[236]

Overall, Dumberry contended that the FET provision has not attained the status of a customary rule in international law, offering a persuasive rationale to support this assertion.

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[228] Moreover, the 'internal' practice of States regarding the use of the FET clause is nowhere near uniform either. A number of States (for instance, Mexico and Argentina) include different variations of FET clauses in their BITs.
[229] Dumberry (n 156).
[230] Ibid.
[231] Vasciannie (n 8) 160.
[232] Vasciannie (n 8) 160.
[233] I have also found no State contracts containing a FET clause. See Dumberry (n 156).
[234] It is true that in a handful of cases, foreign investors have been allowed to benefit from FET protection in situations where the BIT under which they started the proceedings did *not* contain any FET clause. Importantly, however, this was made possible through the use of the MFN clause contained in the BIT. Such importation of an FET protection had therefore nothing to do with the (alleged) customary status of the standard.
[235] Dumberry (n 156).
[236] Schachter (n 107) 126. See also Godefridus JH Hoof, *Rethinking the Sources of International Law* (Kluwer Law and Taxation Publishers 1983) 109.

Considering whether the FET standard has evolved into a rule of customary international law is crucial for understanding the evolving landscape of investment protection. This discussion is particularly relevant to the research questions of this thesis because it sheds light on the shifting dynamics between host countries and foreign investors, which impacts the negotiation and implementation of BITs.

For developing countries, the implications of this ongoing debate are significant, as it underscores the need for a nuanced approach to FET provisions that balances investor protection with national sovereignty, ultimately influencing the investment climate and economic development strategies in these nations.

2.8.5 Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries

Non-precluded measures in BITs refer to government actions or regulations that are not prohibited or restricted by the terms of the treaty. These measures are typically allowed under certain conditions and are not considered violations of the treaty's provisions protecting foreign investments. They allow governments to implement policies or regulations in areas such as public health, environmental protection, consumer safety, and public welfare without breaching the treaty.[237]

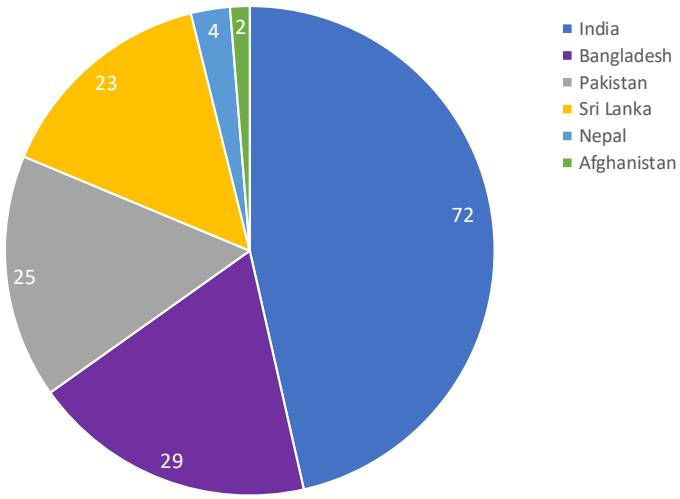
Non-precluded measures are important because they help balance the rights of investors with the regulatory authority of governments to pursue legitimate policy objectives. They provide flexibility for governments to regulate in the public interest while still offering protections for foreign investors against unfair treatment or expropriation.

NPMs are provisions that create exceptions to the usual application of BITs. They allow states to take actions that might otherwise contradict their treaty obligations. [238] In

[237] Amit Kumar Sinha, 'Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries' (2017) 7 *Asian Journal of International Law* 227, 227–263.
[238] Sinha (n 124).

simpler terms, NPMs shift the burden of harm caused to investments from host states to investors, but only in specific and exceptional circumstances. [239]

Figure 2. South Asian BITs



Sinha studied the 155 stand-alone BITs that are currently in force in South Asian countries,[240] including eighty-four BITs of India,[241] twenty-nine BITs of Bangladesh,[242] twenty-five BITs of Pakistan,[243] twenty-three BITs of Sri Lanka,[244] four BITs of Nepal,[245] and two BITs of Afghanistan.[246] Figure 2 shows the current number of BITs per South Asian country; it can be seen that India have the most BIT agreements signed with other countries, while

[239] ibid., 401.
[240] ibid.
[241] India has signed eighty-four BITs, of which seventy-two are in force (10 December 2014), online: Ministry of Finance, 'List of Countries with Whom Bilateral Investment Promotion and Protection Agreements (BIPA) Has Been Signed' (*Government of India*, December 2013) <https://www.finmin.nic.in/list-countries-whom-bilateral-investment-promotion-and-protection-agreements-bipa-has-been-signed> accessed 26 June 2021.
[242] Bangladesh have signed thirty-one BITs, of which twenty-four are in force; United Nations UNCTAD (n 1); BITs signed by Bangladesh can also be found on the website: Government of Bangladesh, 'Bilateral Treaties' (*Ministry of Industries Peoples' Republic of Bangladesh*, 18 September 2017) <https://moind.gov.bd/site/page/f7aa7575-5196-476b-907b-3ea65e885717> accessed 26 June 2021.
[243] Pakistan have signed fifty-three BITs, of which thirty-two are in force; United Nations UNCTAD, 'Pakistan Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator' (*UNCTAD Investment Policy Hub*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh> accessed 26 June 2021.
[244] Sri Lanka have signed twenty-nine BITs, of which twenty-four are in force; United Nations UNCTAD, 'Sri Lanka Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' (*UNCTAD Investment Policy Hub*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/198/sri-lanka> accessed 26 June 2021.
[245] Nepal have four BITs in force out of six BITs that it has signed; United Nations UNCTAD, 'Nepal Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' (*UNCTAD Investment Policy Hub*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/147/nepal> accessed 26 June 2021.
[246] Afghanistan have signed four BITs, three of which are in force; United Nations UNCTAD, 'Afghanistan Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' (*UNCTAD Investment Policy Hub*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/1/afghanistan> accessed 26 June 2021.

Afghanistan and Nepal have the least. Bangladesh has the second highest number of BIT agreements in South Asia. This literature is important to this thesis because it highlights the key issues as to why the number of investor state arbitration cases are rising against South Asian countries. Although Sinha's research indicates that the idea of BIT was not popular until 1990, it suggests that BITs took a dramatic rise after 1990 due to liberalisation.[247]

The article presents an analysis of twenty-nine Bangladeshi BITs in total. It is surprisingly true that only nine of these were signed before 1990[248] and the remaining twenty BITs were signed between 1990 to 2015.[249] India has signed eighty-four BITs to date and it is unbelievable but true that all of them were signed after 1990.[250] In India, after economic reforms in 1991, foreign investment policy was liberalized and Bilateral Investment and Protection Agreements (BIPAs) were entered into with other countries to protect and promote investments on a reciprocal basis to ensure more FDI inflow in the country.[251] The statistics become more interesting if we look at the FDI inflows showing that although Bangladesh was just $3 million USD[252] prior to 1990, this figure had risen to $1,727 million USD by 2015.[253] India, unsurprisingly, also showed an exceptional rise after 1990 with $237 million USD as FDI[254] until 1990 soaring to $36,417 million USD by the end of 2015.[255] Although there were only 300 BITs signed with south Asian countries until 1990, the number increased as much as 3000 by the end of 2015.[256] This figure clearly shows tremendous growth of BIT regime in South Asia.[257]

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[247] Sinha (n 124) 227.
[248] BITs with BLEU (1987), France (1985), Germany (1981), Korea (1986), Turkey (1987), Canada (1990), Romania (1987), the United Kingdom (1980), and the USA (1986).
[249] ibid.
[250] Ranjan (n 13) 421.
[251] ibid 465.
[252] ibid.
[253] ibid.
[254] United Nations UNCTAD, 'Country Fact Sheet: India' (*World Investment Report*, 2020) <https://unctad.org/system/files/non-official-document/wir_fs_in_en.pdf> accessed 27 June 2021.
[255] ibid.
[256] Jeswald W Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *The International Lawyer* 655, 655; for a listing of 309 bilateral investment treaties concluded up to 31 December 1988, Athena J Pappas, 'References on Bilateral Investment Treaties' (1989) 4 *ICSID Review - Foreign Investment Law Journal* 189.
[257] Pravakar Sahoo, 'Foreign Direct Investment in South Asia: Policy, Trends, Impact and Determinants' (*ADB Institute Discussion Paper No. 56*, 2006) <https://www.adb.org/sites/default/files/publication/156693/adbi-dp56.pdf> accessed 27 June 2021.

Sinha's work does however highlighted the downside of this tremendous growth which is evident in the rise of the number of investor-state arbitrations.[258] The author indicated that the sharp growth of BIT agreements later caused a sharp increase in the number of investment disputes, as evidenced by 514 investor-state disputes filed in ISDS by the end of 2012.[259] Within one year the number of known treaty-based cases increased to 568 by 2013.[260] An additional forty-two new ISDS cases were filed by the end of 2014, thereby taking overall number of ISDS cases to around 610.[261] Sinha's research found that out of forty-two cases thirty-six of them were brought against developing or under developed states and only five cases were filed against developed states in 2014.[262] This data shows that developing countries are subjected to BIT claims on more accounts than the developed countries showing Bangladesh on three accounts[263] and India on eighteen accounts.[264]

Sinha placed significant importance on the inclusion of NPMs in BITs of South Asian countries. He claimed that there are numerous reasons for the sharp rise in the number of cases against South Asian countries, pointing out that weak and inconsistent BIT provisions lacking NPMs are responsible for this problem. The author referred to a statistic stating that only eighty[265] out of 147 BITs signed in south Asia contain NPMs and, from those eighty,

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[258] ibid.
[259] United Nations UNCTAD, 'Investor State Dispute Settlement: A Sequel' (*IIA Issues Note*, 2014) 230 <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf> accessed 27 June 2021.
[260] United Nations UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)' (*United Nations Conference on Trade and Development \ IIA Issues Note*, 2014) <https://unctad.org/system/files/official-document/webdiaepcb2014d3_en.pdf> accessed 27 June 2021.
[261] United Nations UNCTAD, 'Recent Trends in IIAS and ISDS' (*United Nations Conference on Trade and Development \ IIA Issues Note*, 2015) <https://unctad.org/system/files/official-document/webdiaepcb2015d1_en.pdf> accessed 27 June 2021.
[262] ibid.
[263] Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award (30 June 2009).
[264] Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v. The Government of India, Bechtel, 'Tribunal Rules for Bechtel and GE in Dabhol Power Project Arbitration' (*Bechtel Newsroom*, 9 September 2003) <https://www.bechtel.com/newsroom/releases/2003/09/tribunal-rules-dabhol-power-project-arbitration/> accessed 27 June 2021; Rimantas Daujotas, 'ICSID "Foreign" Investment Requirement in Case of Borrowed Funds' (*Dr. Rimantas Daujotas Advokatas*, 12 April 2015) <http://rdaujotas.com/publications/icsid-foreign-investment-requirement-in-case-of-borrowed-funds/> accessed 27 June 2021; Maxim Naumchenko, Andrey Poluektov and Tenoch Holdings Limited v. Republic of India, PCA Case No. 2013-23 | Italaw' <https://www.italaw.com/cases/1933> accessed 27 June 2021; Deutsche Telekom AG v. The Republic of India, PCA Case No. 2014-10, Award (13 December 2017); Arnold (n 55); Khaitan Holdings Mauritius Limited v. India, PCA Case No. 2018-50, Award (29 January 2019); Freeman (n 74). Vodafone International Holdings BV v. India (I) PCA Case No. 2016-35, Award (25 September 2020); White Industries Australia Limited v. The Republic of India, IIC 529, Award (30 November 2011); Louis Dreyfus Armateurs SAS v. The Republic of India, PCA Case No. 2014-26, Award (11 September 2018) and others.
[265] ibid.

India alone has seventy[266] included in their BITs.[267] Bangladesh included NPMs in only four BITs out of thirty four.[268]

Sinha noted that incorporating NPMs into BITs is of utmost significance because it safeguards the core national interests of a host country such as public health, public order, environment, morality, circumstances of extreme emergency, international peace and security, and other miscellaneous interests.[269] However, despite this acknowledgment, Sinha's research falls short in providing explicit guidance on the effective integration of NPMs during BIT negotiations.

Undoubtedly, Sinha's contribution to current literature lies in identifying South Asian BIT issues and suggesting future negotiation strategies. However, there are significant gaps in this research upon closer analysis. One aspect to consider is the power dynamics often present in negotiations of BITs, where developing countries typically have less bargaining power compared to developed nations. This power imbalance poses challenges in persuading foreign investors to agree to NPMs unless these measures themselves are adequately protected. Consequently, for developing nations, listing numerous national interests under NPMs tends to be an unpopular strategy for attracting foreign investment. This reluctance stems from concerns that such an approach may disproportionately shift the balance of interests between the host state and foreign investors too heavily in favour of the host state. This means that NPMs are, on their own, not enough to solve the growing problem of addressing the rising number of cases being filed against developing host states by foreign investors. This thesis argues that a more holistic approach needs to be taken to better balance the interests of host states and foreign investors through proposing a

[266] India does not have NPM provisions in BITs with Argentina and Russia.
[267] UNCTAD, 'Bangladesh - India BIT (2009) | International Investment Agreements Navigator' (*UNCTAD Investment Policy Hub*) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/371/bangladesh---india-bit-2009-> accessed 27 July 2021.
[268] UNCTAD, 'Bangladesh - Germany BIT (1981) | International Investment Agreements Navigator ' (*UNCTAD Investment Policy Hub*) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/370/bangladesh---germany-bit-1981-> accessed 27 July 2021.
[269] Sinha (n 124) 227–263.

comprehensive model BIT that encompasses, but does not solely rely on, NPMs to minimize investor claims.

2.9 Conclusion

This chapter conducted a comprehensive literature review, focusing on FET provisions in BITs, with a specific emphasis on Bangladesh and other South Asian countries. The review encompassed the historical development of FET provisions in BITs, theoretical discussions on the pros and cons of including FET provisions, and an examination of potential attributes and emerging concerns related to conflicts of interest between host states and foreign investors.

By thoroughly exploring the theoretical and practical foundations of FET provisions in BITs, this literature review justified the thesis's scope and relevance. It examined how international investors have historically been subjected to social-political and economic debates on the method and extent to which they can use their rights abroad. It also discussed how, over time, the concept of minimum standard of treatment was consolidated into a new standard known as ‘fair and equitable treatment’ (FET) which, due to its levels of protections and ability to attract foreign investors, has become a very popular principle in BITs around the world.

Vasciannie proposed the first academic definition of the FET standard within international investment law, which is still relevant to this day. Although the first BIT between Pakistan and Germany in 1959 made no reference to an FET provision, popularity of FET provisions started to increase during the mid-1960s. The popularity of FET provisions in BITs exponentially increased between the late 1980s and early 2000s.

The literature review then examined scholars' views on the benefits and drawbacks of foreign investment and BITs which divides into two groups, with one group supporting foreign investment for host state growth and the other viewing foreign investors as significant threats. Academics including Subedi, Dumberry, Salisu, Moran, Yussof and Ismail argue that foreign investment enhances income, technology, and living standards in developing nations.

Brooks and Fan emphasise technological progress. Conversely, scholars including Smith, Calvo, Bin Atan, Dunning, Blomstrom, Fraser, and Falki criticise foreign investment's risks and potential threats to national sovereignty.

The literature review then discussed how existing FET provisions tend to favour foreign investors interests over hosts states' national interests, because the FET provisions are often weak and poorly written, allowing for arbitral tribunals to interpret them either too broadly or narrowly to foreign investors' advantage. An increasing number of cases brought by foreign investors against host states alleging expropriation and FET breaches has made the need to reform and rebalance these FET provisions very clear.

This chapter recognises that although safeguarding host states' sovereignty is urgently needed, it is important to balance this with continuing to offer sufficient protections to attract foreign investors and thus retain the economic and many other benefits foreign investment brings to a host state. The chapter then concluded by discussing different ways in which the scope of FET can be safeguarded whilst also achieving this balance, therefore providing the groundwork for subsequent chapters to explore the more intricate facets of FET provisions in Bangladeshi BITs.

The next chapter will provide a methodological justification for this thesis, including the research design, methods, essential elements for legal research, research philosophy, and ethical considerations.

Chapter 3: Methodology

3.1 Introduction

This thesis examines the extent to which Bangladeshi FET provisions establish an effective legal framework for balancing the rights of host states and foreign investors. To address the overarching question, chapters four, five and six have been structured to present the findings from three different analyses. Firstly, to determine the existing problems within Bangladesh's current FET provisions, chapter four presents findings from conceptualisation, doctrinal and documentary analyses of the wording and layers of protections within existing Bangladeshi FET provisions. Secondly, to ascertain why current FET provisions have enabled foreign investors to sue Bangladesh for minimal inconveniences in the past, chapter five presents key case study analyses. Thirdly, to propose pragmatic recommendations for enhancing future FET provisions in Bangladesh, chapter six presents results of a comparative analysis of FET provisions in the US, India and Bangladesh. This comparative analysis takes wider considerations for legal, socioeconomic, geographical, cultural and political differences into account, to ensure that recommendations for future Bangladeshi FET provisions are both viable and realistic.

The following chapter presents the research design, methods and philosophy used to answer the research questions, with relevant justification. It also discusses essential elements for legal research and ethical considerations which have been considered throughout this thesis.

3.2 Research Design

This thesis deploys a qualitative approach to pinpoint existing flaws and propose pragmatic recommendations for future improvements of FET provisions in Bangladeshi BIT agreements. This qualitative approach applies to each of the three main studies as detailed in chapters four, five and six. Qualitative research is applicable because it focuses on the analysis of written materials as opposed to numerical and mathematical data in quantitative

research methods.[270] Qualitative research also includes various exploratory methods which aim to uncover trends in textual data and conduct a deep analysis of a given problem. It is the most frequently used research approach for developing and informing new concepts and theories in law.[271] Two influential scholars Krik and Miller identified that qualitative research helps to find and categorise the meaning of social, legal and economical phenomena. [272]

An exploratory design has been deployed to gain a better understanding of the existing problems of FET provisions in Bangladeshi BITs. This was deployed both in analysing and categorising the wording of existing FET provisions and conducting key case studies to ascertain why current FET provisions have enabled foreign investors to sue Bangladesh for minimal inconveniences in the past. An exploratory design was most appropriate given the lack of prior legal research on existing problems with Bangladeshi FET provisions.

Taking an exploratory rather than hypothesis driven approach enabled a deep and unbiased examination of the complex nature of balancing national sovereignty with foreign investors' commercial interests. Leading case law, treaties, statutes and relevant academic debate will be explored in order to provide suggestions for modifications of the existing BIT framework in Bangladesh.[273] Given that law is a dynamic discipline which constantly reflects and responds to socio-political environment in which it operates, this thesis will also consider conceptual underpinnings and historical developments of FET provisions and its impact in international investment law, in addition to relevant contemporary issues.

[270] Pamela Baxter and Susan Jack, 'Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers' (2008) 13 *The Qualitative Report* 544.
[271] William MK Trochim and James P Donnelly, *The Research Methods Knowledge Base* (3rd edn, Atomic Dog 2006).
[272] Peter Cane and Herbert Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012).
[273] Christoph Klaus Streb, 'Exploratory Case Study' in Albert J Mills, Gabrielle Durepos and Eiden Wiebe (eds), *Encyclopedia of Case Study Research* (2010).

3.3 Research Methods

The methods used in this thesis were conceptualisation, doctrinal, documentary, comparative analyses and case studies. These methods were crucial for this thesis because they enabled critical analysis and effective evaluation, leading to the identification of suggestions and reform proposals to address the existing problems in FET provisions in Bangladeshi BITs.

Chapter four systematically analysed and categorised the wording of FET provisions within all existing signed BITs between Bangladesh and other countries into four different categories to examine discrepancies in wording and classify the level of protections provided by each FET provision. This process of analysing textual data to identify the level of protections each FET provision offers involved a combination of conceptualisation, doctrinal and documentary analyses.

The conceptualisation method simply means to develop a concept.[274] This method first uses a process to build and develop a concept, and then helps to clarify that concept.[275] Since FET is an ambiguous concept, a conceptualisation method was used in this thesis to clarify and narrow down the concept of FET for future use.

A doctrinal method means to instruct, with a systematic evaluation of the rules governing certain legal categories and analysing the relationship between a current position and a foreseeable future position.[276] A doctrinal method was most appropriate for assessing discrepancies between current FET provisions, highlighting the loopholes within each of these and presenting what the foreseeable consequences may be. Moreover, it facilitated a better comprehension of the urgent necessity to adequately safeguard FET provisions thereby diminishing potential future disputes between the host state and foreign investors.

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[274] Vincent A Anfara and Norma T Mertz, *Theoretical Frameworks in Qualitative Research* (1st edn, SAGE Publications, Inc 2006) 23–35.
[275] Vernon Trafford and Shosh Lesham, 'Overlooking the Conceptual Framework' (2007) 44 *Innovations in Education and Teaching International* 93, 100.
[276] Jan BM Vranken, 'Methodology of Legal Doctrinal Research: A Comment on Westerman' in MAA Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline* (Hart Publishing 2011).

Documentary analysis is a form of qualitative research in which documents are examined and interpreted by the researcher to assess the current position of existing law. The types of documents analysed throughout this thesis include public records such as official, policy documents and records of ongoing activities, governmental data in relation to international investment and relevant documents involving FET provisions within Bangladeshi BITs and other international investment agreements. For the specific purpose of analysing FET provisions in existing Bangladeshi BITs, the documentary analysis involved coding different layers of protections into themes. This thesis also examined case law, textbooks, law reform proposals, journal articles and law review reports to gain deeper insights and make robust and realistic recommendations for future Bangladeshi BIT agreements.

Chapter five conducted five key case studies to ascertain why current FET provisions have enabled foreign investors to sue Bangladesh for minimal inconveniences in the past. These case studies analysed and evaluated the most influential investor-state arbitration claims which had arisen as a result of problematic FET provisions in Bangladesh. A case study method was most appropriate because it facilitated an in-depth study of previous cases where Bangladesh had been sued by foreign investors claiming that there had been a breach of FET provisions. Using a case study method allowed the researcher to ascertain why foreign investors had been successful in some claims of breach of FET provisions against Bangladesh, as well as cases where Bangladesh was able to successfully defend its position.[277] Using the case study method alongside conceptualisation, doctrinal analysis, and documentary examination of FET provisions in chapter four, provided a practical means to identify both weaknesses and strengths in the current FET provisions present in Bangladeshi BIT agreements. This combined approach was essential for conducting a comprehensive critical analysis and gaining insights into the existing Bangladeshi BIT framework.[278]

[277] Robert K Yin, *Case Study Research, Design and Methods* (3rd edn, Sage Publications 2003) 13.
[278] Kathleen M Eisenhardt and Melissa E Graebner, 'Theory Building from Cases: Opportunities and Challenges' (2007) 50 *Academy of Management Journal* 25–32.

Conducting this comprehensive critical analysis was essential for identifying new ideas for the development of most appropriate solutions.

Chapter six undertook a comprehensive comparative analysis of FET provisions in the United States, India and Bangladesh, with the aim of formulating practical recommendations to strengthen future FET provisions in Bangladeshi BITs. A comparative method was used to gain a deeper understanding of how changes to FET provisions in both India and the US impacted the number of cases that were filed against them by foreign investors on grounds of breach of FET provisions. Both countries have taken different approaches in recent years towards balancing their national interests with those of foreign investors commercial interests, leading to very different consequences for their economy.

Both India and the US served as valuable examples for Bangladesh, offering insights into how they have addressed issues with FET provisions in their existing BITs by safeguarding and rebalancing vague provisions. Analysing FET provisions in Indian BITs proved relevant to Bangladesh due to the countries' shared social, economic, cultural, and political interests. Moreover, an examination of FET provisions in the US was particularly relevant due to the country's widely acknowledged status as having the most successful BIT framework globally. This distinction is attributed to the US's robust institutional strength and its proactive approach to safeguarding, achieved through regular reviews of their BIT framework.

Employing a comparative method yields significant benefits in evaluating the interplay of diverse legal systems across multiple jurisdictions, fostering a deep understanding of a specific concept. By facilitating the comparison of foreign legal systems, this analytical approach seeks solutions to challenges within a particular legal framework. It delves into essential aspects such as law and economics, civil law and common law, economics and politics, among others, to glean valuable insights and draw meaningful conclusions.[279]

[279] Ellen Hey and Elaine Mak, 'Introduction: The Possibilities of Comparative Law Methods for Research on the Rule of Law in a Global Context' (2009) 2 *Erasmus Law Review* 287, 288.

The choice of a comparative analysis was therefore well-suited as it allowed the researcher to consider a broader range of factors, such as legal, socioeconomic, geographical, cultural, and political differences. This approach ensured that the proposed recommendations for future FET provisions in Bangladesh were not only feasible but also implementable.

Although analysing the formation, development and progression of Indian and US FET provisions in comparison with Bangladesh helped to obtain an understanding of the content and range of existing problems and potential solutions, it is vital to note that law, by its very nature, operates within the different cultures of these countries. This means that consideration of how the law is functioning in each society was of equal importance to simply comparing the differences in FET provisions. This thesis therefore placed particular emphasis on the impact of the formation and development of FET provisions as evidenced by historical, geographical, moral, philosophical and contemporary issues. Academics such as Professor Grossfield and Edward Eberle referred to such driving forces as, 'invisible powers'[280] while Rodolfo Sacco identified them as, 'legal formants', which are highly influential in driving the formation of law.[281] More recent developments in academic debate surrounding comparative law have identified a crucial need for future focus on non-western legal frameworks and cultures of rising superpowers in Asia.[282] It is hoped that this thesis, by its very nature of comparing FET provisions in India and Bangladesh in addition to the US, will make a significant contribution towards this need.

[280] See Bernhard Grossfeld and Edward J Eberle, 'Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers' (2003) 38 *Texas International Law Journal* 291, 291.
[281] See Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 *The American Journal of Comparative Law* 343, 384–385.
[282] Edward J Eberle, 'The Methodology of Comparative Law' (2011) 16 *Roger Williams University Law Review*.

3.4 Essential Elements for Legal Research

According to Brownsword, [283] legal researchers focus on analysing rapid legal changes and offering insights into developments within legal contexts. After completing their examinations, researchers typically provide commentary in an appropriate form. Brownsword emphasises two essential elements to consider during legal research: the consolidation of regulatory effectiveness and regulatory legitimacy, considering local, regional and international governance. For instant research, it is essential for the researcher to adopt an appropriate approach that examines the effectiveness and legitimacy of regulations in addressing the existing problems. In following Brownsword's approach, this thesis sought to uncover the underlying roots of specific problems associated with existing Bangladeshi FET provisions in BITs and traced their development over time.[284]

Furthermore, Brownsword states that 'Black Letter' law is crucial for legal research as it is closest to the primary source of information such as a constitution, pieces of legislation and judgments of courts.[285] This black letter approach was applied throughout the thesis through examination of the primary sources.[286]

Cownie states that characteristically, in order to understand the sole meaning of the law, the assessment of legal sources and the reports of judicial decisions must be examined from the angle of the black letter.[287] Therefore, the primary sources including BITs, international conventions, policies adopted and executed by Bangladeshi governments, legislation, judicial precedents and secondary sources such as academic research, scholars commentary and relevant reports in relation to the FET provisions in BITs were evaluated and interpreted in this thesis.

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[283] Roger Brownsword (ed), 'What The World Needs Now: Techno-Regulation, Human Rights and Human Dignity', *Human Rights* (Hart 2004).
[284] Dacian Dragoş, Bogdana Neamţu and Dan Balica, 'The Romanian Ombudsman and It's Interraction with the Courts-An Exploratory Research' (2010) 6 *Transylvanian Review of Administrative Sciences* 58.
[285] Roger Brownsword, 'An Introduction to Legal Research' (*Report from Wellcome Trust*, 2006) <www.scribd.com/doc/14260230/An-Introduction-to-Legal-Research> accessed 26 July 2021.
[286] Dvora Yanow and Peregrine Schwartz-Shea, 'Doing Social Science in a Humanistic Manner', *Interpretation and Method* (2nd edn, Routledge 2014).
[287] Fiona Cownie, *Legal Academics: Culture and Identities* (Hart Publishing 2004) 31.

The sources used throughout this thesis included provisions of the constitution of Bangladesh; governmental policies; cabinets' decisions; official documents; reports published by the government; and treaties executed by the government and international sources. These included documents provided by international organisations such as United Nations, World Bank, IMF, ICSID and OECD. All of these primary source documents were believed to be original and authentic, and free from any sort of bias or partiality. Judicial precedents and verdicts as well as arbitral tribunals interpretations were also examined to understand existing gaps in the literature on FET provisions in Bangladeshi BITs.

The judicial precedents progress through subterranean judicial scrutiny by the panels of senior judges in several stages within the hierarchy of the judicial system.[288] Similarly, arbitral tribunals' decisions include of a panel of experienced arbitrators, assisted by reputed and expert lawyers from different jurisdictions. The ICSID award has reasonable scope of credible annulment proceedings though annulment jurisdiction, but this is very limited. The arbitral tribunal is generally formed with high threshold standards, thus any element of bias or unreliability of data generated through this procedure is very unlikely.

3.5 Research Philosophy

This research adopts a positivist methodological ontology, as it thoroughly analyses and interprets existing FET provisions within Bangladeshi BITs and related cases from international arbitral tribunals in an objective and factual manner. Positivism emphasises the existence of an external reality that can be observed, measured and analysed.

Furthermore, the research follows an analytical epistemology, which involves gathering empirical evidence through the examination of signed BITs, analysis of international arbitral tribunal cases and comparison of different countries' approaches to their

[288] Appeals move from trial courts to High Courts then Supreme Courts, whereas under the English legal system the Court of Appeal comes before the Supreme Court.

model BIT agreements. This approach aims to provide insights based on systematic analysis and comparison of observable evidence.

To develop a solution for existing flaws in current FET provisions of the Bangladeshi BIT framework (lex lata), several analyses were conducted employing a positivist approach that relied on factual evidence, including doctrines, historical narratives, exploratory case studies and other key documents. This approach was effective for analysing and evaluating FET concepts for developing lex ferenda (i.e. future law). In the context of analysing existing FET provisions, this positivist approach was especially relevant as it allowed for a comprehensive understanding of all existing problems, thereby facilitating the development of the most appropriate solutions.

3.6 Ethical Considerations

All sources contained within this study are publicly available in either a printed or online format, such as official publications and websites of reputed organisations and legal departments around the world including the Bangladesh Investment Development Authority (BIDA), Supreme Court of Bangladesh (SCB), United Nations (UN), International Centre for Settlement of Investment Disputes (ICSID), Organisation for Economic Cooperation and Development (OECD), World Bank (WB), International Monetary Fund (IMF) and more. Given that this thesis will not involve any individual interviews or requests for completion of questionnaires, there are no ethical considerations that need to be made regarding the preservation of individual anonymity and confidentiality or privacy of data.

3.7 Conclusion

In this chapter, methodological justifications were provided for conducting "lex lata" analyses, which served as the foundation for developing the "lex feranda" of this thesis. Throughout the research, various methods including conceptualisation, doctrinal analysis, documentary analysis, case analyses and comparative analysis, were employed as appropriate for addressing each research question. These methods played a crucial role in

analysing the existing FET provisions within BIT frameworks in Bangladesh, India and the US. They facilitated a comprehensive understanding of the prevailing issues, which were indicative of flawed mechanisms in existing Bangladeshi BITs. This comprehensive understanding was instrumental in formulating a set of robust, realistic and implementable recommendations for future improvement of FET provisions in Bangladeshi foreign investment agreements.

The next chapter provides a critical analysis of FET provisions within the existing Bangladeshi foreign investment framework, including the root of Bangladesh's foreign investment law, key domestic legislation that governs the current foreign investment legal framework and discrepancies within the existing BIT framework.

Chapter 4: A Critical Analysis of FET Provisions in Bangladeshi BIT Agreements

4.1 Introduction

The first three chapters have discussed conceptual underpinnings and presented a literature review and methodology for this thesis, clearly demonstrating the significance of current flaws of FET provisions in Bangladeshi BITs. These earlier chapters have discussed that the contribution and influence of international investment in third world countries' economies, like Bangladesh, is enormous. Host states often benefit from international investment in many ways through bringing new skills, technology, equipment and exchange of a wealth of knowledge and experience to the host state.[289] Ensuring protection and fair treatment for foreign investment and investors is very important. Bangladesh recognises the importance of international investment and prioritises issues related to the international investment mechanism over others.

This chapter presents a critical analysis of FET provisions in Bangladeshi BITs. To achieve this, it first examines the existing legal framework of foreign investment in Bangladesh. The chapter then presents an analysis of discrepancies within existing FET provisions in Bangladeshi BITs, categorising the provisions into various levels of protections.

Recognising the absence of a standardised approach to the FET standard in investment treaties and the lack of unanimous interpretation by arbitral tribunals, this thesis initially examines prominent scholars' perspectives. It categorises FET provisions into three primary forms, characterised by varying degrees of protection: strict, classic and flexible FET. Then, in order to gain a deeper insight into the extent of protections offered by Bangladeshi FET provisions and their consequences, this chapter categorises Bangladesh's FET provisions in its current BITs using UNCTAD's classification of FET standards. This is important for capturing the precise problems with existing FET provisions so that these can be addressed within the recommendations of this thesis.

[289] Chrispas Nyombi & Tom Mortimer (n 10).

4.2 The Foundation of Bangladesh's Legal Principle of Foreign Investment

The root of Bangladesh's legal framework for foreign investment primarily draws from international sources, encompassing principles such as the state's duty to protect private property, doctrines of state immunity and restricted immunity, the Calvo Doctrine, [290] the Hull Formula, [291] Washington conventions and various international investment treaties. [292] In Bangladesh, the concept of international commercial arbitration and dispute resolution is relatively nascent, and the current legal framework in this domain is characterised by its inadequacy, lack of clarity and underdevelopment. [293] Prior to this thesis, limited research has been undertaken in this area. Hence, this thesis adopt a comprehensive approach, examining all the prevailing international investment principles practiced in Bangladesh to present a coherent depiction of its existing legal mechanisms in this area.

4.3 The State's Obligation to Protect Private Property

Globalisation has made the world a very small place in which improvements can be made swiftly. Sovereign states are now able to exchange ideas in very short time periods and, through this process, domestic law has started to become international law.[294] Intercontinental law approves that the sovereign state can take the ownership of any assets of the land.[295] However, this absolute sovereign power of the state is not recognised by customary international law.[296] According to customary international law, expropriation and

[290] Carlos Calvo, an Argentinian pro-nationalist scholar in 1860, introduced a legal doctrine that posited aliens settling within a sovereign state are entitled to equal rights of protection as nationals, while precluding them from claiming superior protection. This formulation gave rise to the Calvo Clause, a contractual stipulation wherein foreign entities or host states relinquish the right to diplomatic protection, thereby fostering parity in treatment between foreign and domestic parties. The Calvo Doctrine is underpinned by three cardinal pillars: first, the doctrine advocates for equal treatment of state nationals and foreign nationals; second, it advances the notion that the host state's domestic law shall suffice to safeguard the rights of foreign nationals; and finally, it establishes that the host state's courts shall exclusively exercise jurisdiction over disputes involving foreign nationals within their territorial boundaries. These guiding principles aim to engender legal parity and uphold principles of non-discrimination and non-intervention in the context of foreign investment and disputes.
[291] The renowned Hull formula, initially introduced by the United States in 1917, based around the concept of providing "Prompt, adequate and effective" compensation. This principle, articulated by U.S. Secretary of State Cornell Hull in his note on July 21, 1938, as a response to the Mexican nationalizations of 1917, advocates that investors should promptly receive an amount equivalent to the entire value of their expropriated investment. This compensation should be provided in a currency that can be freely transferred and exchanged.
[292] Manni and Afzal (n 27).
[293] Rahman (n 15).
[294] Van Harten (n 115).
[295] Subedi (n 70).
[296] ibid 145.

nationalisation of any invested private property is permitted unless it contradicts with public policy.[297] Incorporation of public policy exceptions into customary international law serves the purpose of empowering sovereign states to manage essential policy issues unhindered. Nevertheless, this approach has faced strong criticism due to its failure to define the factors that can trigger policy concerns.[298]

BITs are at the top of the list for matters involving conflicting interest between public policy and commercial interest.[299] Modern BITs contain a series of protections in favour of foreign investors which are designed to protect the investor for the host state's expropriation.[300] However, this has become a matter of concern in the last few years as the investor has started suing countries for compensation while claiming minimal inconvenience with indirect expropriation or unfair treatment.[301] These issues have caused an adverse impact on the states' obligation to protect private property.[302] The provision of modern investment treaties is formed in such a way that the host states' national sovereignty issues are largely ignored.[303] The treaties expressly state that it is a duty of the sovereign state to ensure full protection of the assets for the foreign investor while investing in the country.[304] Since BIT disputes are resolved through international arbitration, it is also true that the investor demands international jurisdiction for investor claims.[305] Thus, in modern BITs agreements, the state is deprived of both sovereignty and jurisdiction privileges to the foreign investor.[306]

[297] Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012).
[298] Chrispas Nyombi & Tom Mortimer (n 10).
[299] ibid 213.
[300] Stephan W Schill, 'International Investment Law and Comparative Public Law' (Oxford University Press 2010).
[301] ibid 85.
[302] Chrispas Nyombi & Tom Mortimer (n 10).
[303] ibid 265.
[304] ibid 269.
[305] ibid.
[306] Mortimer and Nyombi (n 2).

4.4 The Legal Framework of Foreign Investments in Bangladesh

The constitution of the People's Republic of Bangladesh[307] is the fundamental law in the country, which came right after the birth of Bangladesh in 1972. Part 2 in Article 25 of the constitution (fundamental principles of state policy) states that, 'the state shall base its international relations on the principles of respect for national sovereignty and equality, and respect international law.'[308] In addition to that, Article 145 (A) of the constitution provides a principle for international treaties, however does not clarify any legal rule or procedures as to how the treaty will be governed in practice.[309] Article 145 (A) further states that all international treaties should be submitted to the President, and it is his duty to put them forward before parliament. It further suggests that treaties that are concerned with national security must be dealt with secretly.[310] Although the articles of the constitution provide very limited guidelines regarding international treaty and foreign investment mechanisms, the wording of the constitution provisions are vague as it has never been subjected to revision or reform and, therefore, can be argued as being unworkable.[311]

4.4.1 The Foreign Private Investment Promotion and Protection Act (1980)

The principal legal framework governing foreign investment in Bangladesh centres around the enactment known as the Foreign Private Investment Promotion and Protection Act (FPIPPA) of 1980.[312] Prior to the establishment of this specific legislation in 1980, customary international law had served as the de facto guiding principle governing foreign investment mechanisms in the country. [313] It is a matter of concern that despite Bangladesh's significant potential for international investment, there has been a lack of substantial

[307] Government of the People's Republic of Bangladesh, 'The Constitution of the People's Republic of Bangladesh 1972' (*Laws of Bangladesh*, 1972) <http://bdlaws.minlaw.gov.bd/act-367.html> accessed 19 July 2021.
[308] ibid.
[309] ibid.
[310] ibid.
[311] Rahman (n 15).
[312] Government of the People's Republic of Bangladesh, 'The Foreign Private Investment (Promotion and Protection) Act 1980' (*Laws of Bangladesh*, 1980) <http://bdlaws.minlaw.gov.bd/act-597.html> accessed 19 July 2021.
[313] Rahman (n 15).

progress in enhancing the efficacy of its legal mechanisms in this domain.[314] Consequently, the FPIPPA 1980 remains the primary national legal instrument regulating international investment in Bangladesh.[315]

Comprising nine integral sections, each rooted in common law practices prevalent in international investment law, the FPIPPA 1980 is intended to ensure the equitable and non-discriminatory treatment of foreign investors, commonly referred to as the "Fair and Equitable Treatment" (FET) principle.[316] The initial four sections of the Act serve to safeguard foreign investments, while the subsequent five sections explicitly proscribe any form of expropriation or nationalisation, except for instances involving public policy considerations. Should expropriation occur, the Act stipulates that the affected investor is entitled to receive appropriate compensation aimed at redressing the entirety of their losses. Specifically, Section 4 of the FPIPPA 1980 firmly guarantees that the Government shall afford foreign private investments fair and equitable treatment, thereby extending comprehensive protection and security within the territorial confines of Bangladesh. Despite the potentially positive intent of this section, the underlying issue of inconsistencies within fair and equitable treatment (FET) provisions is revealed by its broad and ambiguous language.[317]

4.4.2 The Bangladesh Arbitration Act 2001

The Bangladesh Arbitration Act 2001 (AA 2001)[318] is another key national legislation that governs both domestic and international commercial arbitration in Bangladesh.[319] The AA 2001 is the reformed version of the old Arbitration Act 1940 (AA 1940).[320] Despite many advantages, the AA 1940 had a few serious disadvantages for the arbitral process, one of which being that national courts had superiority over arbitral tribunals.[321] The other

[314] ibid.
[315] ibid.
[316] Government of the People's Republic of Bangladesh, 'The Foreign Private Investment (Promotion and Protection) Act 1980' (n 337).
[317] Islam (n 1).
[318] See Appendix D: The Bangladeshi Arbitration Act, 2001
[319] Government of the People's Republic of Bangladesh, 'The Arbitration Act 2001' (*Laws of Bangladesh*, 2001) <See, section 1-18 of the Arbitration Act 2001.> accessed 19 July 2021.
[320] Mohammad Hasan Habib, ' The International Arbitration Review: Bangladesh' (*The Law Reviews*, 4 July 2021) <https://thelawreviews.co.uk/title/the-international-arbitration-review/bangladesh> accessed 26 July 2021.
[321] ibid.

fundamental problem was it did not deal with foreign arbitral awards and, therefore, enforcing a foreign award in Bangladesh was extremely difficult.[322] Thus, the AA 2001 reform was introduced to update the arbitration law especially recognising international arbitration in the Bangladeshi legal system. Although the AA 2001 adopted a few international laws including the United Nations Commission On International Trade Law (UNCITRAL) Model Law on Arbitration (Model Law)[323] and the New York Convention[324] with a view to modernise the arbitration law, there are areas where the AA 2001 failed to address certain issues. One such area that still needs to be addressed is the inaccessibility of interim measures in local courts for foreign-seated arbitrations.[325]

The AA 2001 is divided into fourteen chapters with statutory provisions stipulating the lifecycle of arbitrations and including grounds on which to challenge an award.[326] One important and notable feature of the AA 2001 is that it removed the ability for a seat of arbitration to be determined by parties outside of Bangladesh.[327] Chapter two of the AA 2001 provides general provisions for arbitration. Section 2(c)[328] of chapter two provides a definition for international commercial arbitration, stating that 'International Commercial Arbitration' means an Arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is:

> '(i) [A]n individual who is a national of or habitually resident in, any country other than Bangladesh; or
>
> (ii) a body corporate which is incorporated in any country other than Bangladesh; or

[322] Ibid.
[323] United Nations, 'UNCITRAL Model Law on International Commercial Arbitration ' (*United Nations Commission On International Trade Law*, 2006) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 25 July 2021.
[324] United Nations, 'The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (*The New York Arbitration Convention*, 10 June 1958) <https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf> accessed 26 July 2021.
[325] Manni and Afzal (n 27).
[326] Government of the People's Republic of Bangladesh, 'The Arbitration Act 2001' (n 346).
[327] ibid.
[328] ibid.

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh, or

(iv) the Government of a foreign country'.[329]

The definition makes it clear that in order for an entity to fall under the scope of the international commercial arbitration definition, a party, corporate body or company must be based in a jurisdiction other than Bangladesh.[330] This gives rise to an interesting point because, since nationality is a deciding factor should a dispute arise between two Bangladeshi citizens who own businesses in a foreign country, they cannot be subjected to international arbitration under the AA 2001.[331]

Section 3 of the AA 2001 sets out the scope of the Act which is applicable to arbitrations seated in Bangladesh.[332] This ouster clause has far-reaching implications on foreign investors as well as on domestic parties who prefer to seat their arbitrations outside of Bangladesh.[333] Section 7Ka of the AA 2001 allows the invocation of interim measures in the local courts to protect the subject matter of an arbitration even before the commencement of any arbitration proceedings.[334] Due to this positive bar imposed by Section 3 of the AA 2001, if the seat of arbitration is outside of Bangladesh, interim measures such as an injunction or attachment before the judgment of local assets would not be available.[335]

4.4.3 Judicial Interpretation of Interim Measures: Sections 3 & 7 of the AA 2001

The judicial interpretation regarding section 3 of the Bangladeshi AA 2001 often contradicts itself, as seen in a few previous cases.[336] While the Bangladeshi High Court in

[329] ibid.
[330] Mohammad Hasan Habib (n 347).
[331] ibid.
[332] Government of the People's Republic of Bangladesh, 'The Arbitration Act 2001' (n 346).
[333] ibid.
[334] ibid.
[335] Mohammad Hasan Habib (n 347).
[336] Government of the People's Republic of Bangladesh, 'The Arbitration Act 2001' (n 346).

HRC Shipping Ltd[337] and Bhatia International[338] held that interim measures would be available to foreign seated arbitration, the High Court in STX Corporation Ltd Meghna Group of Industries Limited[339] provided a completely opposite view and held that interim measures would be unavailable to parties if the seat of arbitration was outside of Bangladesh. However, the reasoning of the HRC shipping and STX cases has been reconsidered in the recent decision of the Project Builders Ltd V China National Technical Import and Export Corporation and others,[340] where the High Court confirmed that section 3 of the AA 2001 makes it clear that interim measures are only available to arbitrations that are seated in Bangladesh and courts cannot deviate from this position.[341] This means that the Bangladesh court will no longer have the authority to overturn foreign seated arbitration. Chapter five's Saipem case study illustrates how Bangladesh's court interference in the arbitration decision was deemed illegal. Consequently, the decision favoured the foreign investors, disregarding all arguments put forth by Bangladesh. It should be noted that the facts of this case were extraordinarily unique and a similar circumstance is extremely unlikely to occur in future cases.[342] It is clear from the Saipem case that the Bangladeshi courts failed to understand the scope of the arbitration agreement. The Saipem case served as a significant lesson for Bangladesh, prompting the country to exercise greater caution regarding judicial interference in foreign-seated arbitration decisions.

Additionally, it is worth noting that while sections 7 and 10 of the AA 2001[343] require that Bangladeshi courts refer the parties for arbitration in the presence of a valid arbitration clause, section 89 B of the Bangladeshi Code of Civil Procedure 1908[344] states that parties are free to file a court proceeding at any stage of the arbitration proceedings, which can raise further problems.

[337] HRC Shipping Ltd v. MV X-Press Manaslu [58] DLR 185.
[338] Bhatia International v. Bulk Trading SA [2002] AIR (SC) 1432.
[339] STX Corporation Ltd Meghna Group of Industries Limited [64] DLR 550.
[340] Project Builders Ltd (PBL) v. China National Technical Import and Export Corporation and others 69 Dhaka Law Review 290
[341] Mohammad Hasan Habib (n 347).
[342] Suescun de Roa (n 496).
[343] Government of the People's Republic of Bangladesh, 'The Arbitration Act 2001' (n 346).
[344] Government of the People's Republic of Bangladesh, 'The Code of Civil Procedure, 1908' (*Laws of Bangladesh*, 1908) <http://bdlaws.minlaw.gov.bd/act-86.html> accessed 19 July 2021.

Furthermore, chapter 3 section 9 of the AA 2001 provides provisions for arbitration agreements and states that, “an arbitration agreement shall be in writing and an arbitration agreement shall be deemed to be in writing if it is contained in:

‘(a) [A] document signed by the parties;

(b) an exchange of letters, telex, telegrams, Fax, e-mail or other means of telecommunication which provide a record of the agreement’.[345]

This principle emerged from the domestic case of Globo Piu[346], where the High Court Division of the Supreme Court of Bangladesh held that failure to provide a valid arbitration agreement would lead to the dismissal of the arbitration proceedings and its outcomes.[347] Moreover, while section 12 of the AA 2001 provides detailed guidance regarding the appointment of arbitrators,[348] section 13 of the AA 2001 provides certain grounds including impartiality, independence and the arbitrator's qualifications as agreed by the parties for challenging the validity of the arbitrator’s appointment.[349] Section 14 of the AA 2001 provides procedures for making challenges and states that, ‘challenges must be made by written representation to the arbitral tribunal within 30 days of knowing about the incompetency or partiality of the concerned arbitrator.’[350] Such challenges are decided by the High Court Division of the Supreme Court of Bangladesh.[351]

Chapter eight is one of the most important chapters of the Bangladeshi AA 2001 because it provides numerous provisions including sections 42 and 43 for setting aside an arbitration award.[352] However, it is worth noting that chapter eight of the AA 2001 only applies to domestic arbitration. In other words, it does not apply to international arbitration or arbitrations that are seated outside of Bangladesh. While section 42 of the AA 2001 provides

[345] Government of the People’s Republic of Bangladesh, ‘The Arbitration Act 2001’ (n 346).
[346] Globo Piu Import and Export ltd v. Bangladesh Chemical Industries Corporation (Civil) [1971] DLR 513.
[347] Mohammad Hasan Habib (n 347).
[348] Bangladesh Water Development board v. Additional District Judge, 6th Court, Chittagong (Spl Original) 24 BLC 275
[349] Government of the People’s Republic of Bangladesh, ‘The Arbitration Act 2001’ (n 346).
[350] Ghulam Mohiuddin (Bhutto) v. Rokeya Din (Spl Statutory) [71] DLR 577.
[351] Mohammad Hasan Habib (n 347).
[352] Government of the People’s Republic of Bangladesh, ‘The Arbitration Act 2001’ (n 346).

provisions for the application and time limit of sixty days for setting aside a domestic arbitral award, section 43 of the AA 2001 provides detailed grounds for setting aside a domestic arbitral award.[353] Although there are grounds to challenge a domestic arbitral award in Bangladeshi legal system, these challenging grounds are limited to procedural matters such as fraud, corruption and public policy, and cannot allow the challenging of an award based on its merits.[354] This was confirmed in the leading Bangladeshi case of Nurul Abser (Md) v. Golam Rabbani,[355] where the Supreme Court of Bangladesh held that, 'the Arbitration Act 2001 is a special law that has been enacted with the sole purpose of resolving a dispute between parties through arbitration and that if, after an award is given by the arbitrators, it is allowed to be challenged in a civil suit, then arbitration proceedings become a mockery, and the whole purpose of the arbitration scheme as envisaged in the Act shall fail."[356] Furthermore, the Supreme Court also indicated that allowing challenges to an arbitral award based on its merits would create a huge backlog of cases in Bangladeshi civil courts which would be undesirable for foreign investors.[357]

The AA 2001 is a remarkable improvement on the previous AA 1940 because international arbitration awards are now recognised and enforceable under section 45 of the AA 2001. The awards are also binding,[358] which was previously impossible under the AA 1940. However, despite these improvements, this thesis argues that further amendments need to be made, especially regarding the fast track arbitration proceedings, completion time limits for arbitral proceedings and other matters of international arbitration.[359]

Although twenty years have passed since the AA 2001 was first enforced, Bangladesh has never considered a review or reform of the Act. As a result, Bangladesh is continuing to struggle with its weak arbitration mechanism. Given the passage of time, during

[353] ibid.
[354] Mohammad Hasan Habib (n 347).
[355] Bangladesh in Nurul Abser (Md) v. Golam Rabbani [68] DLR.
[356] ibid.
[357] Mohammad Hasan Habib (n 347).
[358] Division in Jalalabad Gas Transmission and Distribution System Limited v. Lafarge Surma Cement Limited Bangladesh [23] BLC 775.
[359] Mohammad Hasan Habib (n 347).

which the UNCITRAL Model Law[360] was revised twice since 2001, it is high time that Bangladesh review and reform their AA 2001 to make it workable for the current times. It is worth noting that the Indian Arbitration and Conciliation Act 1996 was in a similar situation to Bangladesh until 2015. However, due to the demand of time and increasing popularity of arbitrations, India has moved on and reformed their old-fashioned Arbitration and Conciliation Act 1996 twice in 2015 and in 2021, respectively. The new Indian Arbitration and Conciliation 2021 has completely changed the old legal position and provides exclusive opportunities for the arbitration users, such as the right for anyone to seek, 'the help of national courts in India for interim remedies regardless of whether the arbitration is taking place in India or not.'[361] Thus, this thesis contends that it is time for Bangladesh to emulate India's actions in reforming its AA 2001.

4.4.4 Foreign Investors Chamber of Commerce and Industries (FICCI)

The Foreign Investors' Chamber of Commerce and Industry (FICCI) started its journey in 1963 as the, 'Agrabad Chamber of Commerce & Industry' (ACCI) to promote foreign investment.[362] Following the birth of Bangladesh in 1971, this chamber was incorporated with the national organisation called the, 'Federation of Bangladesh Chambers of Commerce & Industry (FBCCI)' which was subsequently renamed as the 'Foreign Investors' Chamber of Commerce and Industry (FICCI)' in 1987, with an aim to promote and protect international investment in Bangladesh. Since then, FICCI have been considered as the biggest corporate powerhouse in the country with 188 members, operating in collaboration with a wide range of trades and businesses in Bangladesh.[363] The purpose of FICCI is not only to support foreign investment and its investors in Bangladesh, but also to provide support and advice to the government and its authorities for further improvements of the foreign investment sector.[364]

[360] United Nations, 'UNCITRAL Model Law on International Commercial Arbitration ' (n 350).
[361] Arbitration and Conciliation (Amendment) Act 2021, section 9.
[362] FICCI, 'Foreign Investors' Chamber of Commerce & Industry Bangladesh ' (1963) <https://ficci.org.bd/> accessed 26 July 2021.
[363] ibid.
[364] ibid.

While FICCI reviews legislative and other regulatory measures of the government that affect trade and commerce to protect commercial interests of the foreign investors, it maintains in close contact with government authorities to ensure that commercial interests are not contradictory with national sovereignty.[365] Moreover, the chamber provides a platform for foreign investors to interact with each other and share their thoughts, experiences and concerns about the investment environment in Bangladesh.[366] A crucial role played by FICCI lies in its capacity as a facilitator, fostering harmonious relations between foreign investors and the Bangladeshi government. Additionally, drawing from its members' feedback and comprehensive data, the chamber compiles an annual report replete with recommendations aimed at fortifying Bangladesh's international investment framework. Through its multifaceted endeavours, FICCI strives to cultivate a conducive environment for foreign investment while contributing to the nation's economic prosperity..[367]

4.4.5 International Chamber of Commerce Bangladesh (ICCB)

In 1994, the International Chamber of Commerce Bangladesh (ICCB) was formed to promote foreign trade and investment in Bangladesh.[368] The main objective of the ICCB is not only to promote international trade and investment as a driving power for inclusive global economic growth and prosperity, but also to harmonise the law of international trade for cross-border business transactions.[369] The ICCB offers several services for the promotion of the international investment which includes supporting the exporters and importers in dispute settlements, advising the government on World Trade Organisation (WTO) issues, assisting both local and foreign business communities with expert advice and disseminating important trade and business information through publishing frequent news bulletins and business directories.[370]

[365] Rahman (n 15).
[366] ibid.
[367] FICCI (n 388).
[368] ICCB, 'International Chamber of Commerce Bangladesh' (1994) <https://iccbangladesh.org.bd/category/latest-news/> accessed 26 July 2021.
[369] ibid.
[370] ibid.

Moreover, the ICCB collaborate with national trade bodies and relevant government authorities to discuss ways for overcoming national and international business obstacles and challenges to promote sustainable global economic development. Furthermore, a key focus for the ICCB is to balance national interests with foreign investors' commercial interests without affecting the on-going process of globalisation.[371] This became a fundamental focus point since 2005 as scholar Goldman Sachs in the Global Economics Paper No.134[372], published a key article on 'Next Eleven (N-11)' which referred to eleven developing countries including Bangladesh, Egypt, Indonesia, Iran, the Republic of Korea, Mexico, Nigeria, Pakistan, the Philippines, Turkey and Vietnam, as they have a great potential for rapid economic growth.[373] Thus, for sustainable development, the ICCB is working to safeguard national interests without affecting foreign nationals' commercial interests.[374]

4.4.6 Bangladesh Regulatory Commission (BRC)

In 2003, the government of Bangladesh established its first energy regulatory commission to regulate electricity, natural gas and petroleum products in Bangladesh.[375] This commission was formed in response to tackling challenges that were being posed by foreign investors in the energy sector.[376] The aim of the commission is not only to create a suitable environment for an efficient, competent and well-managed sustainable energy sector in Bangladesh through fair practice, but to encourage and promote equal opportunities for public and private investments to develop a competitive market. This commission is chaired by a renowned judge of the Supreme Court of Bangladesh who is responsible for collaborating with various committees within the commission.[377] The committees are tasked with various issues of the energy sector including monitoring transparency in management, cost rationalization and tariff determination, enforcement of fiscal discipline, performance and

[371] ibid.
[372] Goldman Sachs, 'Global Economic Paper No: 134|How Solid Are the BRICs?' (*línea). Web*, 2005) <https://www.goldmansachs.com/insights/archive/archive-pdfs/how-solid.pdf> accessed 26 July 2021.
[373] ibid.
[374] ICCB (n 394).
[375] BRC, 'Bangladesh Regulatory Commission' (2003) <http://www.berc.org.bd/> accessed 26 July 2021.
[376] ibid.
[377] ibid.

incentive-based regulation and uniform operational standards to maintain a high-quality supply.[378]

Additionally, following the review, the committees are required to submit an annual report to the commission which is then further assessed by the board of the council before recommendations are proposed. This process is vital as it allows the government to identify areas of energy law and regulation that need amendments. Based on the commission's report and recommendations, the Bangladesh Energy Regulatory Commission Act (BERC) 2003 has been amended four times including two amendments between 2017 and 2020.[379] Although the establishment of the commission was a good step as it offers equal opportunities and fairness for both public and private investments, it does not offer any specific guidance or support for foreign investors investing in the energy sector in Bangladesh.

4.4.7 Bangladesh Investment Development Authority (BIDA)

The Bangladesh Investment Development Authority (BIDA) is an agency of the Bangladeshi government which was formed under the BIDA Act 2016 for encouraging and facilitating foreign investment in Bangladesh.[380] The main purpose of this agency is to create a business-friendly environment which is not only capable of attracting foreign investment in Bangladesh but also capable of contributing to the country's sustainable economic growth.[381] Additionally, in order to facilitate a business friendly environment, BIDA offers a range of services and advocacy support to foreign investors investing in Bangladesh.[382] Although BIDA work relentlessly to promote foreign investment in Bangladesh to boost the country's economy, it can be argued that they neither have the correct tools nor an appropriate structure to ensure a solid and sustainable foundation for economic growth.[383] One of the key

[378] ibid.
[379] ibid.
[380] BIDA, 'Bangladesh Investment Development Authority' (2016) <http://bida.gov.bd/?page_id=494> accessed 26 July 2021.
[381] ibid.
[382] ibid.
[383] Rahman (n 15).

components for sustainable development that is missing in BIDA is body or department that introduces a set of legal protections for foreign investors while enforcing good governance.[384] Thus, this thesis argues that this quick fix may not be ideal as it is incapable of creating a long-term sustainable development in the Bangladeshi investment sector.

4.4.8 Bangladesh International Arbitration Centre (BIAC)

The Bangladesh International Arbitration Centre (BIAC) is the only international arbitration institution of the country which was established in 2011 as a non-profit organisation.[385] The institution is not only supported and funded by the international Chamber of Commerce-Bangladesh (ICC-B), Dhaka Chamber of Commerce & Industry (DCCI), Metropolitan Chamber of Commerce & Industry (MCCI), but also supported and funded by the International Finance Corporation (IFC), UK Aid and European Union (EU).[386] The aim of BIAC is to provide an impartial, efficient and effective alternative dispute resolution service in South Asia. Although BIAC first introduced its arbitration rules in 2012, the rules were amended in 2019 due to several errors.[387] While BIAC claims that the existing 2019 arbitration rules are the most advanced set of rules that incorporate some of the leading developments in domestic and international arbitration, it can be argued that it may not be the case since the rules are predominantly inspired by the Bangladesh AA 2001 which is outdated itself and requires significant amendments.[388] Moreover, although BIAC was established over nine years ago, only two international arbitration cases have been administered since which clearly demonstrates its ineffectiveness.[389] While the creation of the BIAC is a positive step for Bangladesh, this thesis contends that its inadequate internal framework, unclear regulations, and limited resources do not align with international arbitration institution standards.

[384] ibid.
[385] BIAC, 'Bangladesh International Arbitration Centre' (2011) <https://www.biac.org.bd/> accessed 26 July 2021.
[386] ibid.
[387] ibid.
[388] Manni and Afzal (n 27).
[389] BIAC (n 414).

4.5 Bangladeshi Judicial Structure For Resolving International Commercial Disputes

The existing Bangladeshi judicial structure is predominantly based on the colonial common law system. All civil cases are governed by the Code of Civil Procedure 1908[390] which includes the enforcement of arbitration awards under the existing court system.[391] There are two tiers of courts available for administrating civil disputes in Bangladesh.[392] The first are district courts, given that they are the court of first instance, while the second are High Courts and appellate divisions. There is no arbitration tribunal available under the current Bangladeshi legal system to adjudicate commercial arbitration cases except the Bangladesh Energy Regulatory Commission (BECB) which is limited to cases concerning energy only. Applications for enforcement of an international arbitration award are managed by two benches of the High Court Division, while all other arbitration matters are dealt with by the District Judge.[393]

4.6 BIT Framework of Bangladesh

Bangladesh signed its first Bilateral Investment Treaty (BIT) with the United Kingdom in 1980, and since then, it has entered into 34 more BIT agreements up to July 2023. [394] It is important to note that most of these BITs were signed without proper and purposeful negotiations.[395] The main objective of this thesis is to examine whether the Bangladeshi government had sufficient knowledge and conducted meaningful negotiations while signing these BITs. The expertise, skills, organisational structure and resources used during these negotiations will be evaluated to assess their adequacy within the current government setup.

Bangladesh's BITs are divided into two parts: the first part covers the period until 2005, during which the government signed 26 out of the total 34 BITs. The second part covers 2005 to the present, with only five more BITs signed with India, Denmark, Cambodia,

[390] Government of the People's Republic of Bangladesh, 'The Code of Civil Procedure, 1908' (n 370).
[391] Mohammad Hasan Habib (n 347).
[392] Ibid 45.
[393] Mohammad Hasan Habib (n 347).
[394] United Nations UNCTAD, 'Bangladesh Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' (n 22).
[395] Islam (n 1).

the United Arab Emirates, and Turkey, following the ICSID claim of Saipem v Bangladesh. [396] However, the BITs with Cambodia, the United Arab Emirates, and Turkey are not currently in force. Bangladesh is facing serious challenges in handling these BITs, as it has been involved in more than fifteen cases brought against it in the last fourteen years. Chapter five of this thesis will take a closer look at the most significant of these cases to capture the existing problems within Bangladesh's BITs.

4.7 Analysing Discrepancies Within FET Provisions of Bangladeshi BITs

As mentioned earlier, Bangladesh has signed a total of 34 BIT agreements with different countries from 1980 to 2023. [397] Among these agreements, five are presently not in force, and two have been terminated. Notably, all Bangladeshi BIT agreements contain specific provisions for FET but none of them exhibit uniformity in their language or interpretation.

Appendix A contains a table detailing all FET provisions within existing Bangladeshi BITs.[398] This table highlights significant discrepancies in the drafting of FET provisions within the current Bangladeshi BITs, which have consequently resulted in various issues pertaining to their interpretation. The table provides compelling evidence of the widespread inclusion and evolution of the FET provision in Bangladeshi BIT agreements between 1980 and 2023. However, the ambit and implications of FET have remained a subject of intense scholarly discourse and policy deliberation. Notably, host countries harbour concerns regarding the potential misuse of FET as a catch-all provision, which foreign investors could exploit to challenge a broad array of adverse measures.

The different wording used in FET provisions in various BITs has made things more complex. As a result, arbitral tribunals interpret FET differently depending on the specific wording of the treaty. These diverse interpretations have significant consequences for

[396] Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award (30 June 2009).
[397] United Nations UNCTAD, 'Bangladesh Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' (n 22).
[398] See Appendix A: The Wording of FET Provisions in Current Bangladeshi BITs.

resolving investment disputes, influencing how foreign investment protection is handled and affecting state regulations and relations with investors. This has led to a series of problems that is evidenced by a number of recent cases[399] including Saipem,[400] Chevron Bangladesh,[401] Scimitar Exploration Limited, Niko Resources[402] and NEPC Consortium Power Limited.[403]

4.8 Categorising FET Provisions To Determine Their Protections

It is crucial to understand that variations of FET provisions can offer different levels of protection to investors.[404] While the absence of an FET obligation offers general protection for investors under national law which are usually a bare minimum, FET linked with international law and other substantive content offers a series of unlimited protections that significantly favour investors over the host states.[405]

Given that the FET standard in investment treaties lacks a uniform approach and arbitral tribunals do not universally agree on its interpretation, scholars such as Salacuse, Marshall and Islam have categorised different formations of the FET standard found in

[399] As discussed in chapter five.
[400] Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award (30 June 2009).
[401] Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh, ICSID Case No. ARB/06/10, Award (17 May 2010).
[402] Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("BAPEX") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/11, Award (25 February 2019).
[403] NEPC Consortium Power Limited v. Bangladesh Power Development Board, ICSID Case No. ARB/18/15, Award (12 April 2021).
[404] Islam (n 1).
[405] ibid.

existing international investment treaties into three main categories.[406] These are strict FET, classic FET and flexible FET.[407]

Strict FET refers to where the treaties connect the definition of standard to other concepts, which appear to limit its scope. Classic FET pertains to where the FET clause is formulated without any reference to international law or other limitations. Flexible FET refers to where treaties combining the FET standard with additional obligations, such as full protection and security, prohibiting denial of justice, preventing arbitrary or discriminatory measures, providing MFN treatment, or offering guarantees of protection and security.

4.8.1 Strict FET

A strict FET standard of treatment provision encompasses certain characteristics of the conventional FET provision, but it substantially narrows down these aspects to prevent

[406] Salacuse had divided them under two headings, namely (a) that FET merely reflects the international minimum standard requirement by customary international law; or (b) that the standard is autonomous and additional to general international law, see e.g. Salacuse, The Law of Investment Treaties (n 38) 222–227. Laird has depicted three variations of the standard, i.e. (a) the additive provision, indicating that the provision would appear to consider the FET standard is in addition to whatever treatment international law requires; (b) the inclusive provision, meaning that the FET standard is subsumed under international law, not a separate or autonomous standard of treatment; and (c) the customary international law provision, meaning that the FET standard is customary international law. He also opines that arbitral tribunals have not applied these three variations differently when a claim is made solely under the FET standard. He also argues that, whether one characterizes the FET standard as being customary international law or not, as additive to or included in international law, the question remains, what is the substantive content of FET standard? See e.g. Ian A Laird, 'Betrayal, Shock and Outrage—Recent Developments in NAFTA Article 1105' in Todd Weiler (ed), NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects (Transnational Publisher, Inc, New York 2004) 49, 51–54. In 2007 UNCTAD grouped the various formulations into seven categories, see e.g. Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, UNCTAD (2007) 30–33 <http://www.unctad.org/en/docs/iteiia20065_en.pdf> accessed 25 July 2023. Marshall summarises the different constructions of the standard as '(a) Treaties that grant investments fair and equitable treatment without making any reference to international law or to any other criteria to determine the content of the standard; (b) Treaties that state that investments will receive fair and equitable treatment no less favourable than accorded to its own investors or to investors of any third State; (c)Treaties that couple the fair and equitable treatment standard with an obligation to abstain from impairing the investment through unreasonable or discriminatory measures; (d) Treaties that require investments to be granted "fair and equitable treatment in accordance with the principles of international law"; (e) Treaties that similarly require fair and equitable treatment in accordance with the principles of international law, but that in addition expressly identify some requirements of the standard. These specific inclusions may broaden the scope of the standard; (f) Treaties that make the fair and equitable treatment standard contingent on the domestic legislation of the host country; (g) Finally, some recent BITs and free trade agreements provide a more precisely defined scope of the fair and equitable treatment standard. They oblige the contracting parties to accord covered investments treatment in accordance with the minimum standard of treatment under customary international law. Some also make it express that fair and equitable treatment is part of the minimum standard and does not create additional substantive rights.' See e.g. Fiona Marshall, 'Fair and Equitable Treatment in International Investment Agreements' Issues in International Investment Law, Background Papers for the Developing Country Investment Negotiators' Forum Singapore, 1–2 October 2007, International Institute for Sustainable Development, 4–5 <http://www.iisd.org/pdf/2007/inv_fair_treatment.pdf> accessed 25 July 2023.

[407] Ibid.

broader or narrower interpretations in case of disputes. This version of the FET provision is usually carefully drafted to reduce extensive protection for foreign investors while still preserving certain elements of the FET, albeit with strong safeguards. the new Indian Model BIT (2015) adopted a strict FET standard by renaming their FET as a standard of treatment in their model BIT. [408]

For example, Article 3 (1) of the Bangladesh-India BIT agreement states:

> '[N]o Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv)manifestly abusive treatment, such as coercion, duress and harassment.'[409]

The new Indian provisions restricted the application of denial of justice to only judicial or administrative proceedings and the breach of due process was significantly limited, requiring investors to demonstrate a fundamental breach of due process to bring a claim under this provision. Moreover, discrimination had to be 'targeted' and limited to specific grounds like gender, race and religious belief. Additionally, investor protection against abusive treatment was constrained to only three grounds, namely coercion, duress and harassment.[410]

4.8.2 Classic FET

Classic FET describes where the FET clause is formulated without any reference to international law or other limitations. This category comprises treaties that combine the FET clause with either the minimum standard under international law in general or under customary international law. This perspective primarily stems from capital-exporting countries and is

[408] See Appendix F: The Indian Model BIT 2015
[409] ibid.
[410] Ranjan (n 13).

regarded as the most contentious formulation of the FET standard.[411] In this context, the minimum standard refers primarily to the treatment of foreign investors. The FET standard then denotes the standard of treatment that international law or customary international law guarantees for foreign investors. Additionally, certain regional and bilateral treaties have also restricted the scope of the FET standard by incorporating it with other principles such as minimum standard of treatment. The rationale behind this are: either one of the contracting parties is not willing to provide certain standard treatment to the other party, or one of the parties may have had stronger negotiating power and deliberately restrict the scope of FET term to have a stronger position in case of any future disputes. For example, Article 2 of the Bangladesh-USA BIT states:

> '[I]nvestment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and shall in no case be less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party. Each Party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party.'[412]

4.8.3 Flexible FET

The term 'flexible FET' pertains to treaties that integrate the FET standard with an extra substantive obligation. This additional obligation may encompass various elements, such as ensuring full protection and security, prohibiting denial of justice, forbidding arbitrary or discriminatory measures, imposing MFN obligations, or guaranteeing protection and

[411] See e.g. Pamela B Gann, 'The US Bilateral Investment Treaty Program' (1985) 21 Stanford Journal of International law 373; Muchlinski, Multinational Enterprises and the Law (n 52) 636–639.
[412] Bangladesh - United States of America BIT 1986 <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/278/download> accessed 22nd August 2022

security. For example Article 2 (2) of the Bangladesh - BLEU (Belgium-Luxembourg Economic Union) BIT states:

> '[T]he investments of the nationals or companies of each of the two contracting parties are continuously receiving fair and equitable treatment as well as full protection of security in other contracting party. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party.'[413]

Some treaty provisions go further and combine FET with other wider duties such as 3(1) of the Bangladesh - Austria BIT which states:

> 'Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security. Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and shall in no case be less than that required by international law. Subsection (2) states, a contracting party shall not impair by unreasonable or discriminatory measures the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment by investors of the other Contracting Party. Subsection (3) states, each contracting party shall accord to investors of the other Contracting Party and to their investments, treatment no less favourable than that it accords to its own investors and their investments or to investors of any third country and their investments with respect to the management,

[413] Bangladesh - BLEU (Belgium-Luxembourg Economic Union) BIT, <Bangladesh - BLEU (Belgium-Luxembourg Economic Union) BIT (1981) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub> accessed 25th August 2022

operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favourable to the investor.'[414]

Some treaties combine FET with an additional duty not to take any unreasonable or discriminatory measure. According to these treaty provisions, the FET standard is distinct from other substantive obligations mentioned alongside it. The concepts of arbitrariness, unreasonableness, and discrimination are deemed inherent to the FET standard, thus enriching its otherwise general language.

Nonetheless, the prohibition of arbitrary or unreasonable measures, while establishing the FET standard, does not serve to delineate its full scope. Instead, it indicates that the proscription of unreasonable, arbitrary, and discriminatory measures aligns with the FET standard, but the standard itself extends beyond these restrictions. An example of this can be seen in the LG & E vs. Argentina case, where the tribunal found a state measure to be free from arbitrariness, unreasonableness, and discrimination but still constituted a violation of the FET standard.[415]

4.8.4 Combining FET standards with Full Protection and Security

The articulation of the FET standard within a specific BIT can serve as a guiding principle for its interpretation. This idea emerged from the 1994 U.S. Model BIT. Article II (3) (a) which states, 'Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security and shall in no case accord treatment less favourable than that required by international law.'[416]

This provision reflects a fundamental policy position of the US, stating that BITs should combine the FET standard with full protection and security, as well as requirements derived from international law. Notably, this approach differs significantly from how other

[414] Bangladesh-Austria BIT,
<Austria - Bangladesh BIT (2000) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub>accessed 25th August 2022
[415] LG& E (n 121) Para 162; Also see e.g. Sempara Energy vs. Argentina, ICSID Case No. ARB/02/16, Award, 28 September 2007 Paras 281–283; PSEG (119) Para 262; Duke Energy (n 122) Paras 380–383.
[416] The US Model BIT 1994, article 2 (3) (a).

capital-exporting countries such as Germany, The Netherlands, China and Japan handle the relationship between the FET standard and other treatment standards. On closer inspection, it can be seen that as oppose to use the unqualified form of the FET standard, these counties offer a combination of national and MFN treatment, along with a general assurance of fairness and equity. However, in Bangladeshi BITs, it is common to use the unqualified form of the FET standard and link it with the standard of full protection and security within the same clause.

Moreover, the language used in these treaties lacks clarity in defining the meaning and interpretation of these standards. The provision simply combines both treatments without specifying the nature or extent of the protections involved. For instance, the term 'full protection' does not clarify whether it refers to police protection, military protection, or some other form of safeguarding. This ambiguity leaves room for uncertainty as seen in the case of AAPL v Sri Lanka[417] and potential disputes over the exact scope and application of these standards. This is further supported by Kläger who believes that when one standard is combined with other investment protection standards, it gives the impression that these different standards partially overlap.[418]

4.9 UNCTAD Classification of FET Standards

As an expansion of strict, classic and flexible formations of FET standards, UNCTAD classify variations of FET standards which can be found in existing BIT agreements into five main variations.[419] These are as follows:

(A) General treatment with no mention of FET standard.

(B) Standalone FET without any reference to international law or any additional criteria.

(C) FET attached to international law.

[417] Asian Agriculture Products Ltd. (AAPL) v Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (27 June 1990).
[418] Roland Kläger, Fair and Equitable Treatment in International Investment Law (Cambridge University Press 2011)
[419] 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

(D) FET attached to the minimum standard of treatment of aliens under customary international law.

(E) FET standard linked with other substantive content such as denial of justice, unreasonable or discriminatory measures and violation of other treaty obligation.[420]

4.9.1 (A) Standard of treatment or general treatment with no mention of FET standard

Based on strict FET, UNCTAD's first variation of FET standards is the standard that makes no express mention of the FET term in the BIT agreements. This variation generally indicates two situations; one is that the contracting party is not willing to provide certain standard treatment to the other party or the other is that the contracting party may have possessed better bargaining power in negotiation and deliberately excluded the FET term to be in the stronger position in case any dispute arises in future.[421] This variation can be seen in BIT agreements that are signed between a developed state and underdeveloped or developing state.[422] For example, Article 3 of the Bangladesh - Japan BIT states:

> '[I]nvestors of either Contracting Party shall within the territory of the other Contracting Party be accorded treatment no less favourable than that accorded to investors of any third country in respect of investments. Investments and returns of investors of either Contracting Party shall receive the most constant protection and security, within the territory of the other Contacting Party.'[423]

4.9.2 (B) Standalone FET without any reference to international law or any additional criteria

Based on classic FET, UNCTAD's second variation of FET standards is the standalone FET without any reference to international law or any additional criteria. This standard is also known as the unqualified FET standard.[424] Although this variation usually

[420] ibid.
[421] ibid para 218.
[422] Islam (n 1).
[423] Bangladesh - Japan BIT (1998) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/269/download> accessed 25th August 2022
[424] ibid.

indicates national treatment, the unqualified standard leaves space for arbitral tribunals to interpret this variation. There are criticisms that this variation brings uncertainty with regards to both investors' expectation and outcome of arbitration as this level of treatment is ambiguous and does not have a standard definition.[425] For example Article 3 of the Bangladesh – Singapore BIT states:

> '[I]nvestment of investors of each Contracting Party shall at all times be accorded equitable treatment and shall enjoy full and adequate protection and security in the territory of the other Contracting Party.'[426]

Similarly, Article 3 (1) of the Bangladesh- China BIT states:

> '[I]nvestments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.'[427]

4.9.3 (C) FET attached to international law

Based on flexible FET, UNCTAD's third variation of the FET standard is attached to international law. This variation usually appears in two instances; while the first instance offers international standard of treatment to the foreign investor, the second instance provides with opportunity for arbitral tribunals to interpret the treaty in accordance with international law.[428] For example, article 9 of the amended Bangladesh- Netherlands BIT states:

> '[E]ach Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party. In addition, each Contracting Party shall accord to such investments full physical security and protection.(2) A Contracting

[425] Islam (n 1).
[426] Bangladesh – Singapore BIT (2004) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4885/download>accessed 22nd July 2022
[427] Bangladesh – China BIT (1996) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6524/download>accessed 22nd July 2022
[428] 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 breaches the aforementioned obligation of fair and equitable treatment where a measure or series of measures constitutes:

a) Denial of justice in criminal, civil or administrative proceedings;

b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

c) Manifest arbitrariness;

d) Direct or targeted indirect discrimination on wrongful grounds, such as gender, race, nationality, sexual orientation or religious belief;

e) Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct.'[429]

4.9.4 (D) FET attached to the minimum standard of treatment of aliens under customary international law

Based on flexible FET, UNCTAD's fourth variation of the FET standard is the standard that offers the minimum standard of treatment of aliens under customary international law. The landmark Neer Award (1926) by the US-Mexico General Claims Commission laid the foundation for understanding the international minimum standard of protection for aliens.[430] The classical dictum articulated in this case establishes that:

'[G]overnmental acts must meet international standards, and the treatment of an alien should constitute an international delinquency if it amounts to an outrage, bad faith,

[429] Bangladesh – Netherlands BIT (1996) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/271/download>accessed 22nd July 2022

[430] The United States presented this claim to the US–Mexico Claim Commission on behalf of the family of Mr. Paul Neer, who was killed in Mexico under obscure circumstances. The claim stated that the Mexican government had shown a lack of diligence in prosecuting those responsible and that it ought to reimburse the family. The Commission found that the Mexican authorities' failure to apprehend or punish those guilty of the murder of the American citizen did not per se violate the international minimum standard on the treatment of aliens. See e.g. Neer Claim (US vs. Mexico Opinion) US–Mexico General Claims Commission, 15 October 1926, Reports of International Arbitral Awards, Vol. 4, 60–66.

wilful neglect of duty, or falls significantly short of international standards in a way that any reasonable and impartial person would easily recognise. Whether the insufficiency arises from the deficient execution of a reasonable law or from the country's laws not empowering the authorities to measure up to international standards is irrelevant.'[431]

This interpretation assumes the existence of a set of customary rules agreed upon by nations to protect aliens in foreign countries. It further asserts that the host country must fulfil these standards and any omission to do so may result in international action on behalf of the injured alien against the host country. Since its inception, the scope of this standard has been a subject of ongoing debate. Its primary objective is to embody a shared standard of conduct that the majority of nations have embraced. As early as 1961,[432] scholars like Roy raised questions about it and later, Roth criticised the assumption of a universal standard.[433] Roth argued that the treatment of aliens, as a component of international law, lacks consistency not only in terms of positive legal rules but also concerning the fundamental concepts that form its foundation.[434]

Although this variation was not popular in early days of BITs, recent statistics shows that this variation is becoming increasingly popular in new generation BITs.[435] The majority of BITs either signed or reviewed since 2012 have adopted this variation to provide protection and security to the foreign investor.[436] For example Article 2 of the Bangladesh - United Kingdom BIT states:

'[I]nvestments of nationals or companies/ of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way

[431] ibid.
[432] See generally, SN Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 American Journal of International Law 863.
[433] See Andreas H Roth, The Minimum Standard of International Law Applied to Aliens (A.W. Sijthoff, 1949) 127.
[434] ibid.
[435] ibid.
[436] Islam (n 1).

impair by unreasonable, discriminatory measures the management, maintenance, use, enjoyment disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or company of the other Contracting Party.'[437]

Similarly, other BITs including Bangladesh – Poland BIT, Bangladesh – Italy BIT, Bangladesh – Romania BIT, Bangladesh – Switzerland BIT, Bangladesh - United Arab Emirates BIT also adopted this style of FET provisions.[438]

Moreover, other treaties including Comprehensive Economic Cooperation Agreements (CECAs) and Comprehensive Economic Partnership Agreements (CEPAs), Free Trade Agreements (FTA), EU Canada Comprehensive Economic and the Trade Agreements (CETA) and North American Free Trade Agreements (NAFTA) now replaced by the United States-Mexico-Canada Agreement (USMCA) 2020 have also included this variation of FET to provide protection and security to the foreign investors.[439]

4.9.5 (E) FET standard linked with other substantive content such as denial of justice, unreasonable or discriminatory measures and violation of other treaty obligation

Based on flexible FET, UNCTAD's final variation of FET standards are those linked with other substantive content such as denial of justice, unreasonable or discriminatory measures and violation of other treaty obligation.[440] This variation offers wide ranges of further protections to the foreign investor and does not only offer international standards of FET but also provides further extensive protections.[441] Consequently, this variation has

[437] Bangladesh – United Kingdom BIT (1980) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/277/download> accessed 5th July 2022
[438] See Appendix A: The Wording of FET Provisions in Current Bangladeshi BITs.
[439] ibid.
[440] 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
[441] Islam (n 1).

become an essential component of all newly formulated and updated model BITs. For example, Article 5 of the Bangladesh - USA BIT states:

> '(1) [E]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> (2) For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international Law.'[442]

Furthermore, this variation provides an additional layer of protection for foreign investors which can be seen in the case of PSEG Global Inc. v. Turkey[443] in which the tribunal stated, 'Because 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.'[444]

However, Kläger argues that when a standard is combined with other investment protection standards, it creates the impression that these different standards partially

[442] Bangladesh - United States of America BIT (1986) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/278/download>accessd 22nd July 2022
[443] 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).
[444] Ibid, para 239.

overlap.[445] According to a study by the UN Conference on Trade and Development (UNCTAD), treaties employ this combination to make the FET standard more precise in its meaning and to enhance predictability in its implementation and subsequent interpretation.[446] Nevertheless, the combination of FET with additional substantive standards does not alter the essence of the FET standard itself; it remains independent and self-contained. As Kläger correctly points out, whether these obligations are consolidated within a solitary clause or delineated in distinct clauses primarily concerns stylistic preferences rather than affecting the fundamental meaning.[447]

4.10 Content Analysis of Existing FET Provisions in Bangladeshi BITs

In order to analyse the inconsistencies in wording and, therefore, levels of protections among the Bangladeshi BIT agreements, each of them has been analysed and categorised according to the five main UNCTAD variations, coded with A, B, C, D or E. The two agreements which have been terminated were excluded from this analysis but the currently not in force agreements were included given that they could be reactivated for enforcement at any time.

Appendix C contains a table of UNCTAD FET variations across all Bangladeshi BITs by country.[448] This table further evidences the significant disparities in levels of protections currently offered to foreign investors in Bangladesh. A frequency count on the number of times each UNCTAD coded variation has appeared across all of these BITs is presented below in Table 1.

[445] Roland Kläger, Fair and Equitable Treatment in International Investment Law (Cambridge University Press 2011)
[446] Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements Vol. II (n 42) 29.
[447] Roland Kläger, Fair and Equitable Treatment in International Investment Law (Cambridge University Press 2011)
[448] See Appendix C: Levels of Protections (UNCTAD FET variations) across all Bangladeshi BITs by country.

Table 1. Frequency Count of the Five Main UNCTAD FET Variations Found Across All Current Bangladeshi BITs

CODE	Number of Agreements	Coverage Across Agreements (%)
A	0	0
B	12	39
C	16	52
D	6	19
E	15	48

4.11 Results

The above results in Table 1 show that Code A (no mention of FET standard) has never been used any of the Bangladeshi BIT agreements (0% coverage). This suggests that the concept of national treatment is not widely favored within the framework of Bangladeshi BITs. This is an encouraging finding because it indicates that neither Bangladesh nor foreign investors are enthusiastic about adopting national treatment without referencing FET in BIT agreements. The absence of FET provisions in BITs is uncommon because foreign investors do not always prefer national treatment. This trend is exemplified by India's recent shift from FET to national treatment, signifying their ongoing challenges in attracting foreign investments and signing new BITs.[449] In light of these developments, Bangladesh's current stance appears reasonable, as it aims to avoid becoming an unwelcoming investment destination, taking into account India's recent experiences.

Code B (standalone FET without any reference to international law or any additional criteria) appeared in 12 Bangladeshi BITs with 39% coverage. This unqualified FET has been included to provide FET protection under national law for both foreign investors and national investors. This result could be problematic because it means that just over a third of Bangladeshi BITs could bring uncertainty with regards to both investors' expectations and outcomes of arbitration, as this level of treatment is ambiguous and does not have a standard definition.

[449] As discussed in section 6.2.11 India's Struggle Continues with BITs

Code C (FET attached to international law) appears the most frequently across the Bangladeshi BITs, appearing in 16 agreements with 52% coverage. This indicates that just over half of current Bangladeshi BITs are particularly pro-investor friendly by offering international standards of protection to its foreign investors. Although this result is encouraging because foreign investors are keen to see international standards of FET protection when investing in a foreign country, this thesis argues that the absence of this provision in other BITs could be improved to attract and promote increased foreign investment in Bangladesh.

Code D (FET attached to the minimum standard of treatment of aliens under customary international law) has only been used in 6 Bangladeshi BITs. This result is particularly worrying because only 19% of the Bangladeshi BITs have included this provision even though it has become increasingly popular in other new generation FET provisions in BITs. This finding suggests that Bangladesh is still using older-generation forms of FET provisions within its BITs. To enhance its BIT framework, this thesis argues for improvements in the coverage and safeguarding of FET provisions in future BITs. This would not only promote foreign investment but also modernise Bangladesh's BITs in line with other successful model BITs.

Code E (FET standard linked with other substantive content such as denial of justice, unreasonable or discriminatory measures and violation of other treaty obligation) has been used in the second highest number of BITs, contained in 15 agreements with 48% coverage. This is a particularly problematic result as it indicates that Bangladesh are currently offering additional protections of international law to around half of its foreign investors. This is most concerning, because the list of protections promised under this type of provision are very broad, vague and unrealistic, and arbitral tribunals often provide either broader or narrower interpretations of this provision which makes it impossible for host states to balance their own national interests with foreign investors' commercial interests. The high 48% coverage of this protection across current Bangladeshi BITs is leaving Bangladesh vulnerable to its foreign investors and has already resulted in a substantial number of arbitral cases against

Bangladesh including Saipem, Nikon and Chevron. Much emphasis should be placed on reducing the coverage and enhancing the safeguarding of this provision in future Bangladeshi BITs to avoid Bangladesh being unfairly sued by foreign investors.

4.12 Discussion

The finding that all Bangladeshi BITs contain an FET provision (as indicated by code A) is positive and should be eliminated from future BIT drafting. ‘Standalone FET without any reference to international law’ (Code B) should also be eliminated from future BITs as it is unpopular with foreign investors due to lacking internationally recognised protections and bringing further uncertainties to international arbitral tribunals.

This thesis proposes the consolidation of 'FET attached to international law' (Code C) and 'FET attached to the minimum standard of treatment and customary international law' (Code D) into a unified provision. This unified provision should be incorporated with robust safeguards in all future Bangladeshi BITs, including the country's inaugural model BIT. This is important for Bangladesh to continue to attract and promote foreign investment whilst maintaining a better balance between national interests and commercial interests of foreign investors. It is also important to note that most successful modern model BITs contain these provisions.

This thesis further argues that the existing high coverage of ‘FET standard linked with other substantive content’ (Code E) in existing Bangladeshi BITs poses a significant risk due to their current open-ended nature, lacking sufficient safeguards. This grants unqualified protections to foreign investors while inadequately safeguarding national interests. Consequently, these broad and unequivocal provisions have led to a rising number of arbitration cases against Bangladesh, including Saipem, Niko, Scimitar, Chevron and NEPC.[450] This is because they allow arbitral tribunals to potentially interpret the FET

[450] Discussed in Chapter Five

provisions in ways that overly favour foreign investors, through interpretations that are either too narrow or too broad.

In summary, this thesis argues that the amalgamation of 'FET attached to international law' (Code C) and 'FET attached to the minimum standard of treatment and customary international law' (Code D) holds greater viability for Bangladesh. This consideration is based on the premise that Bangladesh, being a developing nation, presently possesses a relatively fragile BIT framework. Code E, conversely, finds greater applicability within developed nations, owing to their more formidable economic and socio-political standing, coupled with well-established and resilient legal frameworks. Given this context, should Bangladesh succeed in enhancing its economic and socio-political stature, accompanied by the establishment of a comprehensive and robust legal framework, there exists the potential for Code E to be considered as a prospective option for a revised model BIT tailored to Bangladesh's needs in the future.

4.13 Conclusion

This chapter critically analysed FET provisions in Bangladeshi BITs. It began by examining the existing legal framework for foreign investment in Bangladesh and proceeded to assess discrepancies within the FET provisions. It highlighted that Bangladesh’s lack of a model BIT has led to various inconsistent and inadequately drafted FET provisions, making the country's foreign investment mechanism highly vulnerable. It also uncovered that Bangladeshi BITs have been haphazardly signed without proper negotiations to ensure that the interests of both host state and foreign investors are balanced.

Given the absence of a standardised FET approach in investment treaties and the lack of unanimous interpretation by arbitral tribunals, this thesis examined key scholars' viewpoints and categorised FET provisions into three primary forms: strict, classic and flexible FET. Then, for a deeper understanding of the protections provided by Bangladeshi

FET provisions and their implications, the chapter categorised these provisions using UNCTAD's classifications as part of a content analysis.

The results of this analysis of Bangladesh’s FET provisions uncovered pivotal insights for optimising its BITs. The amalgamation of safeguarded 'FET attached to international law' and 'FET attached to the minimum standard of treatment and customary international law' emerges as a more viable option for Bangladesh than other provisions relating to either strict or open-ended and unsafeguarded FET.

The next chapter conducts five key case studies to ascertain why current FET provisions have enabled foreign investors to sue Bangladesh for minimal inconveniences in the past. These case studies will analyse and evaluate the most influential investor-state arbitration claims which have arisen as a result of problematic FET provisions in Bangladesh.

Chapter 5: Exploratory Case Studies

5.1 Introduction

A total of fifteen cases have been filed against Bangladesh by foreign investors through ICSID and five of these cases are particularly influential in highlighting the main problems with Bangladesh's BITs and FET provisions. The objective of this chapter is to critically examine five case studies to uncover the reasons why current FET provisions have enabled foreign investors to initiate legal actions against Bangladesh.

Through this thorough examination, this chapter endeavours to identify and elaborate on the primary challenges posed by the existing FET provisions. This analysis lays the foundation for subsequent chapters, which propose well-informed and effective solutions to address these challenges. By understanding the underlying complexities of the existing FET provisions, this chapter aims to ensure that the recommendations put forth for reforming and rebalancing Bangladesh's FET provisions are comprehensive to address the full spectrum of issues previously raised in arbitral claims.

5.2 Saipem

5.2.1 Essential Facts of The Case

A dispute under a BIT emerged between Bangladesh Oil Gas and Mineral Corporation (Petrobangla) and Saipem, an Italian company, regarding the construction of a gas pipeline in Bangladesh.[451] As Saipem proceeded with the gas pipeline construction, an explosion occurred, resulting in substantial environmental damage and necessitating the evacuation of local residents. Strong opposition and protests by the local population led to significant delays in Saipem's project.

Saipem initiated a claim alleging breach of expropriation and unfair treatment against Bangladesh due to significant delays in the project, sparking contentious debates over their

[451] Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award (30 June 2009).

underlying causes. It is important to note that although this case was framed as a claim of expropriation, FET provisions were not widely favoured at the time of this dispute. In fact, the case's circumstances more closely align with a breach of FET instead of expropriation, which is why this case study is important to consider for this thesis.

While Saipem asserted that the delay stemmed primarily from issues with the local population's opposition to the project, Bangladesh counter claimed that Saipem was already falling behind schedule before the protest-related problems emerged. [452]

During the course of the delay, Saipem sought an extension of the project completion date and compensation for the resulting delay. Concurrently, Petrobangla asserted a claim for compensation against Saipem for its failure to meet the agreed-upon project completion timeline. With the endorsement of the World Bank, the parties mutually agreed to extend the completion date by one year and subsequently initiated negotiations to determine the appropriate compensation attributable to the project delay.

Although $10 million USD was paid by Petrobangla on account of compensation under the Compromise, there remained a disagreement as to the total amount of compensation to be paid and also as to whether Petrobangla should pay compensation. Nevertheless, Saipem referred the dispute to ICC arbitration tribunal claiming compensation exceeding $11 million USD and requested the return of the Warranty Bond.[453] The ICC Tribunal dismissed Petrobangla's challenge on jurisdiction and rendered an award in favour of Saipem.

Consequently, Petrobangla filed an action seeking the revocation of the authority of the ICC Arbitral Tribunal’s decision in the First Court of the Subordinate Judge. The Supreme Court of Bangladesh granted an injunction, temporarily restraining Saipem from progressing with the ICC Arbitration for an eight-week period. Saipem submitted a written objection to Petrobangla's action seeking the revocation of the ICC Arbitral Tribunal's authority. Saipem

[452] ibid para 28.
[453] ibid para 60.

claimed that the Arbitral Tribunal had conducted the arbitration proceedings improperly by refusing to address the admissibility of evidence, excluding certain documents from the record, and failing to require the provision of information regarding insurance. They argued that the Tribunal's disregard for the law constituted misconduct and a miscarriage of justice.

Saipem further claimed that Petrobangla had deliberately chosen Dhaka as the seat of arbitration to enable their courts to interfere with the process and bring matters before local courts, creating an unfavourable climate for a fair trial. Petrobangla disputed Saipem's claims, asserting that the fear of injustice and physical danger was baseless, lacking supporting evidence and emphasising the ICC Arbitral Tribunal's authority to resume proceedings despite the revocation decision.

Following these events, Saipem filed a request for arbitration with ICSID, claiming that Bangladesh had expropriated its investment without compensation and violated the FET provision under the BIT. Saipem sought compensation for damages incurred, including the amount awarded in the ICC Award, legal expenses and the return or cancellation of the warranty bond. Saipem's contentions centred around Petrobangla's collusion with local courts to undermine the ICC Arbitration and deny Saipem's right to arbitrate and obtain satisfaction of its claims. They argued that the revocation of the ICC Tribunal's authority by the Bangladeshi courts was illegal and constituted an expropriation of their investment without compensation. Saipem further maintained that the actions of Petrobangla and the courts were attributable to Bangladesh, preventing the enforcement of the ICC Award and causing substantial losses.

5.2.2 Award

The ICSID tribunal concluded that the revocation of the arbitrators' authority was contrary to international law, in particular to the principle of abuse of rights and the New York Convention and referred to the Award in the case of Salini v. Ethiopia.[454]

Article 5(1)(3) of the Bangladesh-Italy BIT states that 'just compensation' refers to, 'the real market value of the investment […] according to internationally acknowledged evaluation standards".[455] Although this provision was not applicable to determine the amount of compensation as it set out the measure of compensation for lawful expropriation, the Tribunal applied the principles of customary international law and in particular to the principle set out by the European Court of Justice (ECJ) in the Chorzów Factory case:

> 'The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.'[456]

The tribunal applied the Chorzów Factory principle and held Bangladesh liable for unfair treatment and expropriation. The Tribunal awarded Saipem sums of $5,883,770.80 USD, $265,000.00 USD and €110,995.92 EUR plus interest at a rate of 3.375% per annum from 7th June 1993.[457]

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[454] Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Case No. 10623/AER/ACS, Award (7th December 2001)
[455] Ibid.
[456] Factory at Chorzów (Claim for Indemnity) (Germany v Poland) [1928] PCIJ Rep Series A, No.17.
[457] ibid 1217.

5.2.3 Analysis

Saipem was the first ICSID award to hold Bangladesh accountable for expropriation and unfair treatment according to the illegal interference by the judiciary of its arbitration proceedings. Although several commentators including Suescun de rosa,[458] Stephenson, Carroll and Deboos[459] observed that the principles behind Saipem are going to be unique for countering some amount of the interference by national courts with international arbitration, this thesis argues exactly why the use of the authorised principle started in Saipem v. Bangladesh is somewhat remote.[460] The special circumstances of the case along with the departure from earlier ICSID awards will make the explanation of Saipem more than likely inapplicable in future cases.[461]

While the ICSID Tribunal discovered that the actions of the Bangladeshi courts amounted to a breach of expropriation, Saipem acknowledged during the ICSID arbitration that the information on the case probably constituted denial of justice rather than expropriation.[462] The BIT between Bangladesh and Italy narrows the scope of investment arbitration and therefore those cases dependent on FET and expropriation.[463] During the ICSID arbitration, Saipem acknowledged that the reason why they based their claims on expropriation rather than on denial of justice was because Provision 9.1 of the BIT did not confer jurisdiction on the ICSID Tribunal more than a claim primarily based on denial of justice.[464] Additionally, Saipem produced a similar argument concerning equitable treatment.

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[458] Felipe Suescun de Roa, 'Comments on the ICSID Award Saipem v. Bangladesh: Would Its Rationale Be Applicable in Future Cases?' (*CPR International Institute for Conflict Prevention & Resolution*, 5 May 2011) <https://www.cpradr.org/news-publications/articles/2011-05-05-comments-on-the-icsid-award-saipem-v-bangladesh-would-its-rationale-be-applicable-in-future-cases-2011-writing-contest-winner> accessed 1 July 2021.
[459] Andrew Stephenson, Lee Carroll and Jonathon Deboos, 'Interference by a local court and a failure to enforce: Actionable under a bilateral investment treaty?' in Chester Brown And Kate Miles (Eds.), Evolution in Investment Treaty Law and Arbitration (Cambridge University Press 2011) 431.
[460] Ibid.
[461] Felipe Suescun de Roa, 'Comments on the ICSID Award Saipem v. Bangladesh: Would Its Rationale Be Applicable in Future Cases?' (*CPR International Institute for Conflict Prevention & Resolution*, 5 May 2011) <https://www.cpradr.org/news-publications/articles/2011-05-05-comments-on-the-icsid-award-saipem-v-bangladesh-would-its-rationale-be-applicable-in-future-cases-2011-writing-contest-winner> accessed 1 July 2021.
[462] ibid.
[463] Islam (n 1).
[464] Suescun de Roa (n 496).

From the facts of the situation, it was apparent that the Bangladeshi courts' decision not to permit the continuation of the ICC Tribunal was abusive.[465] Although the Bangladeshi courts abused their supervisory jurisdiction over the ICC arbitration procedure, it should not have let the ICSID Tribunal to broaden the scope of the BIT beyond what was agreed upon by the States.[466] Moreover, the BIT agreements between Bangladesh and Italy protects investments in such a way to uphold both parties' interests.[467]

Furthermore, Saipem's decision not to exhaust local remedies gave rise to a substantive problem in initiating an ICSID arbitration according to actions of the judiciary, especially in cases regarding denial of justice.[468] The rationale behind this was that the prohibition of denial of justice presupposes a duty on the host state to make an effective and fair system of justice.[469] Thus, until local remedies have been attempted and failed, no claim of denial of justice is able to be brought forward in international law. This reason rests on specific dynamics of the justice system which results in the realisation that any unfair procedures in international law is actionable only if the exhaustion of local remedies fails.[470] Nevertheless, in this case, the ICSID Tribunal identified that exhaustion of local remedies, instead of denial of justice, was not a substantive requirement to establish a finding of expropriation by actions of the judiciary. The ICSID Tribunal did not provide an explanation regarding the reasons why the exhaustion of local remedies was ignored.[471]

Moreover, the ICSID Tribunal did not clarify whether the actions of the Bangladeshi court constituted indirect expropriation and unfair treatment based on the sole effects doctrine.[472] The most crucial fact for deciding indirect expropriation and unfair treatment is the effect on the measure; the loss must be considerable to be able to cause expropriation.[473] While the ICSID Tribunal acknowledged that not experiencing the

[465] Islam (n 1).
[466] ibid, 647.
[467] ibid, para 805
[468] ibid para 1208.
[469] Dolzer (n 93).
[470] Suescun de Roa (n 496).
[471] ibid.
[472] Marc Jacob and Stephan W Schill, 'Fair and Equitable Treatment: Content, Practice, Method' in M Bungenberg, J Griebel and S Hobe (eds), *International Investment Law: A Handbook* (Hart, Oxford 2015).
[473] ibid.

advantages of the ICC Award constituted a considerable deprivation, it deemed that the substantial deprivation was not adequate to declare an expropriation in this specific situation, since it had been additionally necessary that the measures of the Bangladeshi courts had been unlawful.[474] Because of this, the ICSID Tribunal conducted a legality examination to discover whether the measures of the Bangladeshi courts amounted to a breach of FET and expropriation. Additionally to the significant deprivation, which characterises the sole effects doctrine, the ICSID Tribunal used a legality test. The ICSID Tribunal highlighted that using the legality test in this case should not be known as a changemaker from the single effects doctrine.[475] This is why the specific circumstances of this particular dispute are unique.[476]

The idea of the illegality test must be more restricted to prevent ICSID arbitrators' jurisdictions from being incorrectly extended because judicial mistakes are a type of illegality.[477] For example, if a judge resolves a situation by using an incorrect law, and if the judge applies the relevant law but interprets it improperly, the adopted decision will be illegal on both occasions.[478] Nevertheless, this thesis argues that illegality should not give rise to a case for FET and expropriation. An ICSID tribunal must clarify the scope of a legality test and confirm when illegality would impact arbitration awards.[479] Certainly, illegality for a case for FET and expropriation cannot encompass these sorts of judicial mistakes.[480] In essence, the legality test of Saipem v. Bangladesh may be used in future situations with exceptional circumstances, such as abuse of law and unlawful acts.[481]

Furthermore, it can be noted that the facts of this case were extraordinarily unique and a similar circumstance is extremely unlikely to occur in future cases.[482] It is clear from the Saipem case that the Bangladeshi courts failed to understand the scope of the arbitration agreement. Although these courts did not expressly focus on the arbitration understanding,

[474] Suescun de Roa (n 496).
[475] ibid.
[476] Suescun de Roa (n 496).
[477] Suescun de Roa (n 496).
[478] ibid.
[479] Mortimer and Nyombi (n 2).
[480] Suescun de Roa (n 496).
[481] Mortimer and Nyombi (n 2).
[482] Suescun de Roa (n 496).

their determination to revoke the arbitral award on the grounds of it being a nullity or even non-existent, frustrated the arbitration proceedings.[483] This lack of an arbitration award made it easier for the ICSID Tribunal to provide the verdict in favour of Saipem. However, the effect would be different in cases where the ICC Award would have been recognised as this would not allow ICSID to interpret the law in a way that they deemed was correct.

Based on the earlier ICSID award, an investor must exhaust local remedies in order to commence investment arbitration proceedings. However, the ICSID Tribunal in the Saipem case identified that such requirements were not relevant within the situation of expropriation, without any further explanation. Furthermore, previous ICSID awards used only the single effects doctrine to find out whether the disputed actions amounted to FET and indirect expropriation, however the ICSID Tribunal in the Saipem case also used a legality test regardless. The legality test must be restricted to those exceptional instances where national courts misuse the law and unlawfully favour one party without actually considering other grounds. Thus, the ICSID Tribunal's decision in Saipem appears to be restricted in such a manner that almost certainly will not be used in many future cases.

5.2.4 Summary

Although the Saipem case ultimately favoured the foreign investor due to the Bangladeshi court's illegal interference with the arbitration decision, the original claim seeking compensation for project delays was upheld by the ICC and subsequently reaffirmed by ICSID. While the ICSID Tribunal determined that the actions of the Bangladeshi courts constituted a breach of expropriation, Saipem conceded during the ICSID arbitration that the case information likely constituted denial of justice rather than expropriation.[484] Denial of justice in FET provisions refers to instances where a host state's judicial system fails to provide foreign investors with fair, impartial and effective access to legal remedies or due process. This includes unreasonable delays, arbitrary treatment, corruption, failure to enforce

[483] ibid.
[484] ibid.

legal rights, lack of transparency or violation of legitimate expectations. When denial of justice occurs, it breaches the host state's obligation to ensure fair treatment under international law and investors can seek arbitration to address these breaches and obtain compensation for damages. Scholars such as Suescun de Roa propose that if this case were brought forth in contemporary times, its circumstances would likely warrant classification as a breach of FET, given that denial of justice is an essential component of FET provisions.

This case is pivotal for this thesis as it highlights how foreign investors can lodge claims for project delays, even when they are not directly implicated in incidents such as the gas pipeline explosion. It is unreasonable for investors to seek compensation from a developing nation for project delays when the local community has rightfully protested against previous incidents for which the investor was held unaccountable. In this instance, the investor capitalised on inadequately drafted provisions within the BIT. This case exposes the vulnerabilities of Bangladeshi BIT provisions and showcases how investors can exploit such weaknesses and ambiguities. Overall, this case underscores the pressing need for reforms of existing Bangladeshi BITs to prevent similar unjust outcomes in the future.

5.3 Niko

5.3.1 Essential Facts of The Case

A number of BIT disputes arose between Bangladesh Petroleum Exploration and Production Company Limited (Bapex) and Petrobangla against Niko, a subsidiary of a Canadian-owned energy company. On 7th January 2005, two explosions occurred in the Chhatak gas field in Sunamganj, Bangladesh while Niko was drilling there, causing extensive damage to the environment, gas wells and peoples' lives. A local nonprofit organisation marched along with the local population to protest against Niko's actions, demanding justice.

The power ministry's inquiry committee later discovered that the blowouts had resulted from an operational disaster at Niko as well as an inappropriate casing layout.[485]

Bapex, Petrobangla, and Niko initiated a total of three cases stemming from the gas field explosions. One of these cases has been concluded, while the remaining two are still pending. Initially, Niko filed a lawsuit against Bapex and Petrobangla seeking payments after they ceased payments in the aftermath of the gas field explosions (concluded).[486] In response, Bapex and Petrobangla lodged a counterclaim against Niko, citing an environmental catastrophe and invoking public policy grounds (pending).[487] Following this, Niko chose to abstain from the Bangladeshi court system and filed a case before ICSID against Bangladesh, alleging a breach of FET provisions and pursuing compensation on two grounds: compensation for the blowouts themselves in addition to the payment claim (pending).[488]

During the proceedings of the concluded case regarding outstanding gas payments, ICSID rejected the submissions of Bapex and Petrobangla regarding environmental damages and held that they would have to pay approximately $25 million USD plus approximately Tk 140 million BDT as per invoices for the gas delivered between November 2004 to April 2010. In addition, Bapex and Petrobangla would have to pay interest up to the 11th September 2014 of approximately $6 million USD. This prompted Bapex and Petrobangla to counterargue that the original contract with Niko should be considered null and void due to corruption. If successful, this would have disqualified Niko from pursuing its claim for gas payments.

[485] ibid para 24.
[486] Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex"), ICSID Case No. ARB/10/11, Pending.
[487] Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration and Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/18, Award (25 February 2019).
[488] Ibid para 189.

5.3.2 Corruption Scandal

Following Bangladesh's submission regarding corruption, Niko counter argued that Bangladesh was under the rule of a corrupted government when agreements were negotiated and finalised. They also contended that payments were not directly made by Niko to the implicated civil servants. Instead, payments were routed through various channels involving multiple intermediaries in different countries and passing through the accounts of various individuals.[489]

Bangladesh stated that a vast investigation had been carried out in cooperation between the Bangladesh Anti-Corruption Commission (ACC), the Royal Canadian Mounted Police (RCMP) and the U.S. Federal Bureau of Investigations (FBI).[490] This investigation also concerned other companies and generated a vast amount of evidence to suggest that Niko was liable. Many of the payments identified in the course of the investigation were referred to as a 'spider web'.[491]

Bangladesh further claimed that, 'the only way Niko could enter into the oil and gas market in Bangladesh [was] the promise and payment of bribes'.[492] A key witness Ms LA Prevotte (an FBI agent who had played a leading role in the Joint Investigation in Bangladesh), had also investigated the case of corruption admitted by Siemens and other companies.[493] Ms Prevotte asserted that, 'In many ways the Niko tender or bid was very similar to Siemens. In both cases at the very onset both companies were deemed unqualified and yet they were both still participating in the tender process'.[494] She further added that the case of Niko was quite different from that of Siemens and that Niko was in fact not 'unqualified' for the project it had proposed. Although Niko argued that they were sufficiently qualified for, 'the exploration of marginal gas fields', as it allowed Bangladesh to recover gas from fields which, 'were not rehabilitated due to financial constraints and technical limitations

[489] ibid 1245.
[490] ibid 1254.
[491] ibid 1289.
[492] ibid.
[493] Hartmut Berghoff, ' The Siemens Corruption Scandal ' (2018) 60 *Business History* 423.
[494] ibid.

faced by Petrobangla and due to the marginal nature of these fields and uneconomical investment', they did so with a condition to sell the gas to Petrobangla at a price substantially below the price which Petrobangla had paid to other suppliers.[495]

In 2005, the Bangladeshi Minister of Energy accused Niko of making bribes to government officials including the purchase of a vehicle valued at some $190,000 CAD and approximately $50,000 CAD in non-business-related travel expenses. Proceedings were brought about by BELA and others in the Supreme Court of Bangladesh, High Court Division, in 2005, known as the 'BELA Proceedings'. Following an analysis of the arguments presented concerning the legal impact of corruption on the Tribunal's jurisdiction including good faith, the clean hands doctrine and international public policy, the Tribunal concluded that, 'the Claimant has committed the acts of corruption which were sanctioned [by Canadian authorities] in the Canadian conviction'.[496]

In 2007, a worldwide study conducted by the FBI, Canadian Police and ACC discovered that several middlemen had been hired by Niko to purchase off corrupt key officials, especially politically important individuals, to secure the deal with Bangladesh.[497]

5.3.3 Award

The ICSID tribunal held Niko liable for corruption and awarded compensation of $106 million USD, equivalent to approximately Tk 7.46 billion BDT, to Bangladesh on 28th February 2020.[498] Despite Bangladesh's victory, it is crucial to acknowledge that the verdict centred on contract corruption, neglecting to address any damages to the environment, natural gas stores, public health or displacement of the local community which resulted from the two gas explosions. Bangladesh has since filed another pending case to seek compensation for these damages but Niko has filed a further pending case alleging a breach of FET provisions and compensation for the blowouts themselves in addition to gas payments.

[495] ibid.
[496] ibid 234.
[497] Ibid.
[498] Ibid.

5.3.4 Analysis

This case holds significance for the thesis as it highlights how the negotiation process of Bangladeshi BITs has been susceptible to corruption, enabling foreign investors to take advantage of Bangladesh's lax practices in negotiating and signing BITs. Additionally, it underscores ICSID's inclination to prioritise corporate interests over those of the host state, as evidenced by its dismissal of the host state's concerns regarding public policy and environmental damages. Since most arbitrations are commonly held in international jurisdictions, they frequently escape public concern and scrutiny whilst marginalising impact on national interests.[499] The reputation of the international investment procedure is tormented with instances such as the Bhopal disaster,[500] breach of human rights and policy interference.[501] The decision in the Niko case indicates that the current ISDS system is disproportionately designed in favour of foreign investors. Furthermore, the proceedings of the Niko case show that Bangladesh fought hard to restore its right to protect national rights and sovereignty. This thesis argues that this is a wakeup call for Bangladesh.

In order for Bangladesh to avoid such unforeseen situations in the future, Bangladesh must restructure its international investment framework to safeguard national interests. Most of the existing Bangladeshi BIT agreements are designed to protect commercial interests over national interests.[502] This thesis suggests that Bangladesh must take reasonable care before offering incentives in negotiating its future BIT agreements. Furthermore, foreign investors' direct access to international arbitration prior to local remedies must be limited.

Current trends of international arbitration which leave the host states vulnerable and subservient to the profit driven agenda of foreign investors must be changed.[503] Appropriate and efficient depiction in the realms of international arbitration would need a high standard of

[499] Muhammad Nasrullah Nakib, 'Regulating Foreign Direct Investment for Development: Bangladesh in Context' [2014] *Researchonline,Macquarie University*.
[500] Alan Taylor, 'Bhopal: The World's Worst Industrial Disaster, 30 Years Later' (*The Atlantic*, 2014) <https://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/> accessed 30 July 2021.
[501] Islam (n 536).
[502] Hossian, Yeon and Aziz (n 6).
[503] ibid.

efficiency and skill in drafting and preparing pleadings and responses, rejoinders to circumvent safeguard measures and the usual legal protections for international investors to avoid their corporate responsibility for wrongdoings and consequential compensatory liability.[504] A valuable lesson can be learnt from this case study and Bangladesh must reflect on the procedures it undertook and their subsequent performance during the Niko arbitration in order to build a robust international investment framework for the future.

5.3.5 Summary

While the concluded Niko case was decided in favour of Bapex and Petrobangla, it was decided on grounds of contract corruption. Despite Niko's subsequent filing of another pending claim for the gas payments and compensation for disruption caused by protests, this case is notable for this thesis because ICSID has already displayed a concerning disregard for Niko's liability regarding the gas blowouts. The tribunal’s shift in focus towards corruption added complexity and length to the case. Niko's evasion of accountability during these proceedings is troubling, particularly as Bangladesh is continuing to pursue compensation for damages through their pending case. Niko's pending case alleging breach of FET provisions adds yet another layer of complexity. It will be crucial to observe the outcomes of these pending cases, especially concerning Niko's alleged breach of FET provisions which is highly relevant to this thesis.

These cases involving Niko highlight the ease with which foreign investors can seek compensation for property and environmental damages whilst disregarding their involvement and responsibility in caused them. Additionally, they expose weaknesses in Bangladesh's BIT practices, including inefficient negotiations and susceptibility to corruption. Through neglecting Niko's accountability, the concluded case yet again highlights ICSID’s tendency to prioritise corporate interests over those of host states by disregarding significant public policy

[504] Islam (n 1).

concerns. Overall, these cases further emphasize the urgent need for reforms in Bangladeshi BITs to better safeguard its existing international investment framework.

5.4 Chevron

5.4.1 Essentials Facts of The Case

A BIT dispute arose between the Bangladesh Oil Gas and Mineral Corporation (Petrobangla and Chevron Bangladesh (subsidiary of US oil giant Chevron corporation) filed before ICSID in March 2006 claiming $240 million USD for an FET breach.[505] Chevron claimed that Petrobangla had unfairly inserted a 4% wheeling charge to Chevron for the purchase of gas from the Jalalabad gas field. Petrobangla counter argued that the charge was imposed because Chevron used Petrobangla's pipeline to transmit gas from the Jalalabad gas field to the state-owned national gas network. The claimant Chevron argued that the 4% wheeling charge would only be applicable if it were to use Petrobangla's pipeline to supply gas to other parties, highlighting that they had supplied gas from three gas fields - Jalalabad, Moulvibazar and Bibiyana - to only Petrobangla. On the other hand, Petrobangla argued that it would collect another $312 million USD from Chevron as a wheeling charge over the next twenty years.[506]

5.4.2 Award

ICSID heard the case between 2007 and 2009 in The Hague, Washington and London. Finally, after considering both parties arguments in May 2010, the tribunal held and delivered the verdict in favour of Bangladesh. It concluded that Petrobangla had rightfully inserted the 4% wheeling charges over Chevron and that the charge did not constitute a breach of FET provisions.[507]

[505] ibid 234.
[506] ibid 1215.
[507] ibid 245.

5.4.3 Analysis

In this case, Chevron claimed that a 4% tariff for using Petrobangla's (a state-owned entity in Bangladesh) pipeline was unfair and unreasonable as this charge deprived Chevron of its full investment benefits. However, Bangladesh raised an objection to ICSID's jurisdiction, contending that the dispute did not fall within the scope of an investment dispute since the proceeds from the gas sale did not constitute an investment under the ICSID Convention; the Convention requires an investment to involve the placement of funds or proceeds for the purpose of earning interest or profit.[508] Although Bangladesh's investment definition and its scope was narrow and self-contradictory, the tribunal found that the 4% tariff for using Petrobangla's pipelines was legal and fair. While the Bangladesh-USA BIT (1986) defines investment as, 'every kind of investment owned or controlled directly or indirectly including a claim to money or a claim to performance having economic value',[509] the Bangladesh-UK BIT (1981) explains investment as, 'every kind of asset including claims to money or to any performance under contract having financial value'.[510] Despite earlier stages of the submission indicating that this was likely to be a losing case for Bangladesh, their strategic argument regarding the interpretation of investment in the final stages of the hearing won the case. Importantly, this case not only serves as a valuable learning experience for Bangladesh but also reiterates the need to restructure the investment definition and create a model BIT with consistent practice.

5.4.4 Summary

Although this case was concluded in favour of Bangladesh, it is significant for the thesis because it directly involves a claim regarding breach of FET provisions. Despite Bangladesh's correct implementation of the 4% wheeling charge, this case took a significant

[508] ICSID Convention (1965) 575 UNTS 159, art. 25.

[509] The Treaty Between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment (1986) (Bangladesh – USA BIT), (entered into force on 25 July 1989), Art. 1.

[510] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (1980) (Bangladesh - United Kingdom BIT) (entered into force on 19 June 1980), Art.1.

amount of wasted time and resources to resolve. It exemplifies how foreign investors can utilize the opportunity to bring claims before ICSID tribunals, often relying on the mere possibility of breaches of weak FET provisions. Weak FET provisions create the potential for tribunals' to make ambiguous or expansive interpretations in favour of foreign investors.

In summary, this case underscores the immediate necessity for Bangladesh to safeguard its FET provisions to mitigate the number of weak claims filed against it for purported breaches of FET.

5.5 Scimitar

Another BIT case was filed against Bangladesh by Scimitar Exploration Limited (a British company) alleging a breach of FET provisions. An oil and gas exploration block located in Sylhet, Bangladesh was leased out under a production sharing contract by Petrobangla to Scimitar, a US oil company, who drilled two gas wells. The production sharing contract was cancelled by Petrobangla due to Scimitar's non-fulfilment of contractual obligations in addition to fraud allegations. In response, Scimitar lodged a special damages claim of $25 million USD before ICSID for its losses due to the cancellation of the contract.

. On 20th October 1992, ICSID received an arbitration request letter signed by H.S. Campbell. This letter was submitted on Scimitar's behalf by a law firm identifying itself as, 'its counsel, Burnet Duckworth & Palmer'.[511] However, on 29th March 1993, Bangladesh objected to the claim on jurisdiction grounds and questioned the competence and validity of persons instituting the arbitration.[512] Bangladesh challenged Scimitar's claim on five grounds including jurisdiction and the validity of the letter of request for arbitration. It argued that the persons who submitted the arbitration request were unauthorised and incompetent to act for the interest of the Claimant and thus could not be considered as a valid submission. It also highlighted that the tribunal had no jurisdiction to consider the arbitration request and hear the matter since it fell outside of the scope of the ICSID agreement, as it was evidenced that

[511] Ibid para 28.
[512] Ibid para 105.

the request was made by a person rather than a party. The tribunal held that the arbitration request was void and ordered Scimitar to pay Bangladesh's proceedings costs of $94,157.39 USD.[513]

This case is particularly significant in this thesis due to concerns about the legitimacy and authority of those initiating arbitration, lacking proper representation for the claimant. Their efforts to file a claim highlights the strategic use of Bangladesh's vulnerabilities as a developing nation, exploiting weaknesses in FET provisions to their advantage. This attempt to file a case with inadmissible facts constitutes an abuse of rights of the foreign investors' protection.

5.5.1 Summary

This case holds significance for this thesis because despite Scimitar's representative lacking both jurisdictional capacity and competency to act on behalf of Scimitar, they were able to file a case with ICSID against Bangladesh due to the country's weak BIT framework. This unfounded case resulted in a significant waste of money, time and resources for Bangladesh, and underscores foreign investors' readiness to exploit weak BIT practices and FET provisions. Although the case concluded in favour of Bangladesh, it emphasises the need for Bangladesh to mandate that foreign investors exhaust local remedies for a specified period before being eligible to file a case with ICSID, thereby preventing the filing of meritless cases.

5.6 NEPC

Another BIT dispute arose between the NEPC Consortium Power Limited (a Malaysian owned Powertek company) and the Bangladesh Power Development Board (BPDB) to operate a power plant in Narayanganj, Bangladesh.[514] On 21st April 2014, an explosion caused by crew negligence and mechanical failure caused a large fire at the

[513] ibid para 1875.
[514] NEPC Consortium Power Limited v. Bangladesh Power Development Board (II), ICSID Case No. ARB/18/15, Award (12 April 2021)

Meghnaghat power plant Narayanganj and significantly damaged the three-storey steel structure of the plant. Following the disaster, the power plant was shut down for a significant period of time which led to a huge shortfall in power generation.[515]

When the contract later came to an end in 2017, the Bangladeshi Government expressed their unwillingness to sign a further long-term contract with NEPC, highlighting that their power production costs were much higher in comparison with other providers in Bangladesh. However, Bangladesh then decided to extend the previous NEPC contract for another year whilst asking NEPC to mitigate the previous losses that had caused the explosion. This led to a dispute between the parties and NEPC filed an arbitration claim before ICSID in 2018 claiming compensation on the grounds that Bangladesh had breached FET provisions.[516]

On 12th April 2021, the arbitral tribunal rejected all of Bangladesh's arguments on policy grounds due to the explosion and disproportionately rendered an award in favour of the foreign investor NEPC.[517] The case held that Bangladesh's actions were inconsistent with its FET provisions. This case was the most recent blow for Bangladesh which supports the increasing demand for Bangladesh to restructure its FET provisions in BITs.

5.6.1 Summary

This case is particularly important to this thesis because it further illustrates a situation where, despite the foreign investor's responsibility for a gas explosion, they pursued a claim against Bangladesh, alleging unfair treatment due to contract non-renewal. Importantly, the foreign investor managed to evade accountability for the explosion's costs and environmental harm to the local area and its residents. This case directly evidences why safeguarding FET provisions and reforming Bangladesh's BIT framework is crucial.

[515] ibid.
[516] Ibid para 1013.
[517] Ibid para 1234.

5.7 Conclusion

This chapter has delved into five arbitral decisions by conducting in-depth case studies on Saipem, Niko, Chevron, Scimitar, and NEPC. These analyses provide valuable insights into how foreign investors have sought to exploit the weaknesses in Bangladesh's BIT practices and FET provisions. While three out of the five arbitral decisions favoured Bangladesh, it is crucial to recognise that only one of these directly involved allegations of breaching FET provisions, while one was deemed baseless and another was based on separate accusations of contract corruption.

In the instances where decisions went against Bangladesh, one was attributed to interference from Bangladeshi courts, stemming from a lack of understanding of the international arbitration system, which diverted from the original claim of expropriation, unfair treatment and denial of justice. Additionally, another ruling directly implicating a breach of FET due to inadequately safeguarded provisions, highlighted the deficiencies in Bangladesh's BIT framework.

An key observation is the dismissal of Bangladeshi arguments regarding policy aspects in all cases, despite gas field explosions causing damages to local public interests and the environment. This suggests that ICSID has a tendency to prioritise corporate interests over those of host states by disregarding such significant public policy concerns. The tribunals' interpretation of FET provisions have also notably overlooked the socio-political context of Bangladesh as a developing nation. This omission results in a failure to acknowledge the country's distinct challenges and circumstances. The interpretations of inadequately safeguarded FET provisions by arbitral tribunals have lacked a balanced perspective, ignoring crucial factors such as Bangladesh's resource limitations and administrative capabilities.

This gap is further exacerbated by Bangladesh’s inadequately negotiated BITs and unsafeguarded FET provisions, which enable tribunals to render decisions favouring foreign investors without holding them accountable for negligent actions that have led to explosions. Foreign investors have sidestepped any responsibility for the detrimental effects their operations might have on local communities and environments, disregarding fundamental tenets of corporate social responsibility (CSR). Additionally, these investors have neglected broader developmental concerns within Bangladesh such as human rights, labour rights, safety standards and equality.

The negotiation and signing of Bangladesh's BITs have been revealed as highly ineffective and susceptible to corruption, exacerbating the vulnerabilities within the country's BIT and international investment framework. This underscores the pressing need for comprehensive reforms to strengthen Bangladesh’s BIT agreements and FET provisions which mitigate corruption risks to better protect Bangladesh's interests in future foreign investment.

Neglecting local considerations and failing to exhaust local remedies, investors have turned to ICSID for dispute resolution, undermining Bangladesh’s internal mechanisms. Moreover, contract renewals have failed to be guided by comprehensive evaluations of parties' prior conduct and performance, undermining a merit-based approach. Notwithstanding their role in environmental degradation and losses, it is greatly concerning that foreign investors have been able to advance claims under breaches of FET provisions, rather than being rightfully excluded.

Overall, the findings from this chapter were important to ensure that the recommendations put forth for safeguarding Bangladesh’s FET provisions and reforming its BIT framework are comprehensive to address the full spectrum of issues previously raised in arbitral claims. The next chapter will explore how the US and India have addressed FET provisions in their BITs to manage arbitral claims. By comparing these approaches, the author aims to highlight key distinctions and offer relevant recommendations for Bangladesh.

Chapter 6: Comparing FET Provisions Within The Current BIT Frameworks of India & The US

6.1 Introduction

In the pursuit of pragmatic and implementable recommendations for Bangladesh, this chapter embarks on a comprehensive comparative examination of two influential jurisdictions, India and the United States (US). Both nations have established crucial precedents in addressing issues pertaining to FET provisions within their respective BITs. This examination lays the foundation for later chapters' recommendations, ensuring a holistic and realistic approach tailored to Bangladesh's unique context.

The primary objectives of this chapter are two-fold. Firstly, to select relevant ideas and legal tools from India and the US and, secondly, to apply them *mutatis mutandis* to effectively address the challenges facing Bangladesh. By analysing and integrating the experiences of these two countries, this chapter aims to forge a pathway towards resolving conflicting interests of protecting national interests against foreign investors' commercial interests.

The rationale behind selecting India and the US for the comparative analysis lies in their divergent approaches to safeguarding and rebalancing FET provisions, which offer invaluable lessons for Bangladesh. India's proximity to Bangladesh along with shared social, economic, cultural and political interests, renders its experience in safeguarding and rebalancing FET provisions highly pertinent. Meanwhile, the US stands as a global exemplar, boasting the most successful BIT framework in the world, attributed to its robust institutional strength and proactive safeguarding approach with regular BIT framework reviews.

6.2 An Overview of the BIT Framework in India

India is one of biggest growing economies in Asia and has signed 83 BIT agreements with different countries.[518] Being of no exception to other developing countries, India used to be a very investor friendly country in south Asia, facing numerous challenges in terms of dealing with BIT disputes in the recent past.[519] Consequently, statistics show that India became the most sued country in the world between 2015 and 2016.[520] In 2015, seventeen investor-state arbitration cases were filed against India by foreign investors.[521] More importantly, nine have been settled while seven remain pending. In two losing cases of White Industries and Devas Multimedia, the country paid significant damages to the foreign investors.[522] Since arbitration is a private and confidential phenomenon it is unknown how many cases the country has truly lost.[523]

India have signed eighty-three BIT agreements to date, the first of which was signed on 14th March 1994 with its former colonial ruler, the United Kingdom (UK).[524] Having signed fourteen BIT agreements between 1994 to 2000 (2 per year on average), this number more than doubled to fifty-eight BIT agreements signed between 2001 to 2015 (4 per year on average).[525] The number of BIT agreements being signed decreased in rate again to eleven (2 per year on average) between 2016 to 2021, which can be attributed to India's new 2015 Model BIT, which is stricter on foreign investors.[526]

6.2.1 Development of FET Provisions in The Previous Indian Model BIT

The practice of a model BIT agreement is relatively new in India compared to other jurisdictions and it is still in the development stage.[527] Due to the sharp increase in demand

[518] Ranjan (n 13).
[519] Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 *Nw. J. Int'l L. & Bus.* 437.
[520] Amit Kumar Sinha, 'Amit Kumar Sinha' (2017) 5 *Journal of Comparative Law (Oxford University Press)* 227.
[521] Ranjan (n 13).
[522] ibid.
[523] Kavaljit Singh, 'An Analysis of India's New Model Bilateral Investment Treaty' [2016] *Brothers. org* 81.
[524] Sinha (n 124).
[525] Ranjan (n 13).
[526] ibid.
[527] ibid.

for signed BIT agreements between 1994 to 2000, India introduced its first model BIT in 2003, which was modelled on the OECD Draft Convention for Protection of Foreign Property of 1967.[528] This OECD Draft Convention was extremely vital because it provided foreign investors with exclusive rights and protection including an FET provision; just compensation, which represents compensation for the genuine value of the property affected by question to be paid without delay, for expropriation; and action to international arbitration and dispute resolution for both foreign investors and host states.[529] India's disposition to adopt an OECD model-based Model BIT suggested its open and positive mindset to accept and recognise international legal principles for the promotion and protection of foreign investment which had been absent in the early 1960's to 1980's and in part, it is this positive mindset that makes it amenable as a model for Bangladesh to pattern itself on.

The huge popularity of Indian BITs led India to consider forming a model BIT which could create a suitably liberal investment environment for both the foreign investors and host nation.[530] While foreign investors usually look for maximum protection of their commercial interests, host nations are committed to ensure that their national sovereignty is not compromised. India introduced its first model BIT in 2003 in which it followed the standard ordinary practice. Article 3 of the 2003 Indian Model BIT provides guidance for the 'Promotion and Protection of Treatment'. Article 3 (1) states:

> '[E]ach Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and policy.'[531]

Additionally, Article 3 (2) states that, 'Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of

[528] Subedi (n 70).
[529] ibid 135.
[530] Prabhash Ranjan, 'The 2016 Indian Model BIT: Making the BIT Unworkable for Investors', *India and Bilateral Investment Treaties* (Oxford University Press 2019).
[531] Republic of India (n 55).

the other Contracting Party.'[532] It can be seen from both provisions that India was a keen advocate to include and promote FET provisions via its model BITs.

Furthermore, Article 4 of the 2003 Model BIT included national treatment and most-favoured nation treatment. Article 4 (1) states that:

> '[E]ach contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State.'[533]

The inclusion of this provision not only shows India's willingness to attract foreign investors into India, but also demonstrates its openness to embrace, recognise and promote customary international law into its legal system. These are the tools that this work seeks to draw from. While there are limitations to this model, the next section examines the Indian approach with a view to isolating core approaches that should, as a normative item, be fed into Bangladeshi model BITs. The following Indian case study analysis will also examine pitfalls made by India with a view to using those mistakes as a prevention guide in drafting solutions for the Bangladeshi BITs under analysis.

6.2.2 Indian Case Studies

India's willingness to promote foreign investment in India without safeguarding the nation interest led to a series of problems. The most ground-breaking case that impacted India the most was White Industries v India[534] 2011. White Industries Ltd an Australian mining company (the claimant) brought an arbitration claim against India with the seat in Singapore under the Australia-India BIT.[535] The arbitral tribunal found Coal India Limited, an Indian state-owned company, liable and rendered an award in favour of the White Industries Ltd. While White industries Ltd sought enforcement of the award before the Delhi High Court,

[532] ibid, article 3 (2).
[533] ibid,article 4 (1).
[534] White Industries Australia Limited v. The Republic of India IIC 529 (30 November 2011)
[535] ibid.

Coal India filed a request to the Calcutta High Court to set aside the award.[536] Later, the request was granted by the Calcutta High Court and White Industries appealed to the Supreme Court. After a decade of trying to enforce the award, White Industries decided to take this matter to arbitration in 2010 on the grounds of extraordinary delay in Indian courts to enforce the arbitration award which violated the India-Australia BIT. Additionally, White Industries claimed that the delay violated a number of provisions of the India-Australia BIT including fair and equitable treatment (FET), expropriation, MFN treatment, and free transfer of funds.[537]

In November 2011, the arbitral tribunal provided the final verdict of this high-profile case and held that India violated multiple provisions of the India-Australia BIT. White Industries were awarded a sum of $4,085,180 AUD plus $84,000 AUD for fees and expenses of the arbitrators and $500,000 AUD for arbitral expenses.[538] The Tribunal also ruled that all payments must be made with interest of 8% per annum from 24th March 1998, until the date of payment.[539] The loss of this landmark case received huge media coverage and brought forward the weakness of the 2003 Indian Model BIT and Investor Treaty Arbitration (ITA) system.[540]

A number of questions emerged from the general public in relation to the outcome of the White Industries case.[541] Firstly, since the claim was not to do with public interest, why would a significant amount of taxpayers' money be used to pay damages to White Industries? Secondly, how could the extreme delay of the Indian judiciary in resolving this matter possibly amount to violation of Indian BIT agreements? Thirdly, why was local law concerning the Arbitration and Conciliation Act 1996 not able to set aside or enforce the previous arbitral award that was given to White Industries? While rejecting White Industries' expropriation claim, the tribunal held that such a claim is not proven as the Indian courts

[536] ibid.
[537] ibid paras 10-14.
[538] ibid.
[539] ibid.
[540] Ranjan (n 587).
[541] ibid.

failed to consider Coal Industries' application to set aside the award.[542] Therefore, the tribunal precisely highlighted that a foreign arbitral award is another form of investment under the BIT and setting aside or attempting to set aside such a valid award would undoubtedly constitute expropriation under the BIT. This point is extremely important as it sends a clear message to Indian judicial activism that certain things such as valid arbitral awards should be enforced without any delays.[543] While India argued that only intangible property is capable of being expropriated as part of the contractual rights, the arbitral tribunal disagreed and held that all parts of the contractual rights including tangible and intangible are both capable of being expropriated.[544] The tribunal also clearly stated that International law takes precedent over national laws and, thus, Indian laws could be used to undermine the international provisions of the India–Australia BIT.[545] Finally, this decision raised a burning question whether the Indian BIT adequately balanced public policy and commercial interests.

Answering these questions is becoming crucial as India is considered to be a rising global superpower who are signing an increasing number of BITs and Free Trade Agreements (FTA), such as the India EU FTA, to strengthen their economy.[546] This is highly relevant to the future drafting of a Bangladeshi Model BIT because Bangladesh is also sharply developing its economy with a similar political, social and geographical landscape to India.

Following the investor's success in the White Industries case, other foreign investors started to file treaty claims for millions, if not billions, of dollars against India, relying on India's weak BIT provisions such as standard of treatment including fair and equitable treatment, full protection of security and most favoured treatment.[547] This can be seen with an increased number of cases that were filed against India after the White Industries decision. Some of the key cases will be discussed below.

[542] White Industries Australia Limited v. The Republic of India, IIC 529, Award (30 November 2011).
[543] Ranjan (n 13).
[544] ibid.
[545] ibid.
[546] Ranjan (n 13).
[547] Ranjan (n 587).

In the case of Devas (Mauritius),[548] the claimant brought a claim against India under the India-Mauritius BIT, alleging that 'the termination of the contract amounted to an expropriation of the claimants' investments in India and constituted a denial of justice under FET provisions'.[549] The tribunal was held by a majority and rendered an award in favour of the investor. The tribunal provided a broader interpretation of the FET provision and agreed that the termination of the contract amounted to an expropriation of the claimants' investments in India and constituted a denial of justice under the FET provision.[550]

In 2014, Louis Dreyfus Armateurs[551] (LDA) filed an arbitration claim for $33 million USD against India alleging that India had breached the minimum standard of treatment of the BIT, particularly FET and full-protection and security provisions, as the Indian government did not respond to the court orders dealing with the removal of equipment soon enough.[552] An UNCITRAL arbitral tribunal held and found India's action to be unarbitrary and thus dismissed LDA's claim. The tribunal also ordered LDA to pay $7 million USD to cover Indian legal expenses.[553]

In 2014, Deutsche Telekom,[554] a company incorporated under the laws of the Federal Republic of Germany, brought another claim against India alleging that India's action concerning the annulment of the agreement constituted a breach of the FET provision under the India–Germany BIT.[555] The UNCITRAL tribunal held that the Indian decision to annul the agreement was arbitrary and unjustified, as the decision was not based on facts but a quick response to press reports regarding corruption.[556] The tribunal held India liable for taking such a crucial decision without considering any documentary evidence, sound justification or record, and stated that it amounted to a clear breach of the FET provision in multiple

[548] CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, PCA Case No. 2013-09, Award (25 July 2016).
[549] ibid.
[550] Ranjan (n 13).
[551] Louis Dreyfus Armateurs SAS v. The Republic of India, PCA Case No. 2014-26, Award (25 July 2016).
[552] Ibid para 256.
[553] Ibid.
[554] Deutsche Telekom AG v. The Republic of India, PCA Case No. 2014-10, Award (13 December 2017).
[555] ibid.
[556] Ibid para 68.

respects under the India–Germany BIT.[557] Although India later filed an application to the Swiss courts to set aside the arbitral award by claiming that the BIT did not protect indirect investments, the Swiss Federal Supreme Court rejected Indian arguments and refused to set aside the award in December 2018.[558]

Similarly, in another case, Vodafone[559] filed an arbitration claim in 2016 arguing that the new amendment of the Indian tax law constituted a violation of fair and equitable treatment (FET) promised under the India-Netherlands BIT. Article 4.1 of the India-Netherlands BIT states, 'that the investors shall at all times be accorded fair and equitable treatment, which includes an obligation to ensure a stable and predictable regulatory environment'.[560] The arbitral tribunal held India liable for violation of the FET standard under Article 4(1) of the India-Netherlands BIT and rendered an award in favour of the investor. The tribunal ordered India to pay over $6 million USD compensation and a tax refund.[561]

Given the increased number of claims and mounting pressure from the general public, academics, national and international organisations, India was forced to revise its 2003 Model BIT.[562] This review was not only essential to safeguard the 2003 Model BIT provisions and protect national interests, but also to ensure that the treaty provisions were up to date to meet demands of global investment law.[563] The main objective of the review was to rebalance the foreign investment mechanism in favour of host states.[564] This was necessary in light of the expenditure that arose from the rulings on the interpretation of the FET provisions, all of which swung in favour of the investor state.[565]

[557] Ibid para 145.
[558] Ibid para 184.
[559] ibid.
[560] ibid.
[561] ibid.
[562] Ranjan (n 587).
[563] Ranjan (n 13).
[564] ibid.
[565] ibid.

6.2.3 Arbitral Tribunals' Interpretations of The Indian FET Provision

It has long been discussed that the FET provision within India's 2003 Model BIT is vague and broad, thus problematic, although tribunals have used various, 'general principles of law' to refer to the FET standard in more recent times.[566] In the Cairn Energy[567] and Vodafone cases,[568] India argued that the tribunal should not consider:

> '… whether retroactive taxation violated the FET standard by referring to the approaches of different municipal jurisdictions or other international adjudicative bodies in respect of retroactive taxation, as this would amount to deciding ex aequo et bono'.[569]

However, the tribunal rejected this submission, highlighting that:

> '[I]t is not improper for a treaty tribunal to seek guidance from the practice and jurisprudence of municipal legal systems in order to identify the general principles that are relevant for the interpretation of treaty terms in a specific context'.[570]

Moreover, the tribunal held that, 'legal certainty qualified as a general principle of law that could inform the content of the FET standard irrespective of the background or political stance of the Contracting States'.[571] The tribunal further highlighted that the principle of legal certainty is not always absolute as some retroactive regulations including public policy and public order could be justified under policy reason. The tribunal noted that a test of proportionality can be used to, 'balance the state's public purpose, in enacting retroactive legislation, against the claimant's interest in legal certainty'.[572]

[566] Sinha (n 124).
[567] Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-7, Award (21 December 2020).
[568] Vodafone International Holdings BV v. India (I), PCA Case No. 2016-35, Award (25 September 2020).
[569] Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-7, Award (21 December 2020) para 1738.
[570] ibid para 1738.
[571] ibid para 1749.
[572] ibid paras 1788-9.

The tribunal applied a test of proportionality on retroactive application of the 2012 amendment and concluded that increasing the tax base or revenue was disproportionate and could not justify the retroactive application.[573] The adoption of retroactive legislation in response to the prevention of systemic tax abuse by foreign investors was seen as, 'grossly unfair' and thus could not be justified under policy concern[574] as seen in the decision of Waste Management v Mexico II.[575]

6.2.4 Main Structure of The Current 2015 Indian Model BIT

After a significantly lengthy review, on 28 December 2015 the Indian government finally adopted and released a new version of their 2015 model BIT[576]. Prior to final approval, a draft design of this 2015 model BIT was released to the public during March 2015.[577] The idea behind this was to receive feedback and comments and from the prospective of different stakeholders and both national and international levels. Furthermore, the Law Commission of India (LCI)[578] carried out a critical analysis of the Draft Design BIT and provided suggestions for modifications to various provisions of the agreement.[579]

The final version of India's 2015 model BIT is substantially different from the draft design. One of the key changes is the exhaustion of local remedies, as under the final 2015

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[573] ibid paras 1794, 1801.
[574] ibid para 1813-6.
[575] Waste Management v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Award (30 April 2004).
[576] Republic of India (n 55). See Appendix F: Model Text for the Indian Bilateral Investment Treaty.
[577] ibid. See Grant Hanessian and Kabir Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2016) 32 *ICSID Review - Foreign Investment Law Journal* 729.
[578] The website of the Law Commission of India (LCI) describes its role as follows:
'[T]here had been demands in Parliament and outside for establishing a Central Law Commission to recommend revision and updating of the inherited laws to serve the changing needs of the country. The Government of India reacted favourably and established the First Law Commission of Independent India in 1955 with the then Attorney-General of India, Mr. M. C. Setalvad, as its Chairman. Since then twenty-one more Law Commissions have been appointed, each with a three-year term and with different terms of reference.'
Government of India, Ministry of Law and Justice, LCI, *Post-Independence Developments* <http://lawcommissionofindia.nic.in/> accessed 12 July 2020.
[579] Government of India, Ministry of Law and Justice, LCI, 'Analysis of the 2014 Draft Model Indian Bilateral Investment Treaty' (August 2015) Rep No 260 (*LCI Report*). It is not fully clear who asked the LCI to analyse the Draft Model BIT. The *LCI Report* states that it identified 'some concerns' and 'the Commission set up a Sub-Committee of experts to study the 2015 Model BIT in greater detail' (4). Interestingly, many proposals put forward by the LCI did not find their way into the Final Model BIT. It is also not fully clear whether the analysis of the Draft Model BIT was within the scope of the LCI because the terms of reference for the twentieth LCI (which examined the Draft Model BIT) were restricted to: (i) the review and repeal of obsolete (domestic) laws; (ii) carrying out a post-audit for 'socio-economic' legislations and (iii) reviewing the system of judicial administration to meet the 'reasonable demands of the times'. See Government of India, Ministry of Law and Justice, LCI, 'Terms of Reference of the Twentieth Law Commission'
<http://lawmin.nic.in/la/LAW%20COMMISSION%20OF%20INDIA.pdf> accessed 12 July 2020.

Model BIT an investor needs to, 'exhaust local remedies for at least a period of five years'[580]. There is a significant shift from national treatment in the previous 2003 model BIT to international treatment in the 2015 model BIT.

In terms of policy concerns, the Indian government brought both the Department of Economic Affairs within the Ministry of Finance together to draft the 2015 model BIT, for the first time in history. This was a significant move as the Department of Economic Affairs has traditionally negotiated BITs, while the Department of Commerce has negotiated investment chapters.[581] This has unfortunately led to a very inconsistent outcome as both have taken a very different approach to completing the task[582], even though this change was intended to ensure future consistency when negotiating investment-related issues as noted in Table 2 below.

Table 2. Comparing Texts of Article 3.1 between the Final and Draft 2015 Model BIT

Final text of the 2015 Model BIT	**Draft text of the 2015 Model BIT**
Article 3.1	**Article 3.1**
'No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law[583] through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or	'Each Party shall not subject Investments of Investors of the other Party to Measures which constitute: (i) Denial of justice under customary international law; (ii) Un-remedied and egregious violations of due process; or (iii) Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment'.

[580] Republic of India (n 432), article 15.2.

[581] Ramkumar Khatiwada, 'Re-Negotiating the Bilateral Investment Treaties: Is India Moving in the Right Direction ' (*Academia.edu*, 2016) <https://www.academia.edu/31870844/Re_negotiating_the_Bilateral_Investment_Treaties_Is_India_Moving_in_the_Right_Direction> accessed 25 July 2021.

[582] Kavaljit Singh, 'An Analysis of India's New Model Bilateral Investment Treaty' in Kavaljit Singh and Burghard Ilge (eds), Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices (Both Ends, Madhyam and Somo 2016) 71. '[N]egotiations on investment chapters of FTAs were handled [by] the Ministry of Commerce while standalone BITs were negotiated by the Ministry of Finance. This indeed is a welcome development as there have been several instances of differences on investment issues between these two ministries resulting in a lack of policy coherence.'

[583] For greater certainty, it is clarified that "customary international law" only results from a general and consistent practice of States that they follow from a sense of legal obligation.

(iv) manifestly abusive treatment, such as coercion, duress and harassment'.	

Table 2 compares the texts between Article 3.1 of the final and draft versions of the Indian 2015 model BIT. The standard of treatment under Article 3 replaces the old 2003 model BIT's FET provision. In the final 2015 model BIT, India decided to exclude the FET provision as the policy maker felt the FET provision was one of the fundamental reasons for being sued by the foreign investors. Table 2 shows that the wordings of the draft provisions are significantly different than the final provisions, which were intended to bring certainty and consistency of the provisions. One of the most noticeable changes in the revised 2015 model BIT is the inclusion of customary international law. However, the scope the customary international law has been limited as it stated that, 'for greater certainty it is clarified that 'customary international law' only results from a general and consistent practice of States that they follow from a sense of legal obligation'.[584] More changes can be seen in the other sub-provisions too; while the draft 2015 model article only offered three sub-provisions under article 3 (1), the final 2015 model included an additional one under 3 (1) (iii) for targeted discrimination which includes that, 'targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief'.[585]

The draft article 3 (1) (i) Denial of justice has been limited to only judicial and administrative proceedings in the final 2016 revised provision. The draft Article 3 (1) (ii) Un-remedied and egregious violations of due process has been replaced with fundamental breach of due process in the revise provision. The draft Article 3 (1) (iii) 'manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment' has been replaced with 'manifestly abusive treatment, such as coercion, duress and harassment' in the

[584] Republic of India (n 432), article 3 (1)
[585] ibid.

revise provision under Article 3 (1) (v). The revised version therefore excluded complex terms such as ‘continuous’, ‘unjustified’ and ‘outrageous’.[586]

Following the release of the 2015 model BIT, the government of India expressed its satisfaction and highlighted that the purpose of the new BIT is to provide, ‘appropriate protection to foreign investors in India… while maintaining a balance between investor's rights and the government's obligations’.[587] The Indian government later informed parliament that the:

> ‘[N]ew Indian Model Bilateral Investment Treaty text is aimed at providing appropriate protection to foreign investors in India and Indian investors in the foreign country, in the light of relevant international precedents and practices, while maintaining a balance between the rights of the investors and the obligations of the Government’.[588]

The Indian government also claimed that the new 2015 version is up to date and, thus, intends to reduce the number of future arbitral disputes.[589]

6.2.5 A Comparative Analysis of the 2003 & 2015 Indian Model BITs

While there were only three cases brought against India between 1994 and 2003, prior to the introduction of the model BIT 2003, the number of cases filed against India significantly increased to eleven between 2005 and 2015.[590] Furthermore, the number of cases against India exponentially increased in 2015 as a total of 17 ISDS were filed against India and the country became the most sued country in 2015.[591] Most of these cases were concerned with FET provisions and full protection of security. This led India to reform it’s 2003 model BIT.

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[586] Singh (n 52).
[587] Ranjan (n 587).
[588] Prabhash Ranjan and Pushkar Anand, ‘The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction’ (2017) 38 *Nw. J. Int’l L. & Bus.* 43.
[589] ibid.
[590] Ranjan (n 587).
[591] Ranjan and Anand (n 48).

A key difference between the 2015 model BIT and 2003 model BIT is the extent of detail; while the 2003 model BIT was only a seven-page long document covering only the basic scope and functions of the BIT provision, the new 2015 version is a twenty-eight-page long document containing eight articles which are divided into seven phases. The 2015 model BIT was introduced to provide a sustainable solution to various contemporary issues and problems faced by investors and countries in relation to investment law.

Table 3 compares FET provisions between the old 2003 Indian Model BIT and the new 2015 Indian Model BIT. It compares the most recently released Model BIT 2015 Article 3 standard of treatment with the previous 2003 model BIT.

Table 3. Comparison between the Old Version 2003 and New Version 2015 Indian Model FET Provisions.

Old Version Indian Model BIT 2003	**New Version Indian Model BIT 2015**
Article 3: Promotion and Protection of Treatment 1/Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and policy. 2/ Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. **Article 4: National Treatment and Most-Favoured-Nation Treatment** (l) Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State. 2/ In addition each Contracting Party shall accord to investors of the other Contracting Party,	**Article 3: Standard of Treatment** 'No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law[592] through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv) manifestly abusive treatment, such as coercion, duress and harassment'. **Article 4: National Treatment** 1/Each Party shall not apply to investor or to investments made by investors of the other Party, measures that accord less favourable treatment than that it

[592] For greater certainty, it is clarified that "customary international law" only results from a general and consistent practice of States that they follow from a sense of legal obligation

including in respect of returns on their investments, treatment which shall not be less favourable· than that accorded to investors of any third State. 3/ The provisions of paragraphs 1 and 2 above shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from: (a) any existing or future customs union or similar International agreement to which it is or any become a party, or (b) any matter pertaining wholly or mainly to taxation.	accords, in like circumstances[593],to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory. 2/ The treatment accorded by a Party under Article 4.1 means, with respect to a Sub-national government, treatment no less favourable than the treatment accorded, in like circumstances, by that Sub-national government to investors, and to investments of investors, of the Party of which it forms a part.

As can be seen in Table 3, a key change to Article 3 is the title, which shows that the old 2003 promotion and protection of treatment provision has been replaced with the standard of treatment under the new 2015 model. India decided to replace this provision because it faced a significant number of claims where Investors relied on article 3(2) regarding fair and equitable treatment to sue the host state. Thus, to avoid future problems, India replaced the FET provision with a standard of treatment provision.

The new standard of treatment provision contains some features of FET provision, but these are substantially safeguarded to limit the scope of these features so that the arbitral tribunal cannot provide any broader or narrower interpretation in future.[594] While the 2003 version of the FET provision was open and general, encouraging parties to create favourable conditions for investors and offering fair and equitable treatment, the new 2015 version was carefully developed to completely eradicate the promotion and wider protection of treatment.[595] The new 2015 version of standard of treatment contains very basic but

[593] Republic of India (n 55). Article 4 (1), for greater certainty, whether treatment is accorded in "like circumstances" depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives. These circumstances include, but are not limited to, (a) the goods or services consumed or produced by the investment; (b) the actual and potential impact of the investment on third persons, the local community, or the environment, (c) whether the investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the investment.
[594] Ranjan (n 13).
[595] Ranjan and Anand (n 48).

strongly worded provisions, meaning that it would be harder for investors to prove that these provisions have been breached. Denial of justice is now limited to only 'judicial or administrative proceedings.'[596] Breach of due process has to be fundamental if any investor wishes to bring a claim under this provision. Now, under the new 2015 version, there is no guidance as to what would constitute a fundamental breach. In addition to that, discrimination must be 'targeted' and only limited to three grounds such as gender, race and religious belief.[597] Finally, investors' protection for abusive treatment is also limited to only three grounds, namely, 'coercion, duress and harassment'.[598] On comparison, it can be seen that the new 2015 version of model BIT of 'standard of treatment' is strictly safeguarded and deliberately designed to protect national interest than the previous 2003 model version.[599] Furthermore, the new 2015 model BIT replaces the MFN provision with national treatment provision.

6.2.6 Gaps in The Standard of Treatment Provision of The Current 2015 Indian Model BIT

It is important to note that India's decision to remove the FET provision completely from their 2015 model BIT could be seen as overly ambitious as it did not take aspects such as sustainable development and CSR into account as suggested in both UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises.[600] Although it is understandable that India became frustrated with the number of cases filed against them because of their previously soft FET provision that was poorly drafted in their 2003 Model BIT, this thesis argues that their sudden and extreme decision to eradicate the FET provision by switching to national treatment in their 2015 Model BIT has already been evidenced to cause longer term consequences.[601] Many countries have already

[596] Singh (n 52).
[597] ibid.
[598] Ranjan (n 13).
[599] Ranjan and Anand (n 48).
[600] Singh (n 52).
[601] Hanessian and Duggal (n 634).

shown a lack of interest in signing BITs with India because India's 2015 model BIT provides very little protections for foreign investors.[602]

Although it is clear that India had become frustrated with the old version of promotion and protection of treatment given their subsequent decision to change it completely, the new 2015 amendment also gives rise to a few questions.[603] Firstly, does the new standard of treatment provision contain adequate features to balance both national sovereignty and commercial interest? Or is the amendment a shift from one extreme of pro-investor friendly mechanisms to the opposite extreme of pro-host state friendly mechanisms?

To answer these questions, this thesis has taken a wider approach to consider other recent amendments of model BIT provisions in other countries and noted India's reaction to them and the impact of this reaction on their own BITs.

6.2.7 Wider Domestic Legal Implications of The 2015 Indian Model BIT

This section will discuss the various reforms made within domestic Indian law to improve their existing foreign arbitration mechanism. As part of this, it is important to consider how domestic arbitration law has already been reformed in addition to India's introduction of a new arbitration council and other domestic arbitration institutions. These are all important aspects to consider in order to make appropriate recommendations for the reform of Bangladesh's domestic law.

6.2.8 Reform of Domestic Arbitration Law in India

The new Indian model BIT 2015 has forced India to carry out some key amendments to its domestic investment framework. The key domestic legislation in this area is the Indian Arbitration and Conciliation Act (ACA) 1996.[604] The guiding principle of the 1996 ACA is the UNCITRAL Model Law, as known as the Model Law.[605] Although the 1996 ACA adopted

[602] Ranjan and Anand (n 48).
[603] Singh (n 52).
[604] The Arbitration and Conciliation Act 1996.
[605] Hareesh Kumar Kolichala, 'Time Bound Arbitration Proceedings-A Big Reform in Arbitration Law' (2020) 55 *The Management Accountant Journal* 28.

many of the standard provisions from the Model Law, the discrepancy is high as the adopted number of provisions is considerably lower than that prescribed under the Model Law.[606] One classic example are time limits, as while the Model Law prescribes no time limits for arbitration proceedings, the 1996 ACA provides a time limit of up to twelve months to complete arbitration proceedings. Furthermore, unlike the Model Law, the 1996 ACA also provides unusual provisions regarding the burden of costs.[607] The ACA 1996 has four parts, with part one covering domestic arbitrations and part two covering international arbitrations. Part one consists of twelve chapters, and part two contains only two chapters.[608] Chapter one of part one includes six sections namely definitions: receipt of written communications; waiver of right to object; extent of judicial intervention and administrative assistance. Chapter two of part one includes three sections: arbitration agreements; power to refer parties to arbitration where there is an arbitration agreement and interim measures by Court.[609]

Chapter three of part one includes seven sections: number of arbitrators; appointment of arbitrators; power of Central Government to amend the Fourth Schedule; grounds for challenge; challenge procedure; failure or impossibility to act and termination of mandate and substitution of arbitrators.[610] Chapter four of part one includes two sections: competence of an arbitral tribunal to rule on its jurisdiction and interim measures ordered by arbitral tribunals. Chapter five of part one includes ten sections including: equal treatment of parties; determination of rules of procedure; place of arbitration; commencement of arbitral proceedings; language, statements of claim and defence; hearings and written proceedings; default of a party; experts appointed by arbitral tribunal and Court assistance in taking evidence.[611] Chapter six of the part one includes nine sections: rules applicable to substance of dispute; decision making by a panel of arbitrators; time limits for arbitral awards; fast track procedures; settlement forms and contents of arbitral awards; regime for costs; termination of

[606] ibid.
[607] ibid 25.
[608] ibid 27.
[609] ibid 28.
[610] ibid 28.
[611] Kolichala (n 705).

proceedings; correction and interpretations of awards and additional awards.[612] Chapter seven of part one includes one section: application for setting aside arbitral awards. Chapter eight of part one includes two sections: finality of arbitral awards and enforcement. Chapter nine of part one includes one section: appealable orders. Chapter ten of part one includes six sections: deposits; lien on arbitral award and deposits as to costs; arbitration agreement not to be discharged by death of party thereto; provisions in case of insolvency; jurisdiction and limitations.[613]

Chapter one of part two covers enforcement of certain foreign awards and contains nine sections: definition; power of judicial authority to refer parties to arbitration; when foreign awards are binding; evidence; conditions for enforcement of foreign awards; enforcement of foreign awards; appealable orders; savings and conditions when Chapter II does not apply.[614]

Chapter two of part two covers the Geneva convention and includes eight sections namely: interpretation; power of judicial authority to refer parties to arbitration; foreign awards when binding; evidence; conditions for enforcement of foreign awards; enforcement of foreign awards; appealable orders and savings.[615]

Since the introduction of the ACA 1996, it has been amended twice in recent years 2015 and 2021.[616] The first amendment of the ACA 1996 was brought in 2015 Arbitration Amendments Act which incorporated a series of changes to the original ACA 1996. The first change as part of the reform was that it provided Indian courts with the power to grant interim measures such as injunction and the second big change was safeguarding, 'public policy'.[617] The 2015 reform made it clear that public policy had been restricted and that Indian courts will no longer recognise the merits of international commercial disputes when considering

[612] ibid.
[613] ibid.
[614] ibid.
[615] ibid.
[616] Ranjan and Anand (n 48).
[617] ibid.

matters of public policy.[618] The final key change of the reform was empowering Indian High courts, as the amendment made it clear that High courts have jurisdiction and that all applications to enforce foreign arbitration awards must be submitted in a High court. Also, it said that High courts have the power to set aside awards made in India if arbitrators fail to comply with the new requirement for disclosure of interests.[619] The reform also stated that the amendments of the Arbitration Act 1996 will apply to all arbitrations commencing in October 2015 onwards.

The final amendments of ACA 1996 were brought in 2021 in which it introduced the new qualification requirement for arbitrators in India, meaning that they must have achieved minimum qualifications and experience to hold their positions.[620]

The second big change of the 2021 reform is confidentiality as while the burden of confidentiality of arbitral proceedings is on the parties, arbitrator and arbitral institution, the new reform states that confidentiality will not be observed if the disclosure of an arbitral award is necessary for enforcement of an award.[621] The third big change of the 2021 reform is new protection for arbitrators, which states that arbitrators will be protected against any claims if they act in good faith.[622] The fourth biggest change of the 2021 reform are the time limits of the proceedings of the award, which states that tribunals, 'must endeavour to settle international arbitration disputes within twelve months and domestic arbitration within six months from the date of arbitrators' appointment', compared with a period of twelve months for all arbitration proceedings since 2015.[623]

The final big change of the 2021 reform is a restriction on setting aside awards which restrict the scope of Indian courts' interference in arbitration to increase the effectiveness of arbitration procedures. Historically, Section 34(2)(a) of the 1996 Arbitration and Conciliation Act provided Indian courts with the power and authority to set aside arbitral awards on

[618] Ranjan and Anand (n 48).
[619] Singh (n 52).
[620] ibid.
[621] Kolichala (n 705).
[622] ibid.
[623] ibid.

certain grounds including, ‘incapacity of parties, invalidity of arbitration agreement, lack of proper notice of arbitration, and where tribunal acts outside the scope of its jurisdictions”, but this power has since been revoked by the new 2021 reform.[624]

6.2.9 Introduction of The New Arbitration Council of India

The most significant contribution of the latest Indian Arbitration and Conciliation (Amendment) Act 2021[625] is establishment of an independent council of India called, ‘the council’.[626] This is a fundamental alteration with the potential to change the whole landscape of India’s international investment mechanisms for better.[627] The huge step to establish the council has not only facilitated parties’ demands to resolve disputes swiftly according to the parties’ preferred mode, but this progressive legal regime has also placed India in a permanently better position to handle International commercial arbitration.[628] The council is chaired by a president and the president of the council is a judge in supreme court with significant expert knowledge and experience in arbitration.[629] Other members of the council include arbitrators, arbitration institutional practitioners, academics and the secretary of the government of India in the department of legal affairs.[630] The council is not only responsible for promoting and encouraging alternative dispute resolution mechanisms such as arbitration, mediation and conciliation by holding regular training and collaborating with other councils but also responsible to observe uniform standards to maintain consistency.[631] The long-term goal of the council is to improve the quality of institutional arbitration via monitoring performance and reviewing compliance with time limits of institutional arbitration proceedings.

[624] ibid.
[625] Arbitration and Conciliation (Amendment) Act 2021.
[626] Ranjan and Anand (n 48).
[627] Ranjan (n 13).
[628] Zisha Rizvi, ‘The Shift Towards Institutional Arbitration: Critically Examining the Arbitration (Amendment) Act 2019’ [2020] *SSRN*.
[629] ibid.
[630] ibid.
[631] Ranjan and Anand (n 48).

6.2.10 Domestic Arbitration Institutions in India

India have established a number of domestic arbitration institutions, including the Mumbai Centre established in (2016)[632], Nani Palkhivala Arbitration established in (2005)[633], the Centre Delhi International Arbitration Centre established in (2009)[634] and the Arbitration Centre Karnataka established in (2012)[635]. All of these arbitration institutions are operated by a panel of arbitrators comprising retired judges, practitioners, chartered accountants and civil servants and others.[636] The most popular arbitration institution is the Mumbai Centre for International Arbitration. Although India have established a number of international arbitration centres, the internal structure, quality and development of these institutions are not fully consistent with global standards such as the International Court of Arbitration (ICC), the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDL), the London Court of International Arbitration (LCIA) and the International Institute for Conflict Prevention and Resolution (CPR), as most arbitrations in India are still conducted on an 'ad hoc' basis.[637]

6.2.11 India's Struggle Continues with BITs

Following the release of the final version of 2015 Model BIT, India adopted a two-fold approach with respect to its existing BITs. The government primarily served notice of termination of BITs to fifty-eight countries (inter alia the United Kingdom, France, Germany and Sweden) with whom existing BITs had either expired or would expire soon.[638] Furthermore, India expressed its interest to renegotiate new BITs with these countries, as long as they agree to sign a BIT under the conditions of the new 2015 Model BIT.[639]

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[632] MCIA, 'Mumbai Centre for International Arbitration ' <https://mcia.org.in/> accessed 25 July 2021.
[633] Nani Palkhivala, 'Nani Palkhivala Arbitration Centre' <http://www.nparbitration.com/> accessed 25 July 2021.
[634] DIAC, 'Delhi International Arbitration Centre' <http://www.dacdelhi.org/> accessed 25 July 2021.
[635] ACK, 'Arbitration centre Karnataka' <www.arbitrationcentreblr.org> accessed 25 July 2021.
[636] Rizvi (n 728).
[637] ibid.
[638] Government of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion, 'Lok Sabha Unstarred Question No. 1290' (July 25, 2016), <http://164.100.47.190/loksabhaquestions/annex/9/AU1290.pdf> accessed 24 Jul 2021. However, despite this termination, the treaty provisions shall continue to remain effective for investments made before the date of termination for a further period of 15 years
[639] Ministry of Finance (n 125).

Secondly, for the remaining countries (inter alia, China, Finland, Bangladesh and Mexico), India proposed Joint Interpretive Statements (JIS) to bring clarity in treaty provisions so that broader interpretations by the arbitral tribunals could be avoided. [640] Moreover, India aims to use the 2015 Model BIT to negotiate future international investment agreements such as Comprehensive Economic Cooperation Agreements (CECAs) and Comprehensive Economic Partnership Agreements (CEPAs) or Free Trade Agreements (FTAs).[641] Partner countries include Singapore, Japan, Malaysia and South Korea and South Asian Free Trade Agreements SAFTA[642] Bangladesh accepted India's proposal regarding joint interpretive statements (JIS)[643] in 2017.

Following India's termination of BITs with multiple countries based on its new 2015 Model BIT, India have managed to renegotiate and sign thirteen BIT agreements even though only eight of them are currently in force. Since 2015, only eight countries have agreed to accept the 2015 Indian Model BIT and these countries are mainly developing or underdeveloped countries with less negotiating power such as Bangladesh, Sudan, Latvia, Senegal, Libya, Philippines and Lithuania, meaning that the success and effectiveness of the 2015 Model BIT remains questionable.[644]

Despite making significant changes and modifications to both their domestic and international legal frameworks, recent cases including Nissan, Vodafone and Cairn Energy provide evidence that India is continuing to face a series of problems with its international arbitration mechanism. In the Nissan[645] case, Indian's omission of providing incentives to build a car factory amounted to a breach of the fair and equitable treatment provision under the Japan-India Comprehensive Economic Partnership Agreement. Upon receiving the final award from the arbitral tribunals in May 2020, India agreed to settle the case and pay $238

[640] Government of India, Ministry of Finance, Department of Economic Affairs, Office Memorandum 'Regarding Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties' (Feb. 8, 2016) http://indiainbusiness.nic.in/newdesign/upload/Consolidated Interpretive-Statement.pdf> accessed 24 July 2021
[641] Ranjan (n 13).
[642] Ministry of Finance (n 125).
[643] Government of India Press Information Bureau, 'Signing of Joint Interpretative Note (JIN) to Bilateral Investment Agreement Between India and Bangladesh ' (*Press Information Bureau, Government of India*, 2017) <http://dea.gov.in/sites/default/files/Signed Copy of JIN.pdf> accessed 24 July 2021.
[644] Singh (n 52).
[645] Nissan Motor Co., Ltd. v. Republic of India, PCA Case No. 2017-37, Award (29 April 2019)

million USD to Nissan.[646] In addition to this, India lost two other high-profile tax-related investment arbitrations in 2020. In the case of Vodafone[647], the Indian tax authority imposed withholding tax to buy a Cayman Island entity with an interest in national cell phone operator. Vodafone later filed a case before the arbitral tribunal claiming that such retroactive tax amounted to a breach of the FET provision under the India–Netherland BITs. In September 2020, the arbitral tribunal held and found India liable in this case and subsequently awarded $2 billion USD to Vodafone.

In 2012, India reformed its taxation legislation mainly to impose tax on, 'income arising from the transfer of shares in a company incorporated outside of India, by a non-resident of India, if the shares derived their value substantially from assets located in India'.[648] This amendment was necessary to apply retroactive tax as it is seen in the Vodafone decision that India's attempt to tax such a transaction had been rejected by the Supreme Court of India.[649].

Despite the previous outcome of Vodafone case, India lost a further case against Cairn Energy, a UK company. In the Cairn[650] case, India issued a retroactive tax notice to Cairn Energy demanding tax payable on their 2006 transactions of some $4.4 billion USD, which included interest that had accrued at 2% per month on a principal of $1.6 billion USD. The arbitral tribunal found this action contrary to the FET provision and held India liable under the UK -India BIT for charging retroactive capital gains tax to Cairn Energy and awarded $1.2 billion USD to Cairn Energy.[651]

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[646] ibid.
[647] Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016-35, Award (25 September 2020)
[648] Joshua Paine, 'Cairn Energy v India: Retroactive Taxation, Fair and Equitable Treatment and the General Principles Method' (*European Journal of International Law*, 13 January 2021) <https://www.ejiltalk.org/cairn-energy-v-india-retroactive-taxation-fair-and-equitable-treatment-and-the-general-principles-method/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 16 July 2021.
[649] ibid paras 102-112 and 120-122.
[650] Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-7, Award (21 December 2020).
[651] ibid.

In another case with Devas, [652] India's cancelation of an agreement to lease a satellite broadcasting spectrum amounted to a breach of FET provision under the India-Mauritius BIT. This is a particularly interesting case, as it provides guidance for the discounted cash flow (DCF) model and the projection of future profits. During the last phase of the case in October 2020, India argued that the DCF model would not apply to the party as the company had no holistic operation activity. Nevertheless, the majority of the arbitral tribunal agreed with Devas and noted that evidence of the company's business plan was sufficient to give rise to the DCF model and provide a clear projection of future profits, awarding $111 million USD to Devas.[653]

Furthermore, an investor a claim for $300 million USD is currently pending under the UK-India BIT against India, concerning retroactive taxation in the case of Vedanta Resources[654]. FET provisions have become the most widely used standard in international investment agreements. Since becoming more popular, arbitral tribunals and academics have critically analysed and interpreted the concept of FET standards in many different forms which are broadly categorised as the 'general principles of law'.[655] While arbitral tribunals have interpreted the concept of FET as part of the, 'general principles of law' or, 'customary international law', leading academic Stephane[656] Schill[657] argues that this is not sufficiently clear, as evidenced in recent case law that the scope of FET has been significantly extended.[658] This thesis agrees with the existing literature and submits that the current tribunals' view of FET provisions are questionable, as it is unclear and western-centric, offering a great degree of generosity for foreign investors.[659] A classic example is that definitions of, 'the Rule of Law' developed by the Venice Commission may have been very

[652] CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India, PCA Case No. 2013-09, Award (13 October 2020).
[653] ibid.
[654] Vedanta Resources plc v. India, PCA Case No. 2016-05, Award (8 October 2020).
[655] Ranjan (n 13).
[656] Vasciannie (n 8).
[657] Schill (n 324).
[658] Total S.A. v The Argentine Republic, ICSID Case No. ARB/04/01, Award (1st February 2016) para 111.
[659] Joshua Paine (n 748).

different from what parties in a bilateral or a multilateral treaty may think of when adopting a FET provision in their investment agreements.[660]

Similarly, in the case of Cairn Energy,[661] it was seen that the tribunal interpreted that the retroactive taxation constituted a violation of the FET standard based on a very small amount of academic literature and a few examples of the European Convention on Human Rights, European jurisdictions and the United States.[662] In the crucial part of the award, the tribunal only referred to a brief point on Indian law regarding the general principle, which suggests that legislation commonly governs future prospective. Fundamentally, this shows the tribunal's position that FET was treated as an autonomous international standard, meaning that it would not matter whether the 2012 amendment was constitutional or not under Indian law.[663] The rationale of the award shows how investment treaties provide additional protections for foreign investors via international arbitration.

6.2.12 Evaluating Impact of Changes Made in The 2015 Indian Model BIT

The biggest change that India made in the 2015 reform is the exclusion of a FET provision.[664] The FET provision has been replaced with a general treatment provision that contains features of customary international law to provide protections for investors against inter alia article three 'fundamental breach of due process'.[665] The reformed 2015 model also provides a further provision stating that it, 'shall be interpreted in the context of the high level of deference that international law accords to States with regard to their development and implementation of domestic policies'.[666]

Moreover, it can be seen that countries are keen to include regulatory provisions respecting domestic law when negotiating and signing more recent BIT agreements.[667] This

[660] ibid.
[661] Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-7, Award (21 December 2020).
[662] ibid paras 1790-1801.
[663] ibid paras 1692-4 and 1822.
[664] Ranjan (n 13).
[665] Singh (n 52).
[666] Ranjan and Anand (n 48).
[667] Gazzini (n 668).

idea was inspired and supported by EU investment treaty provisions which indicate that a dispute tribunal may take into account the domestic law of the disputing party as a matter of fact and that they, "shall be bound by the interpretation given to the domestic law by the courts or authorities which are competent to interpret the relevant domestic law.[668] Furthermore, academics such as Rudolf and Schreuer have supported the idea of national treatment, stating 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".[669]

Similarly, this thesis argues that while it may seem that the ambitious 2015 Indian reform excluding the FET provision is a good attempt by making it harder for investors to sue the host state, it may backfire on India through only fundamentally protecting national interests and thus being too strict for investors.[670] Investors may feel too unsafe and unsecure to invest in India and this may certainly have an adverse impact on Indian economy.[671] In the case of Cairn Energy, India argued that, 'there is no customary rule prohibiting retroactive taxation thus it was for each state to balance the relevant principles under its own law'.[672] However, the tribunal dismissed this argument highlighting that the 2012 amendment, 'violated an FET provision not tied to customary international law'.[673]

Furthermore, it can be deduced that even if the Cairn Energy,[674] Vodafone[675] and Nissan[676] cases were brought about after the 2015 Model BIT reform, their outcomes would not have changed.[677] While the decisions of these recent cases placed an emphasis on the fact that international tribunals should consider domestic law and respect domestic

[668] EU – Vietnam IPA, art 3.42(2)-(3))
[669] Rudolf Dolzer and Cristoph Schreuer, Principles of International Investment Law (2nd edn, Oxford University Press 2012) 77.

[670] Singh (n 52).
[671] ibid.
[672] Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India (PCA Case No. 2016-7) (21 December 2020) (paras 1006,1753)
[673] Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India (PCA Case No. 2016-7) (21 December 2020) (para 1731)
[674] Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India (PCA Case No. 2016-7) (21 December 2020)
[675] Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016-35, Award (25 September 2020)
[676] Nissan Motor Co., Ltd. v. Republic of India, PCA Case No. 2017-37, Award (29 April 2019)
[677] Singh (n 52).

interpretations, the tribunal evaluations suggested that the problems within these cases were unique and there were no previous references of Indian law beyond considering such issues as incidental matters.[678] Therefore, this thesis argues that the recent 2015 amendment is not sustainable as it is one-sided in favour of the host state and cannot provide a permanent solution for India.

Another noticeable change that the 2015 Indian model BIT introduced is the exhaustion of local remedies prior to international arbitration.[679] The concept of local remedies came from a long-standing principle of customary overseas law and contemporary international law. However, the purpose has been changed and the use of this principle has taken many different forms in the modern BIT agreements.[680] According to the 2015 Model BIT, foreign investors are required to exhaust local remedies for a period of five years prior to overseas arbitration. Once the five years are completed without reaching a satisfactory resolution, foreign investors can then start the arbitral process by issuing a notice of dispute on the multitude state[681]. This could extend for another six weeks where additional efforts are expected to be made to resolve such disputes through alternative dispute resolution mechanisms such as negotiation, consultation, and any other third-party procedures. In the event that the six weeks lapse without reaching a settlement, the investor will then be able to submit a claim before arbitration if other conditions are met:[682] Firstly, no more than six years have passed from the day where the investor first had knowledge or ought to have acquired knowledge about the matter in question[683]; secondly, no more than twelve months have elapsed from the conclusion of domestic proceedings[684]; thirdly, investors must provide ninety days' notice to the host state (called notice of arbitration) before commencing the

[678] ibid.
[679] Ranjan (n 13).
[680] ibid.
[681] Republic of India (n 432), article 15 (4).
[682] ibid, article 15 (5).
[683] ibid, article 15 (5) (i).
[684] ibid, article15 (5) (ii).

arbitration process[685]; fourthly, investors have to waive, 'the appropriate to start and go on... any proceedings under the household regulations of the multitude state[686]'.

This process can be better understood by an example scenario of assuming that a dispute arises between India and a UK investor in 2020. As a first step, the UK investor must submit the claim within the domestic courts within one year of that knowledge. Next, the investor files the dispute on the 1st April 2020 after which the investor must rely on national treatment and local remedies for five years. This means that if the foreign investor feels that national treatment and local remedies are not fair and are thus unsatisfied, they will have to wait until April 2025 to be able to qualify for the next step. In April 2025, the UK investor would qualify to serve a notice of dispute, but once the notice of dispute is served, the investor would then be given another six weeks until 15th June 2025 to resolve the disputes through alternative dispute resolutions such as meaningful negotiation, consultation and other third-party procedures. If the UK investor failed to find a satisfactory solution within this time period, they would be able to proceed to the next step of serving ninety days' notice of arbitration to the host state. Taking this long process and time into account, it can be concluded that the UK investor may have a valid arbitration claim by 15th September 2025. However, the UK investor must remember that there is a time limitation of twelve months, starting from the date of conclusion of the domestic proceedings in April 2025. This means that the UK investor would have seven and a half months to file an international arbitration claim.[687]

These additions to the 2015 Indian model BIT draw heavily from the Calvo doctrine,[688] as the model is predominantly designed in favour of the host state.[689] The provisions are intended to make it extremely difficult for foreign investors to sue the host

[685] ibid, article 15 (5) (v).
[686] ibid, article 15 (5) (iii).
[687] Joshua Paine (n 748).
[688] In 1860 Carlos Calvo pro nationalist in his study highlighted 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".
[689] Ranjan (n 13).

state by relying on ISDS mechanisms.[690] The essential requirement of five years exhaustion of local remedies for all substantive provisions in the Indian Model BIT demonstrates that the Indian government is proactive in favouring national interests over foreign investors' commercial interests. In recent arbitration decisions, tribunals have indicated that in order for a treaty violation to occur, parties must show the exhaustion of local remedies or a denial of justice.[691] In the Waste Management v. Mexico case, the tribunal states: '…in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim'[692]. Academics such as Schreuer argued that the Calvo doctrine[693] and prioritising national sovereignty over foreigners commercial interest is the best way forward[694], as this could be politically acceptable and further developed in the current backlash against the ISDS mechanism.[695]

This thesis argues that the requirement of exhaustion of local remedies may cause further problems as the domestic courts may become overwhelmed with a huge backlog of cases and potentially bring back the 'Italian torpedo'. The 'torpedo' is 'Italian' due to the notorious slowness of some Italian courts, to make sure that the alleged infringer will benefit from that slowness of Italian proceeding to choose the jurisdiction.[696] In the Italian courts, a decision on the matter of territory can use up to two years, with a further delay of the proceeding pending (and also quit) in a different Member State. This is seen in prominent ECJ decision of Gasser case.[697] Additionally, the strict time limitation, procedural complexity

[690] Singh (n 52).
[691] Ranjan and Anand (n 48).
[692] Waste Management v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Award, (30 April 2004) para 97.
[693] In 1860 Carlos Calvo pro nationalist in his study highlighted 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".
[694] Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 *Law & Prac. Int'l Cts. & Tribunals*.para 15.
[695] Sornarajah, *The International Law on Foreign Investment* (n 23).
[696] According to the Italian civil procedural code (article. 41), the decision on matter of jurisdiction, can straight be appealed in front of the Italian Corte di Cassazione (the last instance).
[697] Case C-116/02, Eric Gasser GmbH. v. MISAT Srl. [2003] ECR 14693. The ECJ stated that when an agreement between the parties is involved, it is always up to the court first seized to assess the validity and enforceability of the agreement and, in such a case, to decline jurisdiction: "finally, the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause, are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose". According to Jonathan Harris "the court first seised mechanism, the prevention of irreconcilable judgments and the doctrine of mutual trust were to be prized above the sanctity of commercial agreements. To the United Kingdom Government's

and unbalanced approach may backfire on India if foreign investors decide to move away from India and consider alternative options, knowing that the current 2015 model BIT does not provide fair and equitable treatment and is rebalanced in favour of the host state.[698]

6.2.13 Lessons Learnt From The 2015 Indian Model BIT

Based on the analysis above it can be noted that the new Indian model BIT 2015 departs from the Calvo doctrine position and ultimately seeks to ensure that FET provisions are interpreted in a way that allows host states the ability to leverage their interests in a favourable way. The inclusion of a list of unrealistically hard qualifying requirements to access ISDS system is not practically workable as it deprives of the rights of an investor to seek a fair quick and effective high standard dispute resolution. Furthermore, the mandatory requirement to exhaust local remedies can be very hard if not impossible given that the domestic judicial system in India is already overflowed with a huge backlog of cases.[699] Thus, India's claim of the success regarding the new 2015 model BIT to balance foreign investors interest with national interest cannot be justified as this highly ambitious reform intends to escape liability without mitigating risks.

This thesis argues that excluding provisions such as FET, FPS, MFT from the new 2015 model BIT has been a poor decision by the Indian government as this extremely pro state friendly model BIT has very little to offer for attracting foreign investors in India. Furthermore, it is evidenced that this sudden and radical shift have stating to negatively impact on Indian investment sector as since 2015 only three developing countries Kazakhstan, Brazil and Belarus have agreed to accept the terms and conditions new 2015

arguments that this would provide a commercially undesirable solution, the ECJ"s response was simply this: rules are rules, and this is the solution dictated by the Convention" in Jonathan Harris, 'The Brussels I Regulation and the Re-Emergence of the English Common Law' (2008), 4 The European Legal Forum, para 182.

[698] Singh (n 52).

[699] Law Commission of India, 'Arrears and Backlog: Creating Additional Judicial (Wo)Manpower' (2014) <https://lawcommissionofindia.nic.in/reports/Report_No.245.pdf> accessed 25 July 2021.

model BIT and negotiation with big multinational companies Monsanto[700] and Amazon[701] now delayed due to disagreement of the new 2015 Indian model BIT.[702]

Fifty-eight BIT claims were brought before ICSID against India by foreign investors until 2015.[703] More precisely, seven BIT claims were brought against India in 2016 alone with the majority of claims involving breach of FET provisions. Given that India was the most sued country in 2016 because it failed to safeguard its FET provisions, the first lesson that Bangladesh can learn is the importance of safeguarding their own FET provisions.

The second valuable lesson Bangladesh can learn from the 2015 Indian model BIT is regarding the complete removal of India's FET provisions, which resulted in India signing only three BITs with other countries since because the new Model BIT offers very few, if any, protections for foreign investors. This has had a major impact on India's economy because all major investors have been unwilling to sign a new BIT agreement with India. Bangladesh should take heed of this lesson when drafting their first Model BIT to avoid taking unnecessary risks to discourage foreign investors in the same way as India, as it may have a similar significant long-term impact on Bangladesh's growing economy. Bangladesh can, however, learn more positive lessons from India's reform of domestic law, such as the Indian Arbitration and Conciliation Reform Act 2015 and 2021, which demonstrate that India are making a positive shift towards institutional arbitration which provides opportunities for constant review of the existing law via an institutional council.

Another important lesson Bangladesh can learn from the Indian model BIT is the new requirement for foreign investors to seek exhaustion of local remedies for a minimum number of years before being able to apply for an international arbitration claim.

[700] Singh (n 52).
[701] Aditya Kalra, 'India Privately Took Amazon to Task over Insulting Flag Doormat | Reuters' *Reuters* (March 31, 2017) < http://in.reuters.com/article/amazon-com-india-politics-idINKBN17208G> accessed 25 July 2021.
[702] Ranjan (n 13).
[703] Sinha (n 124).

6.3 Lessons from Similar Developing Countries' Reforms

Having also faced an increasing number of claims brought by investors against the state, Morocco also introduced a revised model BIT In 2019[704] in the same way as India, although their approaches were quite different. When comparing the current Moroccan and Indian model BITs, it can be seen that India took an extraordinarily strict approach whereas Morocco took a more flexible and rational approach with a clear objective in mind.[705] Morocco decided not only to make essential amendments where needed but also to maintain their old policy of openness to international investment. A key difference is prioritization of sustainable development[706], aimed at striking a balance between national interest and investors' commercial interest[707]. Another key difference is the review process and time; while India rushed and only took a couple of years to review its 2019 model BIT provisions, Morocco took four years whilst also maintaining close consultation with UNCTAD before finalising its modern set of innovative provisions.[708]

Another significant difference is the standard of treatment provision. Unlike the 2015 Indian Model BIT, the revised 2019 Moroccan Model BIT provision contains a FET provision under its general treatment, which is newly worded. Article 4 of the Moroccan revised BIT 2019 states that,

> "1. [E]ach Contracting Party shall in its Territory accord to investments of investors of the other Contracting party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> Note: The Contracting Parties confirm their shared understanding that "customary international law" generally and as specifically referred to in this Article results from a

[704] The Kingdom of Morocco, 'Moroccan Model BIT' (*Investment Policy Hub*, 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download> accessed 24 July 2021.
[705] Tarcisio Gazzini, 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties ' (*Investment Treaty News (An online quarterly journal on investment law and policy from a sustainable development perspective)*, 2017) <https://www.iisd.org/system/files/publications/iisd-itn-september-2017-english.pdf> accessed 24 July 2021.
[706] ibid.
[707] ibid.
[708] ibid.

general and consistent practice of States that they follow from a sense of legal obligation. The Contracting Parties also confirm that the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of alien.

2. For greater certainty, a change of the regulation of a Contracting Party does not constitute by itself a violation of paragraph 1.

3. It is understood that:

(a) " fair and equitable treatment " includes the obligation of the Contracting parties to guarantee access to the courts of justice and administrative tribunals and not to deny justice in criminal, civil or administrative proceedings in accordance with the principle of due process of law.'[709]

In order for a country to achieve sustainable development objectives, safeguarding policy space is undoubtedly very important.[710] Morocco carefully considered its policy concerns before wording its revised provision. This can be seen in the wording of the revised 2019 FET provision in which the country reserves the right to regulate certain actions.[711] The scope of the FET provision has been limited in the revised version to stop its abuse. Furthermore, it clarifies the cause and explains as to what would constitute a violation of the FET provision. Morocco's 2019 revised model also explicitly made it clear that certain regulatory actions and other circumstances cannot be challenged under the scope of the FET provision, including legitimate policy matters such as public order, public health and environmental issues.[712] Although the country has only signed two new BITs with Brazil and Japan in 2020, the recent reform of the 2019 Moroccan model BIT has been considered an example of good practice for many countries who are currently struggling with the BIT and

[709] The Kingdom of Morocco (n 661).
[710] Van Harten (n 5).
[711] Tarcisio Gazzini, 'Beyond Protection: The Role of the Home State in Modern Foreign Investment Law' [2021] *Public Actors in International Investment Law* 19.
[712] Garcia-Amador (n 84).

ISDS systems.[713] Currently, Morocco is negotiating with both Arab Regional Investment Agreement (ARIA) and Investment Protocol of the African Continental Free trade Agreement (AFCFTA) to update its chapter regarding International Investment. Scholars, such as Gazzini, stated that this new reform has great potential as it contains sustainable development features which bring equilibrium in the BIT.[714] Other developing countries can also use the new reformed Moroccan BIT 2019 as an example for reforming their own outdated BIT provisions.[715]

Moving away from international standards of FET provision to ambitious national treatment may not be ideal for many developing countries as it may have a significant impact on their economy.[716] Foreign investors may not feel safe to invest in a country where investment protections are considerably low and so countries who are struggling with their existing BITs and investment frameworks must find a pragmatic solution to update their BIT provisions.[717]

6.3.1 The New Look of Standard of Treatment

Another country who has also recently revised and adopted their Model BIT is the Netherlands,[718] with the aim to strike a balance between public policy and commercial interests.[719] The new 2019 Netherlands model BIT is considerably different from the old 2004 Netherlands model BIT.[720] The wording of the new 2019 model is carefully considered not only to add a series of restrictions to limit the scope of investors, but also to reduce the investors' privileges and deliberately make it harder for them to rely on investment protections.[721] The threshold qualifying requirement has been increased and, under the new

[713] Gazzini (n 668).
[714] Tarcisio Gazzini, 'Beyond Protection: The Role of the Home State in Modern Foreign Investment Law' [2021] *Public Actors in International Investment Law*,pp19-35.
[715] Tarcisio Gazzini (n 662).
[716] Mortimer and Nyombi (n 2).
[717] Singh (n 52).
[718] The Kingdom of the Netherlands, 'The Netherlands Model Investment Agreement' (*UNCTAD Investment Policy Hub*, 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> accessed 24 July 2021.
[719] Adam Marios Paschalidis and Nikos Lavranos, 'Comparative Analysis between the 2018 and 2004 Dutch Model Bilateral Investment Treaty Texts' (2019) 4 *European Investment Law and Arbitration Review Online* 89.
[720] ibid.
[721] ibid.

2019 model, investors are required to satisfy genuine and substantial company standards which links with Corporate Social Responsibility (CSR) in order to gain approval for receiving protection. If the company do not comply with CSR, their chances to receive compensation for expropriation may be reduced.[722] Finally, more procedural rules have been put in place which require investors to maintain certain deadlines.

The Netherlands' 2019 model BIT is considered to be one of the most advanced Model BITs in the world, due to its uniqueness of provisions and exclusive modern features, which have been meticulously drafted.[723] Wider provisions of other frameworks have been considered during the review process, including Free Trade Agreements (FTA), the EU Canada Comprehensive Economic and the Trade Agreements (CETA), the Court of Justice European Union (CJEU) landmark decision in the case Achma[724], as well as the European Commission's proposal for the establishment of an Investment Court System (ICS) as a substitute for the existing investor-state dispute settlement system (ISDS).[725] After taking everything into account, significantly stricter standard of treatment provisions for the new 2019 model BIT have been adopted in comparison with the previous 2004 model BIT.[726] Although India failed to incorporate the type of changes seen between The Netherlands' 2004 and 2019 model BIT in their Indian 2015 model BIT, consideration of these changes will help Bangladesh significantly in producing a strong, robust and sustainable standard of treatment provision when drafting their own model BIT.

6.3.2 Implications for Sustainable Development from the Moroccan and Netherlands' Standard of Treatment Reforms

Section 3 of the new Netherlands 2019 model BIT[727] contains two new provisions called sustainable development under Article 6 and Corporate Social Responsibility (CSR)

[722] ibid.
[723] Ranjan (n 13).
[724] Case 284/16 Slovak Republic v. Achmea EU:C:2018:158.<http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TXT&ancre> accessed 18 March 2021
[725] Paschalidis and Lavranos (n 676).
[726] ibid.
[727] The Kingdom of the Netherlands (n 675).

under Article 7, to address growing concerns regarding foreign investments and the ISDS system.[728] These provisions have been carefully worded to strike a balance between national interest and investors' commercial interests.[729] In this regard, a cross-reference can be brought between the Netherlands' 2019 model BIT and the Moroccan 2019 model BIT, which have both been considered as ground-breaking evolutions of model BITs in this generation.[730] To be more specific, while Article 19 of the Moroccan 2019 model BIT[731] provides provisions for health and safety, environment measures and labour rights, Article 21 further provides an exceptional provision on general security and public policy.[732] These articles were also adopted in The Netherlands' 2019 model BIT to provide states with more room to regulate and protect fundamental national interests under the banner of sustainable development.[733]

Article 6 of The Netherlands' 2019 model BIT provides provisions not only environmental and labour rights but also women's participation and contribution to economic activity for international investment.[734] Furthermore, Article 7 provides provisions for CSR. While Article 7 (2) and (3) expect investors to show due diligence on social and environmental matters prior to the start of the investment and voluntarily adopt, 'internationally recognised standards, guidelines and principles' on CSR, Article 7 (4) provides critical guidance on investors liability and states that investors shall be liable if their acts or decisions lead to significant damage in the environment or society as a whole.[735] This sustainable and responsible investment principle is also supported by Article 23 of The Netherlands' 2019 model BIT which not only sets out the standard of the behaviour of investors but also requires investors to abide by UN Guiding Principles on Business and Human Rights as well as OECD Guidelines for Multinational Enterprises.[736]

[728] Paschalidis and Lavranos (n 676) 89–123.
[729] ibid.
[730] Paschalidis and Lavranos (n 676).
[731] The Kingdom of Morocco (n 661).
[732] Gazzini (n 668).
[733] ibid.
[734] The Kingdom of the Netherlands (n 675).
[735] ibid.
[736] Paschalidis and Lavranos (n 676).

Section 4 of The Netherlands' 2019 model BIT[737] contains a few provisions under, 'non-discriminatory treatment' (Article 8) and 'treatment of investors and of covered treatments' (Article 9). In particular, Article 9 of the 2019 Netherlands model BIT predominantly covers 'the fair and equitable treatment (FET) provision'.[738] The wording and structure of this new 2019 FET provision is considerably different than the older generation, more traditional FET provision in 2004. [739]While Article 9 (1)[740] broadly defines the concept of the FET provision, Article 9 (2) provides an exclusive list of six potential breaches of the FET provision by the contracting parties, including denial of justice, fundamental breach of due process, arbitrariness, discrimination on wrongful grounds, abuse and, 'a breach of any further elements of the fair and equitable treatment obligation adopted by the Contracting Parties in accordance with paragraph 3 of this Article'.[741]

Furthermore, Articles 9 (3)[742] (4)[743] (5)[744] (6)[745] provide broader guidelines regarding the applicability of FET provisions and what might constitute a breach. The purpose of this elaboration and clarification was not only intended to limit the scope of the FET provision, but also to stop arbitral tribunals from making different broader or narrower interpretations of the FET provision.[746]

[737] The Kingdom of the Netherlands (n 675).
[738] ibid.
[739] Paschalidis and Lavranos (n 676).
[740] The Kingdom of the Netherlands (n 675).
[741] ibid.
[742] ibid, Article (3) The Contracting Parties shall, upon request of a Contracting Party, review the content of the obligation to provide fair and equitable treatment and may complement this list through a joint interpretative declaration within the meaning of Article 31, paragraph 3, sub a, of the Vienna Convention on the Law of Treaties.
[743] ibid, Article (4) When applying paragraph 2 of this Article, a Tribunal may take into account whether a Contracting Party made a specific representation to an investor to induce an investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Contracting Party subsequently frustrated.
[744] ibid, (5) When a Contracting Party has entered into a written commitment with investors of the other Contracting Party regarding a specific investment, that Contracting Party shall not, either itself or through an entity exercising governmental authority, breach the said commitment through the exercise of governmental authority in a way that causes loss or damage to the investor or its investment.
[745] ibid, (6) For greater certainty, a breach of another provision of this Agreement or of any other international agreement does not constitute a breach of this Article. In addition, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article.
[746] Paschalidis and Lavranos (n 676).

6.4 An Overview of the BIT Framework in the US

The current US 2012 model BIT[747] is considered to be the most powerful and successful BIT in the world, given that the US have been sued by a much smaller number of international investors compared with other countries.[748] This is not because the US have signed many of its BIT agreements with underdeveloped or developing nations, but because their 2012 model BIT[749] framework involves a complete package of different layers of protection for the US whilst positively contributing to the development of international investment law.[750] The US BIT programme started in the 1960's following European success.[751] Although the programme formally started in 1977, it took the US three years to complete its first model BIT in 1981. The programme is jointly run by the Department of State and the United States Trade Representative (USTR).[752] The US signed its first ever BIT with Panama In 1982 and since then have signed an additional forty-six BIT agreements to date, with thirty-nine of them in force.[753] All US model BITs include a FET provision. Given the ongoing dissatisfaction about FET provisions in other countries' BITs which are leading them to either leave ICSID or remove FET provisions from their model BITs, it is highly interesting to observe that the US is consistent with its approach and finding its provision to be comprehensive and extremely effective.[754] This thesis intends to investigate why the US FET provision appears to work better than other countries'. In order to understand the effectiveness of the US FET provision, this thesis will first analyse various wordings of the provision that has been used over the years to represent the FET provision. Next, it will consider and highlight key developments of the provisions and how these have been

[747] The United States of America, 'U.S. Model Bilateral Investment Treaty' (*UNCTAD Investment Policy Hub*, 2012) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2870/download> accessed 24 July 2021.
[748] Nam (n 60).
[749] See Appendix E: 2012 U.S. Model Bilateral Investment Treaty.
[750] Nam (n 60).
[751] Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (n 202).
[752] Nam (n 60).
[753] America (n 803).
[754] Nam (n 60).

executed before finally evaluating the main contributing factors to the success of the FET provision contained within the US model BIT.[755]

6.4.1 Origin of Minimum Standard of Treatment Provisions in US Model BITs

Although the wording of the FET provision has been updated and developed over time, it is noticeable that the positioning of the provision remains the same and still falls under the minimum standard of treatment principle.[756] This is not just because the principle of the minimum standard of treatment is popular in US, but more importantly because it is a concept of US origin, which emerged from the case of Neer.[757] In this case, the US represented the claimant Neer's family and sued Mexico for murdering an American national named Mr Neer. Although Mr Neer was brutally murdered by a Mexican national, the state failed to prosecute the suspected offenders, highlighting a lack of evidence. This led the US to file a compensation claim of $100,000.00 USD against the Mexican government for breaching international standards.[758]

Although the claim was unsuccessful, this case set a ground-breaking principle for the minimum standard of treatment. The commission stated that:

> '[T]he 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'.[759]

Since then, this principle has become an indispensable part of international agreements.[760] This has played into the evolution of US BITs in significant ways, as Table 4 below indicates.

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[755] America (n 803).
[756] Nam (n 60).
[757] L.F.H. Neer and Pauline E. Neer (USA) v. United Mexican States, 4 R.I.A.A. 60 (U.S.-Mex. Gen. Claims Comm'n Oct. 15, 1926), available at < http://legal.un.org/riaa/cases/vol_IV/60-66.pdf> accessed 25 July 2021.
[758] ibid.
[759] ibid.
[760] Subedi (n 70).

The US have updated their model three times since the introduction of its first US model BIT in 1984. Table 4 shows the different wordings between the various US model BITs over time, which are important to consider alongside their significant success in reducing the number of arbitration claims brought against them by foreign investors. Analysing the improvements and subsequent impact of these minimum standards of treatment and FET provisions is extremely important for indicating the most appropriate way forward for the drafting of Bangladesh's first ever model BIT.

Table 4. The Evolution of the Minimum Standard of Treatment and FET Provisions Under The US Model BIT

U.S Model BIT 1984	U.S Model BIT 1994	U.S Model BIT 2004	U.S Model BIT 2012
Minimum Standard of Treatment. Article II states, Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments	Minimum Standard of Treatment. Article II (3) (a) states, Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security and shall in no case accord treatment less favourable than that required by international law.	Minimum Standard of Treatment. Article 5 states, Minimum Standard of Treatment 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The	Minimum Standard of Treatment. Article 5: Minimum Standard of Treatment 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not

		obligation in paragraph 1 to provide: (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.	create additional substantive rights. The obligation in paragraph 1 to provide: (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

6.4.2 Minimum Standard of Treatment in the Pre 2004 Prototype US Model BIT

For the purpose of the minimum standard of treatment, the 1984 US model BIT stated that:

> '[I]nvestments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments'[761].

In summary, this standard provision provides a long list of principles that are expected to be protected and fairly treated, while further suggesting that the treatment must comply with international legal standards.[762] Although this provision initially received positive feedback and was considered to be a significant contribution to the development of subsequent US model BITs, this provision faced criticism shortly after its introduction, which claimed that the long list of protections were neither safeguarded nor practical. This eventually led to the 1994 US model BIT reform, with the core text of the substantive provisions being based on the North American Free Trade Agreements (NAFTA) now replaced by the United States-Mexico-Canada Agreement (USMCA) 2020.[763] Chapter 11 concerning investment of the United States-Mexico-Canada Agreement (USMCA) codified the fundamental elements of the 1994 minimum standard of treatment provision.[764] The provision states, "Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security and shall in no case accord treatment less favourable than that required by international law".[765] In essence, this provision guarantees FET and full protection of security to parties and reiterates that the standard of treatment should not be any less than that required by international law. While the 1994

[761] Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (n 202). Minimum standard of treatment of the US Model BIT 1984.
[762] ibid.
[763] Nam (n 60).
[764] ibid.
[765] Organization of American States (n 218).

provision seemed to be comprehensive, concerns arose regarding the vagueness of FET, full protection of security and the lack of states' policy power.[766] One of the main concerns was whether the broad FET concept could create additional substantive rights or not. Another concern was whether the interpretation of, 'full protection and security' would cover only police protection or extend to further protection such as from the army or special forces.[767]

In 2004, the Office of the United States Trade Representative (USTR) released a comprehensive new protype version of the model BIT that incorporated directives from Congress and existing BIT standards of protection to, 'improve investment climates, promote market-based economic reform, and strengthen the rule of law'[768]. Importantly, unlike previous model BITs, the 2004 prototype model BIT provided a set of very detailed provisions which were comprehensively drafted in order to protect the interest of its investors abroad.[769] This was absolutely necessary as many US investors had raised concerns about the, "potential security and economic impact of foreign investment following the September 11th attacks in 2001.[770] This led the US to introduce an investor friendly prototype model BIT in 2004. The highlighting features of the 2004 prototype model included an open and flexible definition of 'investment' and a new provision concerning environment matters which clearly stated that, 'treaty shall never prevent either party from taking appropriate measures for environmental concerns.'[771] Another noticeable change of the 2004 prototype model BIT was that it used Annexes to provide further clarifications to the provisions that were historically broad, vague and problematic, such as indirect expropriation and the minimum standard of treatment.[772] Other vital changes included selection of wordings that were particularly aimed

[766] Nam (n 60).
[767] Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (n 202).
[768] Office of the United States Trade Representative, 'United States Concludes Review of Model Bilateral Investment Treaty | United States Trade Representative' (*Office of the United States Trade Representative*, 2012) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/april/united-states-concludes-review-model-bilateral-inves> accessed 25 July 2021.
[769] Laura Henry, 'Investment Agreement Claims under the 2004 Model US Bit: A Challenge for State Police Powers' (2009) 31 *U. Pa. J. Int'l L.* 935.
[770] Martin A Weiss and Shayerah Ilias, 'The U.S. Bilateral Investment Treaty Program: An Overview' (*The U.S. Bilateral Investment Treaty Program and Foreign Direct Investment Flows*, 2013) 1.
[771] The US Model BIT 2004, article 12 ("Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.").
[772] Weiss and Ilias (n 826).

at protecting the host state's regulatory interests.[773] It is important to note that most members of ICSID had expressed deep concerns about ISDS being one-sided and too favourable to the foreign investor before this point, as it did not provide any options for accessing its sovereign regulatory powers.[774] Giving the state some space to regulate policy-oriented matters might perhaps have been the first step in balancing foreign investors' commercial interests with the host state's national interests.[775]

Moreover, Article 5 of the 2004 US model BIT provides,

> '[E]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum to be accorded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights…[776].

Additionally, at the same time, the US FTAs provided an interpretation of the provision confirming the, 'customary international law' as:

> '…the general and consistent practice of States that they follow from a sense of legal obligation… the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights band interests of aliens.'[777]

[773] Henry (n 825).
[774] Nam (n 60).
[775] ibid.
[776] United States of America, 'The US Model BIT 2004', article (5) <https://ustr.gov/sites/default/files/U.S. model BIT.pdf> accessed 25 July 2021.
[777] Nam (n 60).

This confirmation clarifies that the standard is not a conventional standard, but rather a customary international law standard.[778]

There is no doubt that the 2004 prototype model BIT is significantly different from the previous 1994 model BIT. Although the prototype 2004 model BIT brought a number of changes in the revised provision, landmark changes were the inclusion of customary international law and clarification of the concepts of FET and full protection and security.[779] Article 5 (2) of the prototype 2004 US model BIT clarifies that both FET and full protection and security concepts cannot create further substantive rights.[780] The amendments also confirm that full protection and security only covers police protection under customary international law.[781]

In 2009, the US started its periodic review of the 2004 model BIT and asked different stakeholders for their expert opinions, including the Advisory Committee on International Economic Policy (ACIEP), U.S. Congress, environmental organizations, labour groups, business groups, trade associations, academia, the general public, and investment organisations.[782] After a thorough review, the reform committee discussed a number of issues and submitted that the MST provision within the 2004 model was ambiguous and too broad and thus needed further clarifications[783]. They proposed that the MST provision could be reformed, 'either by codifying BIT-related customary international law or by abandoning reference to customary international law altogether in the BIT.'[784] It was highlighted that Article 3 of the 2004 model BIT which demands that states shall treat investors, 'no less favorable than that it accords, in like circumstances, to its own investors with respect to the

[778] Weiss and Ilias (n 826).
[779] Nam (n 60).
[780] United States of America (n 832).
[781] ibid.
[782] US Department of State, 'Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty' (*The US Department of State*, September 2009) <https://2009-2017.state.gov/e/eb/rls/othr/2009/131098.htm> accessed 24 July 2021.
[783] United States of America (n 832).
[784] ibid.

establishment ... or other disposition of investments in its territory',[785] can create uncertainties regarding unique investments as it opposed the term of, 'like circumstances.'[786]

Furthermore, the committee emphasised that the requirement of FET under article 5 of the 2004 model which was governed by the 'minimum standard treatment'[787] was vague and problematic, through providing a supportive reference from one of the world's leading scholars Mann, who argued that the FET concept is ambiguous, broad and complex.[788] Another scholar Professor Muchilinski stated that, 'the 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…'[789]

Other recommendations included expansion of the 'investment' definition to protect investors interests abroad,[790] by forming a transparency council which could advise investors regarding business negotiations and host states' rules and processes[791] plus adding a new provision for active participation so that investors could discuss the effects of regulatory amendments with host states.[792]

6.4.3 Minimum Standard of Treatment in the Post 2004 Prototype US Model BIT

After taking three years to complete the review process, the US introduced its last revised model BIT in 2012.[793] The revised 2012 model BIT made no changes to the substantive provisions including the minimum standard of treatment. Despite some proposals to limit the FET provision, the US administrator decided to reject them and left the provision unchanged to be the same as the previous 2004 model.[794] However, four key changes were made to the 2012 model BIT: first, a new transparency requirement was included under article 11 of the model BIT which allows investors to participate and discuss the effects of

[785] United States of America (n 674), article (3).
[786] ibid.
[787] ibid, article (5).
[788] Mann (n 106).
[789] Peter Muchlinski, *Multinational Enterprises and The Law* (1st edn, Oxford University Press 1995) 625.
[790] Weiss and Ilias (n 826).
[791] ibid.
[792] ibid.
[793] America (n 803).
[794] Weiss and Ilias (n 826).

regulatory amendments with the host state. The new provision also provides the host state with an opportunity to re-evaluate proposed changes if it contradicts with the BIT agreement, allowing both parties to avoid future disputes through active participation.[795] Second, the 2012 revised model BIT expanded the scope of labour and environmental obligations by including a definition of 'environmental law' and extending the definition of 'labour law.'[796] The provision further adopted a very important new clause that gives the host state the power to exercise regulatory discretion and make certain decisions on two conditions: 1) that it has to be reasonable and 2) it must be executed in good faith (bona fide).[797] Third, the 2012 revised model BIT introduced a few key changes designed to address investments in countries with state-led economies; these changes include a new performance clause requirement that hinders host states from the need to use domestic technology.[798] The new provision also allows investors and other parties to take part in technological developments and other similar standards in a non-discriminatory manner. It also confirms that, 'the obligations under the model BIT entirely cover state-owned enterprises, and other entities or persons that act under delegated governmental authority.'[799] Forth, the 2012 revised model BIT brought a small but powerful change to the definition of, 'territory of a Party'. The new provision explicitly states the scope of the territorial sea and high sea areas so that, 'the party can exercise sovereign rights or jurisdiction under customary international law'.[800] This amendment is intended to support investments that are related to offshore oil and gas projects and fish farms.

Although it is evidenced that the US have ignored some recommendations from the 2012 reform advisory committee,[801] given that the key substantive provision of 2012 model BIT including the standard of treatment and FET provision remains unchanged from the previous 2004 model, this thesis argues that this is perhaps deliberate because striking a

[795] Nam (n 60).
[796] ibid.
[797] ibid.
[798] ibid.
[799] ibid.
[800] ibid.
[801] Weiss and Ilias (n 826).

balance between investors' interests and host states' interests is never so easy and thus the US relies on its institutional strength to resolve issues with conflicting interests.[802]

Since the introduction of their first model BIT in 1984, the USA has had a total of twenty cases[803] brought against the State by foreign investors to date. All of these cases were brought forward on grounds of fair and equitable treatment, indirect expropriation, national treatment, most favoured nation treatment and denial of justice.[804] Ten out of twenty cases were decided in favour of the state, three cases are still pending, three cases were discontinued, and four cases were settled before a decision regarding liability.[805] Although there were no cases filed between 1984 – 1998[806], seven cases were filed between 1994 – 2003 after the first model BIT amendment in 1994; one discontinued, one settled and five decided in favour of the state[807]. A further eight cases were filed between 2004 – 2011 following the second model BIT amendment in 2004; two discontinued, two settled and four decided in favour of the state[808]. Finally, a further five cases have been filed between 2012 to date, following the latest third amendment to the model BIT in 2012; one settled, three pending and one decided in favour of the state[809]. From this, it can be seen that the USA's strength of model BIT reform is exceptional when compared with other countries such as Ecuador, Venezuela and Bolivia, whose rapid growth of cases since 2012 have caused them to leave ICSID.[810]

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[802] Nam (n 60).
[803]UNCTAD, 'International Investment Agreements Navigator' (Investment Policy Hub) < https://investmentpolicy.unctad.org/investment-dispute-settlement/country/223/united-states-of-america/respondent > accessed 25 July 2021.
[804] ibid.
[805] ibid.
[806] UNCTAD, 'International Investment Agreements Navigator' (Investment Policy Hub) < https://investmentpolicy.unctad.org/investment-dispute-settlement/country/223/united-states-of-america/respondent > accessed 25 July 2021.
[807] UNCTAD, 'International Investment Agreements Navigator' (Investment Policy Hub, UNCTAD) < https://investmentpolicy.unctad.org/investment-dispute-settlement/country/223/united-states-of-america/respondent > accessed 25 July 2021.
[808] UNCTAD, 'International Investment Agreements Navigator' (Investment Policy Hub) < https://investmentpolicy.unctad.org/investment-dispute-settlement/country/223/united-states-of-america/respondent > accessed 25 July 2021
[809] ibid.
[810] Chrispas Nyombi & Tom Mortimer (n 10).

6.4.4 US Domestic Legal Framework for Foreign Investment

The 1925 Federal Arbitration Act (FAA)[811] is the key domestic legislation that governs both domestic and international arbitration in the US. While chapter one contains general provisions regarding domestic arbitration between US nationals via US code title nine sections one to sixteen, chapters two and three of the FAA govern international arbitration.[812] It is worth noting that the rules that are codified as chapter two and three are the rules that came from the New York and Inter-American convention, also known as Panama convention.[813] While all eight sections of chapter two (201-208) provide guidance regarding conventions on the Recognition and Enforcement of Foreign Arbitral Awards, the other seven sections of chapter three (301-307) provide further guidance about inter-American conventions on international commercial arbitration.[814]

Although it is true that the FAA is historically old and not fully based on the UNCITRAL Model Law, it contains a set of provisions including the principles of party autonomy, the enforcement of arbitration agreements and limited judicial review of arbitral awards which support the UNCITRAL Model Law.[815] Despite some similarities between FAA and the UNCITRAL Model Law, there are a few significant differences.[816] One of the key differences are provisions of the UNCITRAL Model Law, which are more detailed and clearer than the FAA provisions.[817] This makes a significant difference to arbitration procedures as unclear, short provisions can give rise to issues that may require further clarifications from either arbitrators or applicable institutional rules.[818] The other difference is the mechanism that sets aside arbitration awards. While the UNCITRAL Model Law[819] does not allow any national courts to amend or change arbitration awards, the FAA does provide the US courts with power to modify or correct arbitration awards in certain circumstances. Bangladesh can

[811] The Federal Arbitration Act 1925.
[812] ibid.
[813] Nam (n 60).
[814] The Federal Arbitration Act 1925.
[815] United Nations, 'UNCITRAL Model Law on International Commercial Arbitration ' (n 350).
[816] ibid.
[817] Weiss and Ilias (n 826).
[818] Nam (n 60).
[819] United Nations, 'UNCITRAL Model Law on International Commercial Arbitration ' (n 350).

learn from this US domestic act to reform and improve the provisions in its AA 2001 in a way that provides similar benefits for providing Bangladeshi courts with additional power to modify or correct arbitration awards in certain circumstances.

6.4.5 The US Arbitration Institutions

The American Arbitration Association (AAA) is the one of the largest and arguably strongest arbitration institutions in the world, with a track record of 6,658,645 administrated cases until today.[820] The AAA was formed in 1926 soon after the enactment of the US Federal Arbitration Act in 1925, with an aim to reduce the pressure on courts and promote arbitration to resolve disputes out-of-court.[821] The AAA has various departments and branches which work independently, not only to improve parties' arbitration experience but also to enhance arbitration rules to make the system more effective. The International Centre for Dispute Resolution (ICDR) is a key branch of the AAA that offers a range of unique services for innovative Alternative Dispute Resolution (ADR). ICDR services include the international dispute procedure, party centred resolution services, ICDR roster for arbitrators and meditators, advanced administration services and local expertise around the world with 26+ US based offices and a strong global network of cooperative agreements with 80+ countries in the world.[822]

6.4.6 The US Council

Another key department of the AAA is the AAA-ICDR Council, which consists of experts including 90+ business executives, attorneys, in-house counsel, retired judges, law professors, industry professionals, arbitrators and mediators.[823] The council work towards a common mission to improve the methods of fair, effective and fast dispute resolution through education, technology and solution-oriented services. The main objective of the council is to

[820] American Arbitration Association, 'Virtual - Cases Statistics' <https://www.adr.org/> accessed 24 July 2021.
[821] ibid.
[822] ibid.
[823] American Arbitration Association, 'AAA-ICDR Council ' (*American Arbitration Association*) <https://go.adr.org/AAA-ICDR-Council.html?utm_source=website-adr&utm_medium=mosaic&utm_campaign=website-aaa-icdr-council&_ga=2.139747571.1380300597.1622921385-1169892617.1622921385> accessed 25 July 2021.

foster measures and expert guidance that not only reduce or resolve conflicts, but also provide easy access to justice. The Council is run by various committees including the Arbitrator Committee, Diversity and Inclusion Committee, Healthcare Committee, International Committee, Labour/Management Committee, Large Case Committee, Mediation Committee and National Construction Dispute Resolution Committee (NCDRC), Nominating and Governance Committee, Budget and Finance Committee, Law and Practice Committee and the AAA-ICDR Foundation Committee.[824] While some committees only focus on Alternative Dispute Resolution (ADR) areas and topics, particularly examining ways to develop and promote best practices, others focus on operations and governance matters. Since the formation of the council, the ADR committees have carried out a significant amount of work to improve the arbitration system. Some exemplary work includes the, "creation of Best Practice Guides (BPG) in a number of areas, including controlling e-discovery burdens, strategies for dispositive motions, use of experts in arbitration and preliminary hearings, assisting in the creation and drafting of unique sets of rules for specific industries and/or case types, recommendations with major ADR rule revisions, assisting in the development of new service options and Initiatives and best practice guidelines for arbitrators in various areas."[825]

There are three other major US-arbitral institutions, including the Judicial Arbitration and Mediation Services (JAMS) which is another big US-based institution that handles an average of 18000 cases annually.[826] JAMS have twenty-eight domestic centres and one international arbitration centre worldwide. Although the institution was formed 1979, it became the world's biggest ADR provider due to its cost effective, efficient and fast service. Alongside mainstream ADR services, JAMS run various Pro Bono projects and activities on social responsibility and sustainability. The International Institute for Conflict Prevention and Resolution (CPR) is another US-based prominent arbitration institution founded in 1977, having had more than 4000 companies and 1500 law firms sign up date. Along with the

[824] ibid.
[825] American Arbitration Association, 'AAA-ICDR Council ' <https://go.adr.org/AAA-ICDR-Council.html?utm_source=website-adr&utm_medium=mosaic&utm_campaign=website-aaa-icdr-council&_ga=2.139747571.1380300597.1622921385-1169892617.1622921385> accessed 25 July 2021.
[826] Judicial Arbitration and Mediation Services (JAMS) <https://www.jamsadr.com/about/ > accessed on 20 June 2021

domestic centre, CPR collaborates with other international institutions, companies and law firms in Europe, Canada, Brazil and Latin America, not only to prevent conflicts but also to develop a best practice guide for the ADR mechanism.[827] Another institution that works for effective International commercial dispute resolution is the Inter-American Commercial Arbitration Commission (IACAC). IACAC meets every two years to review and discuss effective settlement resolutions for international commercial disputes.[828]

6.4.7 Lessons Learnt from The US BIT Framework

The US currently has the strongest model BIT in the world with the fewest arbitration claims against them. Key factors in the strength of their model BIT includes extensive safeguarding of FET provisions and a strong arbitration institution, particularly the AAA which is designed to support, review and improve international commercial arbitration in the US. Bangladesh can learn a valuable lesson from the US's strongly drafted FET provisions and the establishment of their specialised arbitration institution which could also offer the facility of a Council to support, review and develop its BIT practises.

Some of the Council's main activities include the creation of Best Practice Guides (BPG) in a number of areas, including controlling e-discovery burdens, strategies for dispositive motions, use of experts in arbitration and preliminary hearings, assisting in the creation and drafting of unique sets of rules for specific industries and/or case types, recommendations with major ADR rule revisions, assisting in the development of new service options and initiatives and best practice guidelines for arbitrators in various areas. Bangladesh can learn from these activities of the US Council to create a robust Council of their own which will not only help them to develop best practices but also keep them up to date with the highest international standards for a model BIT.

[827] JAMS, 'Local Solutions. Global Reach. Arbitration Institution' <https://www.jamsadr.com/about/> accessed 25 July 2021.
[828] Inter-American Commercial Arbitration Commission, 'Union of International Associations' (*Inter-American Commercial Arbitration Commission*, 2013) <https://uia.org/s/or/en/1100004109> accessed 24 July 2021.

6.5 Conclusion

This chapter has demonstrated two different approaches to FET provisions within the model BITs of India and the US. While India has taken a more cut-throat approach to resolve their significant problem of rising arbitration disputes by entirely removing their FET provisions, the US have taken a more balanced approach towards safeguarding their FET provisions which has arguably been much more successful in continuing to attract foreign investment whilst also protecting their own national interests.

This thesis argues that while the Indian approach towards removing FET provisions may not be ideal for Bangladesh, there are still other positive lessons that can be learnt from India's recent reform of domestic law and shift towards a beneficial institutional arbitration approach. The US approach towards FET provisions may be much more suitable for Bangladesh to maintain a balance between attracting foreign investment whilst also protecting their national interests. However, to do this, Bangladesh need to make sure that they create a strong arbitration institution including a council to review and improve their arbitration practises. The establishment of such a council would not only help Bangladesh to draft their first ever model BIT, but also help to review, monitor and keep their model BIT up to date with ever improving international standards.

Based on the lessons learnt throughout this chapter in combination with findings from previous chapters, the final chapter will set out various pragmatic recommendations for safeguarding FET provisions to address the central argument of reforming and rebalancing the FET standard in future Bangladeshi BITs.

Chapter 7: Recommendations and Concluding Remarks

7.1 Introduction

In this concluding chapter, pragmatic recommendations are proposed to address the thesis' central argument that there is pressing need for restructuring and safeguarding the FET standard in future Bangladeshi BITs and the foreign investment framework. Chapter one introduced the background of the study in addition to research questions, aims and contribution to the research; Chapter two provided context by describing the historical evolution of FET provisions in BITs, theoretical discussions analysing the merits and drawbacks of incorporating FET provisions and an investigation into potential attributes and emerging concerns pertaining to conflicts of interest between host states and foreign investors; Chapter three presented methodological justifications for several analyses that were conducted in subsequent chapters; chapters four, five and six presented a series of in-depth analyses aimed at formulating practical, strong and viable recommendations for enhancing future FET provisions for Bangladesh in chapter seven.

Chapters four, five and six detailed examinations of the wording and layers of protections of existing FET provisions within Bangladeshi BITs, conducted thorough analyses of key case studies involving claims of FET breaches by foreign investors against Bangladesh, and carried out a comparative study of the formulation and evolution of FET provisions in BIT agreements of India and the US alongside Bangladesh. The purpose of this was to serve as the foundation for proposing tangible and effective improvements to existing FET provisions in Bangladeshi BITs, with the aim of better balancing issues of national sovereignty with those of foreign investors. The ultimate goal was to foster a more favourable investment climate in Bangladesh, promoting cooperation and benefiting all stakeholders involved.

As highlighted in chapter four, Bangladesh does not have a model BIT and its FET provisions in various existing BIT agreements are inconsistent and poorly drafted, leaving the country's foreign investment mechanism extremely vulnerable. The findings of this chapter

uncovered pivotal insights into optimising Bangladesh's BITs. This thesis argues that the amalgamation of safeguarded 'FET attached to international law' and 'FET attached to the minimum standard of treatment and customary international law' emerges as a more viable option for Bangladesh than other provisions relating to either strict or open-ended and unsafeguarded FET.

Based on these findings in chapter four, the recommendations presented in this chapter necessitate the revision of their existing FET provisions through the development of Bangladesh's inaugural model BIT. The formulation of the model BIT should be subject to meticulous consideration to mitigate the potential risk of foreign investors initiating legal actions against Bangladesh for minor infractions of the FET provision. Adequate safeguarding measures must be integrated into the wording of the model BIT to achieve this objective.

Chapter five's case studies, Saipem, Niko, Scimitar, Chevron and NEPC, highlighted the tribunals' interpretations of FET standards within policy, socio-political and environmental contexts in Bangladesh. The analyses revealed that prevailing FET provisions in existing BITs did not effectively serve Bangladesh's interests. These provisions lacked clarity, offering overly generous and divergent protections to foreign investors. Weakly drafted, open-ended FET provisions led to varying interpretations by tribunals, favouring foreign investors filing claims for unfavourable treatment and breaches of FET. Arbitral interpretations overlooked Bangladesh's specific circumstances and disregarded instances of bribery and corruption. Moreover, arbitral tribunals lacked balance, disregarding crucial factors such as Bangladesh's resource limitations and administrative capabilities.

Chapter five also emphasised that foreign investors have avoided accountability for environmental impacts, bypassing corporate social responsibility. Neglecting local considerations and failing to exhaust local remedies, these investors turned to ICSID for dispute resolution in the first instance, undermining Bangladesh’s internal dispute resolution mechanisms. Furthermore, contract renewals lacked thoroughness, enabling foreign

investors to assert FET breach claims despite their negligence and significant contributions to environmental damage and losses.

In light of these challenges, the recommendations proposed in this chapter aim to address these issues and restrict the scope of tribunals' interpretations. By doing so, the goal is to minimise instances where foreign investors can claim breaches of FET for minor inconveniences, to better balance national sovereignty with foreign investors' interests.

Chapter six presented a critical analysis regarding the safeguarding of the FET provision in the US and Indian model BITs. It was evident that both countries adopted different approaches to preserve their FET provisions, when aiming to balance national sovereignty with the interests of foreign investors. India decided to remove the FET provision entirely from its 2015 model BIT, citing concerns that it was broad, vague, and problematic, providing excessive protection to foreign investors. In its place, India introduced national treatment, which led to challenges in promoting foreign investment within the country. In contrast, the US chose to retain its FET provisions in their 2012 model BIT, considering them effective in striking a balance between the interests of investors and the host state. The US pursued this approach by leveraging its institutional strength and implementing regular reviews of the model BIT. Consequently, the US successfully attracted foreign investment while safeguarding its national sovereignty. In summary, India's more extreme approach of eliminating FET provisions struggled to attract foreign investment, whereas the US's balanced approach achieved success in attracting foreign investors without compromising national sovereignty.

Taking the findings of chapter six into account, the recommendations proposed in this chapter should consider that while India's approach of removing FET provisions may not be ideal for Bangladesh, there were valuable lessons to be learned from India's recent domestic law reform and shift towards institutional arbitration. The US approach was considered more suitable for Bangladesh to strike a balance between attracting foreign investment and protecting national interests. However, achieving this will require considerations for creating

a robust arbitration institution with a council tasked to develop and review a model BIT, safeguarded FET provisions within the model BIT, reviews of the existing BIT framework and reform of domestic laws regarding foreign investment in Bangladesh.

This final chapter draws upon all of the findings of these previous chapters to propose several recommendations for improving future FET provisions in Bangladeshi BITs. It proposes pragmatic recommendations for all constitutional, statutory and treaty based foreign investment frameworks to ensure that the Bangladeshi investment mechanism is up to date and in keeping with the demands of the modern era. The recommendations are not only intended to facilitate the Bangladeshi foreign investment mechanism but also contribute to other developing countries' foreign investment mechanisms around the world.

7.2 An Independent Institution and a Council

Based on the thorough investigations carried out in chapters four, five and six, it can be seen that the Bangladeshi foreign investment framework, and particularly BIT framework, is inconsistent, outdated and poorly drafted. Thus, the first recommendation is to create a new, independent institution for Bangladesh with a council tasked to develop and review an inaugural model BIT with safeguarded FET provision.

Chapter six discussed how the US have managed to effectively use its robust AAA institution to strengthen their international investment framework. Similarly, Bangladesh can establish an institution such as a Bangladeshi Arbitration Association (BAA) to monitor, review and develop their international investment framework.

Alongside other departments, the institution must create a specialised department called a council. This council should consist of experts from various national and international business executives, attorneys, in-house councils, retired high court and supreme court judges, legal scholars, industry professionals, human rights representatives, environmental activists, arbitrators and mediators.

The council should set a vision and mission not only to improve the methods of fair, effective and fast dispute resolution through education, technology and solution-oriented services to improve parties' arbitration experience but also to enhance arbitration and other ADR rules to make the system more effective for the future. The key objective of the council should be to focus on fostering measures that are guided by experts in the field, aiming not only to reduce the number of conflicts but also provide easy access to justice.

The Council can be governed by various committees including the Arbitrator Committee, Equality, Diversity and Inclusion Committee, Healthcare Committee, International Committee, Labour/Management Committee, Large Case Committee, Human Rights Committee, Nominating and Governance Committee, Budget and Finance Committee, Law and Practice Committee and the BAA Foundation Committee. While some committees should focus on arbitration and other ADR areas and topics, particularly examining ways to develop and promote best practices, others should focus on operations and governance matters of the council.

The first task of the council will be to develop an inaugural model BIT with safeguarded FET provision. The council will then be required to schedule mandatory reviews of this model BIT each year, alongside producing an annual report for submission to the institution. As part of the annual review, they will be expected to produce a best practise guide and also consistently monitor, review and develop this guide to improve the efficiency of the model BIT.

7.2.1 Setting Up An Expert Department to Negotiate Future BITs

Chapters four and five of this thesis have not only provided evidence that the existing provisions of Bangladeshi BITs, and particularly FET, are not only inconsistent and drafted in a haphazard manner but also found that the treaty negotiation process was poor with many treaties being signed under a heavy influence of corruption and political motives. Despite poor negotiation concerns and an increasing number of claims regarding such treaties, Bangladesh have failed to address the issues and improve its several decades old approach.

To address this persistent and prolonged problem, this thesis recommends creating an expert department that shall consist of highly qualified experts and government officials to make processes to BITs more effective and robust.

Before signing any new BIT agreements or renewing old BIT agreements, it is recommended that Bangladesh take more considerable care when discussing and negotiating the provisions of the BIT agreements with other countries. An expert BIT department must check and balance whether the provisions are compatible for balancing national sovereignty with commercial interests. While the new BIT agreements can be negotiated under the new model BIT provisions, the old agreement provisions need to be either cancelled or amended in line with the model BIT to avoid discrepancies. The same procedure can be followed when negotiating the signing of other international investment agreements, such as foreign direct investments.

7.3 Bangladeshi Model BIT

Bangladesh can encourage the ministry of trade and finance to collaborate with the new BAA council, to create a comprehensive model BIT. It is important to highlight that, unlike the existing provisions of the Bangladeshi BIT agreements, this model BIT is expected to be very detailed including explanatory notes when explaining the standard of protection provisions to avoid future extended interpretation from arbitral tribunals.

Once the draft model BIT is complete, it must be published on government websites and the government should invite both national and international people from all walks of life to review the draft and put forward their comments, suggestions and amendments. Once the process is complete, the draft should be presented before the house of parliament for parliamentary assent. A set Bangladeshi model BIT will not only eliminate the uncertainties of existing and future BIT provisions, but also eliminate future allegations regarding bribe, malpractice and favouritism. It is further suggested that Bangladesh should adopt a vigilant approach towards its model BITs. These approaches are discussed below.

7.3.1 Definition of Investment

The definition of investment has been subjected to debate for a long period of time in international investment law. Having considered various definitions that have recently been adopted in modern model BITs including the US model BIT, Indian model BIT,[829] and other recent model BITs, this thesis proposes the following recommendations. This thesis proposes that Bangladesh needs to replace broad definitions of investment with 'enterprise-based' definitions.

To qualify for investment protection, an investor must satisfy that they are a valid investor having made previous substantial investments. While it is seen that investment includes an enterprise; shares, stock, and other forms of equity participation in an enterprise; bonds, debentures, other debt instruments, and loans; futures, options, and other derivatives; turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; intellectual property rights; licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges, it is proposed that for greater certainty Bangladeshi model BIT includes just 'enterprise' which can be further explained as any legal entity constituted, organised and operated in compliance with the law of the host state, including any company, corporation, limited liability partnership or a joint venture; and having its management and real and substantial business operations in the territory of the host state.

For absolute certainty, for the purpose of the definition, 'real and substantial business operations' must not only make a substantial and long-term commitment of capital in the host state and engage with a substantial number of employees in the territory of the host state, but it must also take risk and make substantial contributions to the development of the host

[829] Discussed in chapter six.

state through its operations along with a transfer of technological support in accordance with the law of the host state.

The, 'real and substantial business operations' must not include objectives, strategies or arrangements, the main purpose or one of the main purposes of which is to avoid tax liabilities and the passive holding of stock, securities, land, or other property; or the ownership or leasing of real or personal property used in a trade or business. In order for an investment definition to satisfy, parties must fulfil the abovementioned criteria. Partial satisfaction will not be sufficient to qualify as a substantial business investment. Furthermore, this thesis suggests that although arbitral tribunals are keen to use the popular Salini[830] test[831] in line with article 25 of the ICSID convention[832] to define investment[833], it is possible to adopt this test in Bangladeshi BITs to define investment if it corresponds with the national law of the host state and complies with public policy.

7.3.2 Dispute Resolution Provision

To avoid future ambiguity, this thesis recommends that the choice of law for dispute resolutions can be the same as choice of jurisdiction for settling a dispute in an international commercial contract. However, in the event that any dispute emerges concerning the investment made by an investor from one signatory State within the territory of the other signatory State, the procedure, mechanism, and applicable law outlined in the investment agreement shall possess obligatory force and supersede any other dispute resolution mechanisms, procedures, or laws delineated in this or any other treaty or agreement. Consequently, such dispute shall be resolved in accordance with the provisions set forth in the commercial contract.

[830] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Award (23 July 2001)
[831] The Salini test, established by the tribunal in Salini v. Morocco, sets four criteria for "investment" (1) a contribution; (2) a certain duration; (3) a risk; and (4) a contribution to the economic development of the host State.
[832] Article 25(1) of the ICSID Convention provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment".
[833] Schreuer, C.H., Article 25, in Schreuer, C.H. (ed.), The ICSID Convention: A Commentary 71, 2nd ed., 2009.

Moreover, a few more clauses can be added to strike a balance between the host state's interests and foreign investors' commercial interests. For example, the host signatory State is obligated to inform the investor of the signatory State, in writing, about its prerogative to exercise a preference or exclusive choice of the treaty forum and law before executing the investment contract. Subsequently, once both parties have reached agreement on the dispute resolution mechanism, procedure, and applicable law, such agreement shall be binding and enforceable. Any departure from the selected forum, procedure, and law by any party is strictly prohibited. It is important that both parties effectively communicate and share their intention in the first instance as to whether they wish to incorporate a negative list for removing certain disputes from the jurisdiction of treaty-based arbitral forums and prefer to give the exclusive jurisdiction to the host state's courts or other forums. Such negative lists can include matters that are closely concerned with policies such as tax, environment, child labour, labour law, minimum wages, defence and national security and public policy. To avoid ambiguity in this matter, an example clause could be written in the following manner:

> 'The provisions outlined within this treaty shall not be interpreted as impeding the sovereign State from executing, enforcing, and maintaining any measure in an impartial manner, as it sees fit, to guarantee that investments made within its jurisdiction by the investor from the opposing contracting State align with its domestic policy and regulations pertaining to taxation, environmental protection, prohibition of child labour, labour law, minimum wage standards, defence and national security, as well as public policy considerations'.

Furthermore, it is recommended that new Bangladeshi model BIT includes a qualifying provision for international dispute resolution based on India's recent reform of their domestic law as discussed in chapter six. This provision should include a mandatory requirement of exhaustion of local remedies and national treatment for a minimum of two years. If the national treatment and local remedies fail to prove a satisfactory resolution, the investor must serve ninety days' notice of international arbitration. In the notice they must

show that national treatment and local remedies were inadequate because they breached one or more of the following grounds: illegality, procedural impropriety, and/or irrationality.

7.3.3 Reform of The Fair and Equitable Treatment (FET) Provisions

This thesis has revealed the prolonged controversies over several decades regarding the FET provision and its application. This thesis argues that the traditional FET term is notoriously slippery as it provides flexible options for tribunals' interpretations. In chapter four, it was shown that the FET provision can be interpreted in six different ways, with growing concern that arbitral tribunals are keen to interpret the term in favour of foreign investors. To resolve this problem, this thesis recommends the following reforms for the Bangladeshi FET provision.

Firstly, Bangladesh must use one form of the FET provision for all international investment agreements to avoid discrepancies, which can be included under the general treatment or minimum standard of treatment.[834] Secondly, the FET provision needs to be safeguarded so that the arbitral tribunal can no longer provide either too broad or too narrow interpretations of the provision. Thirdly, the FET provision needs to be detailed and clearly worded to avoid future ambiguity. While section one of the FET provision should include the standard text, 'Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.' Furthermore, section two needs to be more elaborate and must include that, 'For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.'

[834] The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in General Treatment or Minimum Standard of Treatment and Expropriation results from a consistent malpractice of States that they follow from a sense of legal obligation. With regard to the General Treatment or Minimum Standard of Treatment, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that balances the economic rights and interests of aliens with national sovereignty.

It is vitally important that the section further clarify that the concepts of 'fair and equitable treatment and full protection and security do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.' The obligation in paragraph 1 could provide:

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

(B) "full protection and security only require each Party to provide the level of police protection required under customary international law.'

Section 3 of the provision must clarify that, 'a determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of the FET provision.' Section 4 of the provision must include other general protections of international law, 'neither Contracting Parry shall, within its Territory, in any way impair investment activities of investors of the other Contracting Party by unreasonable, arbitrary or discriminatory measures.' The purpose of this elaboration and clarification is not only intended to limit the scope of the FET provision, but also to stop arbitral tribunals from making unpredictable broader or narrower interpretations of the FET provision in future.

7.3.4 Sustainable Development Provision

Based on discussions in chapter six regarding the recent successful amendments to both Morocco and The Netherlands' sustainable development provisions of their model BITs, this thesis proposes recommendations for a sustainable development provision for the new Bangladeshi model BIT.[835] It further suggests that this provision should consist of two parts; while part A should focus on sustainable development fetchers, part B should emphasise the inclusion of Corporate Social Responsibility (CSR). The aim of this provision is to strike a

[835] Discussed in chapter 6.

balance between national interests and investors' commercial interests. An example of this provision can be seen below:

> 'Each party to this agreement shall ensure that its laws and policies governing investments promote and incentivise a high degree of environmental and labour safeguarding, and shall strive to continually enhance the laws, policies, and corresponding levels of protection. The parties to this agreement pledge to advance equal opportunities and participation for both women and men in economic activities. When deemed advantageous, the parties shall engage in cooperative endeavours to enhance women's participation in economic affairs, including international investments. The parties acknowledge that reducing the standards of protection provided by domestic environmental or labour laws in order to encourage investments is inappropriate. A party to this agreement shall not enact or enforce domestic laws that contribute to the goal of sustainable development in a manner that constitutes unjustifiable discrimination or a concealed restriction on trade and investment. Within the scope and application of this agreement, the parties reaffirm their obligations, as signatories, to the multilateral agreements addressing environmental protection, labour standards, and the safeguarding of human rights, such as the Paris Agreement, fundamental International Labour Organization (ILO) Conventions, and the Universal Declaration of Human Rights. Furthermore, each party to this agreement shall exert continuous efforts to ratify the fundamental ILO Conventions that have not yet been ratified. The parties to this agreement are committed to appropriate cooperation on investment-related sustainable development matters of mutual interest in multilateral forums'.

This comprehensive provision shall not only emphasise environmental, human rights, labour rights and health and safety but it shall also promote equality, women's participation and contribution to economic activity for international investment.

7.3.5 Corporate Social Responsibility (CSR) Clause

As discussed in chapter six regarding the recent successful introduction of sustainable provisions within both the Moroccan and Netherlands' model BITs, this thesis proposes that part B of the Bangladeshi sustainable development provision should include a CSR clause. This must place emphasis on the mandatory requirement to show due diligence on social and environmental matters prior to the start of the investment and voluntarily adopt, 'internationally recognised standards, guidelines and principles'. The clause should cover the following:

> 'Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour laws. The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business. The Contracting Parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment. Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state. The Contracting Parties express their commitment to the international framework on Business and Human Rights, such as the United

Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises and commit to strengthen this framework.'[836]

This exclusive clause shall not only prevent environment and social risks but also hold investors liable for any acts or omissions that lead to significant damage, personal injuries or loss of life in the host state. This new clause will require foreign investors to provide evidence of due diligence when performing their business activities aboard and expect them to protect the environment and comply with CSRs. This will help Bangladesh to provide an equilibrium between state and foreign investors interests and resolve the existing problems that have been raised throughout the exploratory case studies in chapter four where foreign investors have been overly favoured by ICSID Tribunals.

7.3.6 Exhausting of Local Remedies Provision

For greater certainty and fairness, this thesis recommends that the Bangladeshi model BIT includes an exhausting of local remedies provision based on discussions in chapter six regarding lessons learnt from the Indian model BIT.[837] This provision shall include that, before seeking resolution, parties must first submit their claims before the relevant domestic courts or administrative bodies of the host state. It should also set a time limit of a minimum of two years to exhaust local remedies prior to serving ninety days' notice of arbitration. Furthermore, it must clarify that any claim arising out of the treaty-based investment agreement must be brought within one year from the date on which the breach first appears to the party:

'[R]ight to recourse to the treaty forum on the ground of denial of justice amounting to treaty breach shall be subject to the principle of judicial finality and the host State shall not be held responsible for the judicial act unless it attains the judicial finality and creates the international wrong. Nothing contained in this treaty would amount to

[836] Organisation for Economic Co-operation and Development, 'OECD Guidelines for Multinational Enterprises' (*OECD Guidelines for Multinational Enterprises*, 2013) <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 24 July 2021.
[837] Discussed in chapter 6.

exclude the scope of Loewen v United States regarding exhaustion of local remedy and judicial finality rules before recourse to treaty forum where claimant asserts on denial of justice.'[838]

7.3.7 Anti-Corruption Provision

Corruption in foreign investments is common problem in Bangladesh as demonstrated in the Niko case discussed in chapter five. To tackle and overcome this problem, this thesis recommends an anti-corruption provision for the Bangladeshi model BIT. The anti-corruption provision should include the following:

> 'Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.'

Preventing corruption is not only important for stopping abuse of the investor state arbitration system but also extremely vital in regaining public trust and improving the economy.

7.4 Recommendations on Domestic Legal Framework

The overview of the Bangladeshi domestic legal framework in relation to the international investment has been discussed in chapter four of this thesis, where a number of loopholes and weaknesses have been identified. Furthermore, lessons learnt from the recent reforms of both the Indian and US domestic legal frameworks regarding foreign investment have been discussed in chapter six, including different tools which will be useful for Bangladesh to strengthen its own domestic legal framework. Thus, in this section, this thesis proposes the following recommendations to address the issues identified and improve the

[838] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3), Award (26 June 2003).

domestic law accordingly to strike a balance between foreign investors' interests and national interests.

7.4.1 Reform of the Constitution of the People's Republic of Bangladesh 1972

It is discussed in the chapter four of this thesis that Article 25 governs (fundamental principles of state policy) which state that, 'the state shall base its international relations on the principles of respect for national sovereignty and equality, and respect international law'. Furthermore, Article 145 (A) provides a principle for international treaties, however, does not clarify any legal rule or procedures as to how the treaty will govern in practice. Considering the vagueness of the Article 145 (A), this thesis proposes a reform of the constitution of Bangladesh. In order to carry out such amendment Part 10 of the constitution, Article 142[839] must be followed as it provides the following guidance for amendment of the constitution:

> '[N]otwithstanding anything contained in this Constitution -
>
> (a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament:
>
> Provided that -
>
> (i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;
>
> (ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two thirds of the total number of members of Parliament;
>
> (b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.'[840]

[839] The Constitution of the People's Republic of Bangladesh 1972 Part 10, Article 142.
[840] The Constitution of the People's Republic of Bangladesh 1972 Part 10, Article 142.

It is recommended that the new reform should include a definition for 'foreign investor' and adopt a standard provision for the promotion and protection of foreign investors.

7.4.2 Reform of The Foreign Private Investment Promotion and Protection Act 1980

The structure of this main domestic legislation regarding international investment has been thoroughly discussed in chapter four, in which this thesis found that the provisions of this domestic act are vague, outdated and unworkable.[841] This is mainly because the FPIPPA 1980 has never been amended since 1980.[842] While section 4 of the act provides a FET provision which states that, 'the government shall accord fair and equitable treatment to foreign private investment which shall enjoy full protection and security in Bangladesh',[843] this provision is broad and vague, neither clarifying what constitutes a FET breach nor whether a breach of another provision of the treaty, or of a separate international agreement, can give rise to a breach of the FET provision. Thus, to ensure greater consistency for private investment protection this thesis proposed a comprehensive FET reform under the Bangladeshi model BIT. The same FET provision can be used to replace the current section 4 of the FPIPPA 1980.

As discussed in chapter four, it has been twenty years since the Bangladeshi Arbitration Act 2001 (AA) has been reviewed and reformed.[844] This thesis has reviewed the existing 2001 AA and found that a need for reform with regards to international arbitration is necessary. This is particularly important to reduce judicial intervention and improve efficiency of the existing law to create a robust arbitration mechanism for Bangladesh. This section thus proposes a reform of the 2001 AA.[845] Firstly, similar to other domestic arbitration acts discussed in chapter six including the US FAA 1925 and Indian Arbitration and Conciliation Act (ACA) 1996, Bangladesh can divide its AA into two parts; while part one should provide provisions for domestic arbitrations that are seated in Bangladesh, part two should provide

[841] Discussed in chapter four.
[842] Government of the People's Republic of Bangladesh, 'The Foreign Private Investment (Promotion and Protection) Act 1980' (n 337).
[843] ibid, section 4.
[844] Discussed in chapter four.
[845] Government of the People's Republic of Bangladesh, 'The Arbitration Act 2001' (n 346).

provisions for international arbitration. Secondly, as identified in chapter four, the existing Bangladeshi 2001 AA does not offer any fast-track arbitration procedures for the parties, including the fast-track enforcement of arbitral awards and a statutory time limit for completing arbitration proceedings. This matter can be resolved through the reform of the existing AA. This thesis suggests that the reform AA should include provisions for fast-track arbitration proceedings.

Furthermore, a provision for completing the arbitration proceedings can be added to either the model BIT or reformed AA to avoid delays and uncertainties. Thirdly, it is discussed in chapter four that section 42 of the existing 2001 AA provides limited procedural grounds such as fraud, corruption and policy concerns to set aside domestic arbitral awards.[846] This thesis proposes that these grounds can not only be extended to the breach of human rights, labour rights, environmental issues and other CSR matters but also apply to both national and international arbitration. Finally, the unavailability of interim measures for foreign arbitration has been identified in chapter four. This can be reformed in line with the Indian ACA reform 2015 which allows foreign seated arbitration parties to submit a request for an interim measures' application to the domestic courts. Thus, in order to modernise the existing 2001 AA, Bangladesh should follow the Indian reform and allow foreign seated arbitration parties to submit a request for interim measures application to the domestic courts.

7.5 The Scope for Further Research

As an original contribution to knowledge, this research is the first piece of academic literature to be conducted specifically on the problems surrounding current FET provisions within Bangladeshi BITs. The intention of this research is to provide the first ever set of guiding principles for reforming Bangladesh's FET provisions, creating a model BIT and making further recommendations regarding the development of a suitable legal infrastructure to support this. Having been conducted by one author, it is important to emphasise that this

[846] ibid, section 42.

research provides ‘guiding principles’ as opposed to strict rules for the improvement of current FET provisions. It is fully expected that these principles will need further development and amendments, particularly given that many subject specific experts will be involved in the real-life implementation of these guidelines in Bangladesh. The proficient experience and opinions of these additional experts will be vital to consider throughout the process of implementation and will require further research. It would also be highly beneficial to translate this thesis into the Bengali language which will widen access to this research for the people of Bangladesh.

The scope for further research in this area is widespread and more research needs to be carried out to address the issues raised by this thesis. The problems involving FET provisions are not only an individual country’s problem but rather a global problem. Although the contexts in which drafting of FET provisions can be problematic, as discussed in this thesis, further investigation is required in order to understand whether safeguarded FET provisions work equally well in both developing and developed countries.

Further research can also consider whether national treatment has the potential to replace FET provisions in BITs. It is discussed in this thesis that the Indian model BIT 2015 has made a significant shift from pro-investor friendly investment mechanisms to pro-host state friendly investment mechanisms.[847] It would be interesting to conduct more research in this area to understand the economic impact of such a radical shift, especially when a country has the potential to become a global superpower.

Further research is suggested to rebalance investor state arbitrations in favour of host states. ICSID and the UN can work together to create a sustainable three tier standard model BIT agreement: one tier for developed states, another tier for developing countries and a further one for underdeveloped countries.

[847] Discussed in chapter 6.

The importance for further research in this area is inevitable as countries have started to leave ICSID claiming that the system is not working and, thus, the whole BIT and international commercial arbitration mechanisms are greatly threatened. More research needs to be encouraged to reframe the dispute resolution mechanism. Furthermore, additional research on appeal mechanisms for international commercial arbitration is of the essence.

Further research on regional court systems such as the Asian Court of Arbitration or the African Court arbitration can also be considered. Additional research regarding the need for a World Investment Court (WIC) could also be explored.

7.6 Concluding Remarks

This thesis asks to what extent current FET provisions in Bangladeshi BITs provide an effective legal framework for continuing to promote and attract foreign investment whilst also striking a delicate legal balance between the rights of the host state and those of its foreign investors. The core argument of this thesis is that there is an urgent need for reforming and safeguarding the FET standard within future Bangladeshi BITs to continue to attract foreign investment whilst balancing Bangladesh's national interests with the commercial interests of its foreign investors. The thesis has clearly demonstrated why this urgent need to reform and safeguard Bangladesh's FET provisions has arisen, through meticulous evaluations and analyses, revealing existing issues and their impact on Bangladesh.

Chapter one laid a strong foundation for the thesis by introducing the study's background, research questions, aims and contributions of the research. It illuminated the widespread use of FET standards in BITs, especially in Bangladesh, and the challenges faced due to weak FET provisions. Scholars delving into the literature consistently recognise the inherent ambiguity of the FET standard. Chapter one further demonstrates that ambiguous FET provisions essentially open the door for foreign investors to initiate claims against host developing countries in any instance of loss.

Chapter one further emphasised that current vague FET provisions in BITs often favour foreign investors over host nations, a challenge not unique to Bangladesh. This situation arises from the latitude given by arbitral tribunals and ICSID, allowing foreign investors to contest legitimate regulations and public policy.[848] Reforms are crucial to address issues stemming from unclear language and inconsistency in FET provisions, as demonstrated in this chapter. The economic and regulatory impact of foreign investor claims is evident, influencing policy-making, the judiciary and anti-corruption efforts.

Chapter two extensively explored literature on FET provisions in BITs, with a focus on Bangladesh and South Asian nations. It covered historical trajectories, pros and cons of FET, and emerging conflicts between host nations and foreign investors. The review traced the evolution from minimum standard of treatment to 'fair and equitable treatment' (FET) which gained popularity in BITs. Vasciannie's definition remains pertinent.[849] Initially, FET was absent, but gained traction in the mid-1960s and surged between late 1980s and early 2000s. It discussed how scholars' opinions on foreign investment's benefits and drawbacks diverged. One group saw it aiding host growth while the other perceived it as a threat. Academics including Subedi, Dumberry, Salisu, Moran, Yussof and Ismail argued that foreign investment enhances income, technology and living standards in developing nations. Brooks and Fan emphasised technological progress. Conversely, scholars including Smith, Calvo, Bin Atan, Dunning, Blomstrom, Fraser, and Falki criticised foreign investment's risks and potential threats to national sovereignty.[850]

FET provisions often favour foreign investors due to their vague drafting, allowing arbitral tribunals to interpret them either too broadly or narrowly to foreign investors' advantage. An increasing number of cases brought by foreign investors against host states

[848] See discussion in 1.1 Background of the Study 20
[849] As discussed in 2.3 The Fair and Equitable Treatment Standard in International Investment 46
[850] As discussed in 2.8 Growing Concerns Regarding Conflict of Interests Between Host States and Foreign Investors 55

alleging expropriation and FET breaches has made the need to reform and rebalance these FET provisions very clear.[851]

Chapter two recognised that although safeguarding host states' sovereignty is urgently needed, it is important to balance this with continuing to offer sufficient protections to attract foreign investors and thus retain the economic and many other benefits foreign investment brings to a host state. The chapter then concludes by discussing different ways in which the scope of FET can be safeguarded whilst also achieving this balance, therefore providing the groundwork for subsequent chapters to explore the more intricate facets of FET provisions in Bangladeshi BITs.

Chapter three provided methodological justifications for the thesis, including the research design, methods and philosophy used to answer the research questions. The thesis employed a positivist methodological ontology as it thoroughly analysed and interpreted existing FET provisions within Bangladeshi BITs and related cases from international arbitral tribunals in an objective and factual manner. Various methods were used throughout the thesis including doctrinal analysis, case studies and comparative analysis, tailored to address each distinct research question.[852] Chapter three also discussed essential elements for legal research and ethical considerations which were considered throughout the thesis. Based on the methodology, chapters four, five and six conducted a series of comprehensive analyses to formulate robust recommendations for improving FET provisions in Bangladeshi BITs.

Chapter four critically analysed FET provisions in Bangladeshi BITs by examining the existing legal framework for foreign investment in Bangladesh and assessing discrepancies within current FET provisions. It highlighted that Bangladesh's lack of a model BIT has led to various inconsistent and inadequately drafted FET provisions, making the country's foreign investment mechanism highly vulnerable.[853] It also uncovered that Bangladeshi BITs have

[851] As discussed in 2.7 Current Position of FET Provisions in BITs 54
[852] As discussed in 3.3 Research Methods 80 and 3.5 Research Philosophy 85
[853] As discussed in 4.7 Analysing Discrepancies Within FET Provisions of Bangladeshi BITs 104

been haphazardly signed without proper negotiations to ensure that the interests of both host state and foreign investors are balanced.

Given the absence of a standardised FET approach in investment treaties and the lack of unanimous interpretation by arbitral tribunals, chapter four then examined key scholars' viewpoints and categorised FET provisions into three primary forms: strict, classic and flexible FET. Then, for a deeper understanding of the protections provided by Bangladeshi FET provisions and their implications, the chapter categorised these provisions using UNCTAD's classification as part of a content analysis. The results of this analysis revealed crucial perspectives for enhancing Bangladesh's BITs. Based on these results, the chapter concluded by arguing that combining safeguarded 'FET attached to international law' and 'FET attached to the minimum standard of treatment and customary international law' emerges as a more feasible approach for Bangladesh than alternative provisions.[854]

Chapter five delved into case studies (Saipem, Niko, Scimitar, Chevron and NEPC), demonstrating tribunals' FET interpretations in Bangladesh's policy, socio-political and environmental contexts. These case studies revealed how foreign investors have attempted to exploit weaknesses in Bangladesh's BIT practices and FET provisions. While three decisions favored Bangladesh, only one directly implicated breaches of FET provisions, with another dismissed as baseless and one revolving around contract corruption. Decisions against Bangladesh highlighted issues such as court interference and inadequately safeguarded FET provisions.

The chapter emphasized the consequences of Bangladesh's ineffective BIT negotiation process and susceptibility to corruption. It also highlighted the alarming trend of foreign investors bypassing local remedies and exploiting FET breaches to advance baseless claims. Notably, Bangladeshi arguments regarding policy aspects were disregarded, indicating a tendency for tribunals to prioritize corporate interests over public

[854] As discussed in 4.10 Content Analysis of Existing FET Provisions in Bangladeshi BITs 118, 4.11 Results 119 and 4.12 Discussion 120

policy concerns. Of particular concern, foreign investors evaded their environmental obligations and ignored the adverse impacts of their activities on local communities. This demonstrates a disregard for fundamental principles of CSR and broader issues such as human rights, labor rights, and safety standards. Despite these issues, contract renewals for foreign investors failed to be guided by comprehensive evaluations of parties' prior conduct and performance.[855] The findings of chapter five significantly contributed to ensuring that the recommendations put forth for reforming and rebalancing Bangladesh's FET provisions were comprehensive, resilient and addressed the full spectrum of previously encountered issues in claims.

Chapter six presented a comparative analysis of FET provisions in Indian and US BITs. Both countries adopted distinct approaches to balance national sovereignty and foreign investors' interests. In 2015, India eliminated the FET provision from its model BIT due to concerns regarding excessive foreign investor protections and instead adopted a national treatment approach. Although effective in reducing the number of cases filed against India, this also resulted in adverse effects on India’s economy due to dwindling foreign investment.[856]

In contrast, the US retained FET provisions in their 2012 model BIT, using institutional strength and regular reviews of their model BIT for success in attracting investment while preserving their sovereignty.[857]

India's decision to eliminate FET provisions hindered investment attraction, while the US's approach was successful in attracting foreign investment and balancing national and foreign investors’ interests. Although India's decision has reduced its attractiveness for foreign investment, its domestic law reform and enhanced institutional arbitration offer valuable insights for Bangladesh. However, aligning with Bangladesh's goal of balancing foreign investment and national interests, the US's strategy of retaining FET provisions with

[855] ibid.
[856] As discussed in 6.2.13 Lessons Learnt From The 2015 Indian Model BIT 174
[857] As discussed in 6.4.7 Lessons Learnt from The US BIT Framework 197

effective safeguarding appears more fitting. The chapter argued that Bangladesh can learn from both of these approaches, focusing on a balanced model BIT and establishing a robust independent institution with council, tasked to develop and review an inaugural model BIT with safeguarded FET provision.

Chapter seven proposed practical recommendations to address the thesis' central argument to reform current FET provisions in Bangladeshi BITs whilst demonstrating a path towards balancing national sovereignty with foreign investors' commercial interests. The chapter presented recommendations for constitutional, statutory and treaty based foreign investment frameworks. They specifically encompassed the formation of an independent institution with council, developing a model BIT with safeguarded FET provisions, and reforming domestic laws on foreign investment.[858]

Informed by earlier findings, the recommendations were designed to be holistic and realistic, considering Bangladesh's developing status and addressing the full spectrum of issues previously raised. The intention was to modernise Bangladesh's BIT framework to meet contemporary demands, not only benefiting Bangladesh but also inspiring other developing countries' BIT frameworks worldwide. The ultimate goal of these recommendations was to continue to foster a favourable foreign investment climate in Bangladesh, promoting cooperation and benefiting all stakeholders involved.

This thesis represents the first academic study focused on issues within current FET provisions in Bangladeshi BITs. It aimed to establish pioneering guiding principles to reform Bangladesh's FET provisions, shape a model BIT and suggest a supportive legal framework. As a single-authored work, it emphasises recommendations rather than strict rules for enhancing current FET provisions. These recommendations are anticipated to evolve with input from subject-specific experts during their practical implementation in Bangladesh.

[858] As discussed in 7.2 An Independent Institution and a Council 202, 7.3 Bangladeshi Model BIT 204 and 7.4 Recommendations on Domestic Legal Framework 213

Further research is essential to address raised issues globally, not limited to individual countries. Investigating whether safeguarded FET provisions are effective in both developing and developed countries is crucial. Balancing investor-state arbitration in favour of host states through a three-tier standard model BIT agreement could be explored, considering developed, developing and underdeveloped states. Given that several countries have left or are considering leaving ICSID having questioned the system's efficacy, research is vital to reshape dispute resolution mechanisms and appeal systems for international commercial arbitration.

Overall, this thesis provides the first stepping stones for reforming FET standards within Bangladeshi BITs and its wider foreign investment framework, illuminating a path towards balancing national sovereignty with foreign investors' commercial interests. The importance of formulating strong FET provisions within an optimal BIT framework persists. It is hoped that this thesis makes a significant contribution to the development of such a framework for Bangladesh and serve as an inspiration for other developing and underdeveloped nations.

Bibliography

Table of Cases

International Investment Arbitration Cases

Asian Agriculture Products Ltd. (AAPL) v Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (27 June 1990)

Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, ICSID Case No ARB/05/22, Award (24 July 2008)

Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India (PCA Case No. 2016-7) (21 December 2020)

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, PCA Case No. 2013-09, Award (12 October 2020)

Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh, ICSID Case No ARB/06/10, Award (17 May 2010)

Deutsche Telekom AG v. The Republic of India, PCA Case No. 2014-10, Award (13 December 2017)

El Paso Energy International Company v. Argentine Republic, ICSID Case No ARB/03/15, Award (31 October 2011).

Genin v Esthonia, ICSID Case No ARB/99/2, Award (25 June 2001).

Glamis Gold Ltd. v. United States of America, UNCITRAL (NAFTA), Award (8 June 2009).

Louis Dreyfus Armateurs SAS v. The Republic of India, PCA Case No. 2014-26, Award (11 September 2018)

Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration and Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/18, Award (25 February 2019)

Nissan Motor Co., Ltd. v. Republic of India, PCA Case No. 2017-37, Award (29 April 2019)

Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016).

Philip Morris v. Australia, PCA Case No. 2012-12, Award (17 December 2015).

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).

Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award (30 June 2009)

Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Case No. 10623/AER/ACS, Award (7th December 2001)

Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation, ICSID Case No. ARB/92/2, Award (4th May 1994)

Total S.A. v The Argentine Republic, ICSID Case No. ARB/04/01, Award (1st February 2016)

Vedanta Resources plc v. India, PCA Case No. 2016-05, Award (8 October 2020)

Vodafone International Holdings BV v. India (I) (PCA Case No. 2016-35) (25 September 2020)

Waste Management v. United Mexican States (II), ICSID Case No. ARB(AF)/00/3, Award (30 April 2004).

White Industries Australia Limited v. The Republic of India IIC 529 (30 November 2011)

International Court of Justice (ICJ) Cases

Eric Gasser GmbH. v. MISAT Srl. [2003] ICJ 116/02

Factory at Chorzów (Claim for Indemnity) (Germany v Poland) [1928] PCIJ Rep Series A, No.17

German Interests in Polish Upper Silesia (Germany v Poland) [1926] PCIJ Rep Series A No 7

German Interests in Polish Upper Silesia (Germany v Poland) [1926] PCIJ Rep Series A No 7

Mavrommatis Palestine Concessions (Greece v. U.K.) [1924] PCIJ Rep Series A No. 2

Nicaragua v USA (Merits) [1986] ICJ Rep

North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark) [1969] ICJ Rep

Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania) [1939] PCIJ Rep Series A/B No. 76

Slowakische Republik (Slovak Republic) v Achmea BV [2018] ICJ 284/16

Bangladeshi Cases

Bangladesh in Nurul Abser (Md) v. Golam Rabbani [68] DLR

Bangladesh Water Development board v. Additional District Judge, 6th Court, Chittagong (Spl Original) [24] BLC 275

Bhatia International v. Bulk Trading SA [2002] AIR (SC) 1432.

Division in Jalalabad Gas Transmission and Distribution System Limited v. Lafarge Surma Cement Limited Bangladesh [23] BLC 775.

Ghulam Mohiuddin (Bhutto) v. Rokeya Din (Spl Statutory) [71] DLR 577

Globo Piu Import and Export ltd v. Bangladesh Chemical Industries Corporation (Civil) [1971] DLR 513.

HRC Shipping Ltd v. MV X-Press Manaslu [58] DLR 185.

Project Builders Ltd (PBL) v. China National Technical Import and Export Corporation and others [69] DLR 290

STX Corporation Ltd Meghna Group of Industries Limited [64] DLR 550.

Indian Cases

ABN Amro N.V. v. Republic of India [2004] UNCITRAL

ANZEF Ltd. v. Republic of India [2004] UNCITRAL

BNP Paribas v. Republic of India [2004] UNCITRAL

Credit Lyonnais S.A. (now Calyon S.A.) v. Republic of India [2004] UNCITRAL

Credit Suisse First Boston v. Republic of India [2004] UNCITRAL

Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India [2004] UNCITRAL

Offshore Power Production C.V., Travamark Two B.V., EFS India-Energy B.V., Enron B.V., and Indian Power Investments B.V. v. Republic of India [2004] UNCITRAL

Standard Chartered Bank v. Republic of India Bycell [2004] UNCITRAL

US Cases

Faulkner (US on behalf of) v The United Mexican States [1927] 21 A.J.I.L. 349

LFH Neer and Pauline Neer (US) v The United Mexican States [1926] IV RIAA 60

Marbury v. Madison [1803] 5 U.S. 1 Cranch 137

Norway (Norwegian Shipowners' Claims) v The United States of America [1922] 1 RIAA 307, 332

The United States of America (George W. Hopkins) v The United Mexican States (Docket No.39) [1926] 21 A.J.I.L. 160

The United States of America (Harry Roberts) v The United Mexican States [1927] 21 A.J.I.L. 357, 360-361.

The United States of America (Way) v The United Mexican States [1929] 23 A.J.I.L. 466

Constitution

Constitution of India 1949

The Constitution of the People’s Republic of Bangladesh 1972

Conventions

Havana Convention 1948

Vienna Convention on the Law of Treaties, 'United Nations Treaty Series' (1969) 1155

Legislation

Bangladesh

Arbitration Act 1940

Arbitration Act 2001

Bangladesh Contract Act 1872

Bangladesh Energy Regulatory Commission Act (BERC) 2003

Bangladesh Investment Development Authority (BIDA) Act 2016

Bangladesh Labour Act 2006

Bangladesh Oil, Gas and Mineral Corporation Act of 1989

Code of Civil Procedure 1908

Companies Act 1994

Foreign Private Investment Promotion and Protection Act (1980)

India

Arbitration and Conciliation (Amendment) Act 2015

Arbitration and Conciliation (Amendment) Act 2021

Government of India Act 1919

Government of India Act 1935

Indian Arbitration and Conciliation Act (IACA) 1996

Indian Contract Act 1872

Transfer of Property Act 1882

United States of America

US Federal Arbitration Act 1925

Books

Adede AO, 'The Minimum Standards in a World of Disputes', *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine, and Theory* (1986)

Amerasinghe CF, *State Responsibility for Injuries to Aliens* (Clarendon Press 1967)

American Law Institute, *Restatement of the Law, Second, Foreign Relations Law of the United States* (1965)

Anfara VA and Mertz NT, *Theoretical Frameworks in Qualitative Research* (1st edn, SAGE Publications, Inc 2006)

Anghie A, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005)

Arnold R, 'Aliens' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 1 (North-Holland Pub Co 1992)

——, 'Aliens' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 1 (Aaland Islands to Dumbarton Oaks Conference 1994)

Bauer MW, 'Classical Content Analysis: A Review' in Martin W Bauer, George Gaskell and N Allum (eds), *Qualitative Researching with Text, Image and Sound: A Practical Handbook* (Sage Publications 2000)

Benedek W, 'Cerrutti Arbitrations', *Encyclopedia of Public International Law* (1992)

Black HC, *Black's Law Dictionary* (6th edn, West Publishing Company 1990)

Brownlie I, *Principles of Public International Law* (6th edn, Oxford University Press 2003)

Brownsword R (ed), 'What The World Needs Now: Techno-Regulation, Human Rights and Human Dignity', *Human Rights* (Hart 2004)

Cable J, *Gunboat Diplomacy 1919–1991: Political Applications of Limited Naval Force* (2nd edn, Macmillan 1981)

Calvo C, *Le Droit International Théorique et Pratique*, vol 6 (5th edn, A Rousseau 1896)

Cane P and Kritzer H, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012)

Colbert ES, 'Chapter I. Private Reprisals, Particularly as Practiced in England', *Retaliation in International Law* (West Sussex: Columbia University Press 1948)

Cownie F, *Legal Academics: Culture and Identities* (Hart Publishing 2004)

Dolzer R, 'Mixed Claims Commissions', *Encyclopedia of Public International Law* (1992)

Dunn FS, *The Protection of Nationals: A Study in the Application of International Law* (Johns Hopkins Press 1932)

Dunning JH, Kogut B and Blomström M, *Globalization of Firms and the Competitiveness of Nations* (Lund University Press 1990)

Eagleton C, *Responsibility of States in International Law* (New York University Press 1928)

Feller AH, *The Mexican Claims Commissions, 1923-1934* (Macmillan Company 1935)

Freeman AV, *The International Responsibility of States for Denial of Justice* (Longmans, Green and Company 1938)

Garcia-Amador F V, *The Changing Law of International Claims*, vol 1 (Oceana Publications 1984)

Garner BA (ed), *Black's Law Dictionary* (7th edn, Thomson/West St Paul 2004)

Gill R, 'Discourse Analysis' in Martin W Bauer, George Gaskell and N Allum (eds), *Qualitative Research with Text, Image and Sound: A Practical Handbook* (Sage Publications 2000)

Glaser BG and Strauss AL, *Discovery of Grounded Theory: Strategies for Qualitative Research* (Routledge 2017)

Goldberg LS and Klein M, 'Foreign Direct Investment, Trade and Real Exchange Rate Linkages in Developing Countries' in Reuven Glick (ed), *Managing Capital Flows and Exchange Rates: Perspectives from the Pacific Basin* (Cambridge University Press 1998)

Grotius H and Kelsey FW, 'De Jure Belli Ac Pacis Libri Tres' in JB Scott (ed), *II* (Clarendon Press 1925)

Hall KL (ed), *The Oxford Guide to United States Supreme Court Decisions* (Oxford University Press 1999)

Hood M, *Gunboat Diplomacy 1895-1905* (Allen & Unwin 1975)

Hoof GJH, *Rethinking the Sources of International Law* (Kluwer Law and Taxation Publishers 1983)

Hossian MB, Yeon ALB and Aziz ASBA, *FDI and Dispute Settlement Arrangements in Bangladesh: Issues and Challenges*, vol 11 (Cambridge University Press 2021)

Islam R, 'Different Constructions of the FET Standard in Investment Treaties', *The Fair and Equitable Treatment (FET) standard in international investment arbitration: developing countries in context* (Springer 2018)

Izzeddin AKE-D, *The Calvo Doctrine and the Hull Formula: : Prospects for Harmony* (Book Venture Publishing LLC 2017)

Jacob M and Schill SW, 'Fair and Equitable Treatment: Content, Practice, Method' in M Bungenberg, J Griebel and S Hobe (eds), *International Investment Law: A Handbook* (Hart, Oxford 2015)

Johnston D, *The Historical Foundations of World Order: The Tower and the Arena* (Martinus Nijhoff 2008)

Kulick A, *Global Public Interest in International Investment Law* (Cambridge University Press 2012)

Lillich RB, *International Law of State Responsibility for Injuries to Aliens* (University of Virginia Press 1983)

Lipson C, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*, vol 11 (University of California Press 1985)

Lowenfeld AF, *International Economic Law* (Oxford University Press 2002)

Miles K, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, vol 99 (Cambridge University Press 2013)

Ralston JH, *International Arbitration from Athens to Locarno* (Oxford University Press 1972)

Moore JB, *A Digest of International Law*, vol 7 (US Government Printing Office 1906)

Mortimer T and Nyombi C, *Rebalancing International Investment Agreements in Favour of Host States* (Wildy, Simmonds & Hill Publishing 2018)

Muchlinski P, *Multinational Enterprises and The Law* (1st edn, Oxford University Press 1995)

Muchlinski P, Ortino F and Schreuer C, *The Oxford Handbook of International Investment Law* (Oxford University Press 2008)

Napolitano AP, *Lies the Government Told You: Myth, Power, and Deception in American History* (Thomas Nelson 2010)

Neufeld H, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648-1815); A Contribution to the History of the Law of Nations* (Leiden: Sijthoff 1971)

Ranjan P, 'The 2016 Indian Model BIT: Making the BIT Unworkable for Investors', *India and Bilateral Investment Treaties* (Oxford University Press 2019)

Roth AH, *The Minimum Standard of International Law Applied to Aliens*, vol 69 (Leiden: AW Sijthoff 1949)

Schill SW, 'International Investment Law and Comparative Public Law' (Oxford University Press 2010)

Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (RH Campbell, AS Skinner and WB Todd eds, Clarendon Press 1976)

Sornarajah M, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004)

——, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010)

——, *The International Law on Foreign Investment* (4th edn, Cambridge University Press 2017)

Streb CK, 'Exploratory Case Study' in Albert J Mills, Gabrielle Durepos and Eiden Wiebe (eds), *Encyclopedia of Case Study Research* (2010)

Stuyt AAM, *Survey of International Arbitrations: 1794-1989* (3rd edn, Martinus Nijhoff Publishers 1990)

Subedi SP, *International Investment Law: Reconciling Policy and Principle* (3rd edn, Hart Publishing 2016)

——, *International Investment Law: Reconciling Policy and Principle* (Bloomsbury Publishing 2020)

The Compact Edition of the Oxford English Dictionary (Oxford University Press 1971)

Trochim WMK and Donnelly JP, *The Research Methods Knowledge Base* (3rd edn, Atomic Dog 2006)

Tudor I, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008)

Van Harten G, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2009)

——, *Sovereign Choices and Sovereign Constraints* (Oxford University Press 2014)

Vasciannie S, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, vol 70 (Oxford Publishing Limited (England) 2000)

Vranken JBM, 'Methodology of Legal Doctrinal Research: A Comment on Westerman' in MAA Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline* (Hart Publishing 2011)

Webley L, 'Qualitative Approaches to Empirical Legal Research' in P Cane and H Kritze (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010)

Yanow D and Schwartz-Shea P, 'Doing Social Science in a Humanistic Manner', *Interpretation and Method* (2nd edn, Routledge 2014)

Yin RK, *Case Study Research, Design and Methods* (3rd edn, Sage Publications 2003)

Journal Articles

Abs H and Shawcross H, 'The Proposed Convention to Protect Foreign Investment: A Round Table: Comment on the Draft Convention by Its Authors' (1960) 9 *Journal of Public Law* 119

Atan G bin, 'The Effects of DFI on Trade, Balance of Payments and Growth in Developing Countries, and Appropriate Policy Approaches to DFI' [1996] *Third World Network, Penang*

Balasubramanyam VN, Salisu M and Sapsford D, 'Foreign Direct Investment as an Engine of Rowth' (1999) 8 *Journal of International Trade & Economic Development* 27

Bangladesh Board of Investment, 'Guide to Investment in Bangladesh' [1989] *Procedure for Foreign Investment*

Baxter P and Jack S, 'Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers' (2008) 13 *The Qualitative Report* 544

Baxter RR, 'Multilateral Treaties as Evidence of Customary International Law' (1965) 41 *British Yearbook of International Law*

Berghoff H, ' The Siemens Corruption Scandal ' (2018) 60 *Business History* 423

Bishop WW and Whiteman MM, 'Digest of International Law' (1965) 8 *Michigan Law Review*

Borchard EM, *The Diplomatic Protection of Citizens Abroad, or, The Law of International Claims* (Banks Law Publishing Company 1915)

Borchard EM, 'Limitations on Coercive Protection' (1927) 21 *American Journal of International Law* 303

Chrispas Nyombi & Tom Mortimer, 'Tackling the Legitimacy Crisis in International Investment Law Through Progressive Treaty-Making Practices' (2017) 20 *International Arbitration Law Review* 165

Cremades BM, 'Resurgence of the Calvo Doctrine in Latin America' (2006) 7 *Business Law International* 53

De Vattel E, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and*

Affairs of Nations and Sovereigns (PH Nicklin & T Johnson 1835)

De Vaus D, *Research Design in Social Research* (Sage 2001)

Drago LM, 'State Loans in Their Relation to International Policy' (1907) 1 *American Journal of International Law* 692

Dragoş D, Neamţu B and Balica D, 'The Romanian Ombudsman and It's Interraction with the Courts-An Exploratory Research' (2010) 6 *Transylvanian Review of Administrative Sciences* 58

Dumberry P, 'The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105' [2013] *Kluwer Law International*

Eberle EJ, 'The Methodology of Comparative Law' (2011) 16 *Roger Williams University Law Review*

Eisenhardt KM and Graebner ME, 'Theory Building from Cases: Opportunities and Challenges' (2007) 50 *Academy of Management Journal*

Falki N, 'Impact of Foreign Direct Investment on Economic Growth in Pakistan' (2009) 5 *International Review of Business Research Papers* 110

Fawcett JE, 'Some Foreign Effects of Nationalization of Property' (1950) 27 *British Yearbook of International Law* 355

Gazzini T, 'Beyond Protection: The Role of the Home State in Modern Foreign Investment Law' [2021] *Public Actors in International Investment Law* 19

Grossfeld B and Eberle EJ, 'Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers' (2003) 38 *Texas International Law Journal* 291

Hanessian G and Duggal K, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2016) 32 *ICSID Review - Foreign Investment Law Journal* 729

Henry L, 'Investment Agreement Claims under the 2004 Model US Bit: A Challenge for State Police Powers' (2009) 31 *U. Pa. J. Int'l L.* 935

Hey E and Mak E, 'Introduction: The Possibilities of Comparative Law Methods for Research on the Rule of Law in a Global Context' (2009) 2 *Erasmus Law Review* 287

Jandhyala S, 'Bringing the State Back In: India's 2015 Model BIT | 17 August 2015' [2015] *Columbia FDI Perspectives | Perspectives on Topical Foreign Direct Investment*

Jandhyala S, Henisz WJ and Mansfield ED, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55 *Journal of Conflict Resolution* 1047

Klein MU, Aaron C and Hadjimichael B, *Foreign Direct Investment and Poverty Reduction* (2015) World Bank Publications 1

Kolichala HK, 'Time Bound Arbitration Proceedings-A Big Reform in Arbitration Law' (2020) 55 *The Management Accountant Journal* 28

Lall S, 'Vertical Inter-firm Linkages in LDCs: An Empirical Study' (1980) 42 *Oxford Bulletin of Economics and Statistics* 203

Law D of I, *The Hague Convention (II) of 1907 Respecting the Limitation of the Employment of Force*

for the Recovery of Contract Debts (The Endowment 1915)

Lee JW, Baimukhamedova GS and Akhmetova S, 'The Effects of Foreign Direct Investment on Economic Growth of a Developing Country' (2009) 12 *Allied Academies International Conference* 22

Legum B, 'The Innovation of Investor-State Arbitration under NAFTA' (2002) 43 *Harv. Int'l LJ* 531

Lockwood JE, 'The Economic Agreement of Bogota' (1948) 42 *American Journal of International Law* 611

Loree DW and Guisinger SE, 'Policy and Non-Policy Determinants of US Equity Foreign Direct Investment' (1995) 26 *Journal of International Business Studies* 281

Mann FA, 'British Treaties for the Promotion and Protection of Investments' (1982) 52 *British Yearbook of International Law* 241

Manni UH and Afzal MNI, 'Effect of Trade Liberalization on Economic Growth of Developing Countries: A Case of Bangladesh Economy' (2012) 1 *Journal of Business Economics and Finance* 37

Marchessault L, 'Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh (ICSID Case No. ARB/06/10) Introductory Note' (2011) 26 *ICSID review* 256

Moran T, 'FDI and Development: What Is The Role of International Rules and Regulations?' (2003) 12 *Transnational Corporations* 1

Muchlinski P, The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 *International & Comparative Law Quarterly* 527

Nakib MN, 'Regulating Foreign Direct Investment for Development: Bangladesh in Context' [2014] *Researchonline,Macquarie University*

Nam J, 'Model BIT: An Ideal Prototype or a Tool for Efficient Breach' (2016) 48 *Geo. J. Int'l L.* 1275

Nyombi C, 'EU Reform of International Investment Law in the Shadow of Brexit' (2016) 27 *International Company and Commercial Law Review*

Ortino F, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) 30 *Leiden Journal of International Law* 71

Pappas AJ, 'References on Bilateral Investment Treaties' (1989) 4 *ICSID Review - Foreign Investment Law Journal* 189

Parra AR, 'Principles Governing Foreign Investment, as Reflected in National Investment Codes' (1992) 7 *ICSID Review - Foreign Investment Law Journal* 428

Parry C, 'A British Digest of International Law' (1965) 6 *The Cambridge Law Journal*

Paschalidis AM and Lavranos N, 'Comparative Analysis between the 2018 and 2004 Dutch Model Bilateral Investment Treaty Texts' (2019) 4 *European Investment Law and Arbitration Review Online* 89

Rahman A, 'Impact of Foreign Direct Investment on Economic Growth: Empirical Evidence from Bangladesh' (2015) 7 *International Journal of Economics and Finance*

Ranjan P, 'India and Bilateral Investment Treaties—a Changing Landscape' (2014) 29 *ICSID Review* 419

Ranjan P and Anand P, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 *Nw. J. Int'l L. & Bus.* 437

Rizvi Z, 'The Shift Towards Institutional Arbitration: Critically Examining the Arbitration (Amendment) Act 2019' [2020] *SSRN*

Roberts A, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *American Journal of International Law* 45

Robinson DR, 'Expropriation in the Restatement (Revised)' (1984) 78 *Am. J. Int'l L.* 176

Root E, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 *American Journal of International Law* 517

Roy SNG, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 *American Journal of International Law* 863

Sacco R, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 *The American Journal of Comparative Law* 343

Salacuse JW, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 *The International Lawyer* 655

Schachter O, 'Compensation for Expropriation' (1986) 78 *American Journal of International Law*

Schreuer C, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 *Law & Prac. Int'l Cts. & Tribunals* 1

Schultz T and Dupont C, 'Investment Arbitration: Promoting the Rule of Law or over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 *European Journal of International Law* 1147

Shea DR, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955)

Silagi M, 'Preferential Claims Against Venezuela Arbitration', *Encyclopedia of Public International Law* (1992) 1098

Singh K, 'An Analysis of India's New Model Bilateral Investment Treaty' [2016] *Brothers. org* 81

Sinha AK, 'Amit Kumar Sinha' (2017) 5 *Journal of Comparative Law (Oxford University Press)* 227

——, 'Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries' (2017) 7 *Asian Journal of International Law* 227

Thomas JC, 'Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators' (2002) 17 *ICSID Review – Foreign Investment Law Journal* 21

Trafford V and Lesham S, 'Overlooking the Conceptual Framework' (2007) 44 *Innovations in Education and Teaching International* 93

Vandevelde KJ, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 *Cornell International Law Journal* 201

——, *United States Investment Treaties: Policy and Practice* (Kluwer Law International 1992)

——, 'A Brief History of International Investment Agreements' (2005) 12 *UC Davis Journal of International Law & Policy* 157

Weiss MA and Ilias S, 'The U.S. Bilateral Investment Treaty Program: An Overview' (2013) *The U.S. Bilateral Investment Treaty Program and Foreign Direct Investment Flows* 1

William H.Rehnquist, 'Notion of a Living Constitution ' (1976) 54 *Texas Law Review*

Yussof I and Ismail R, 'Human Resource Competitiveness and Inflow of Foreign Direct Investment to the ASEAN Region' (2002) 9 *Asia-Pacific Development Journal* 89

Newspaper Articles

Aditya Kalra, 'India Privately Took Amazon to Task over Insulting Flag Doormat | Reuters' *Reuters* (March 2017)

Islam MR, 'The Niko Arbitration: Lessons for Bangladesh' (*The Daily Star*, 2018) <THE NIKO ARBITRATION Lessons for Bangladesh> accessed 27 July 2021

Monbiot G, 'The Real Threat to the National Interest from the Rich and Powerful' (*The Guardian* 15 October 2013)

Web Pages

America TUS of, 'U.S. Model Bilateral Investment Treaty' (*UNCTAD Investment Policy Hub*, 2012) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2870/download> accessed 24 July 2021

American Arbitration Association, 'AAA-ICDR Council ' (*American Arbitration Association*) <https://go.adr.org/AAA-ICDR-Council.html?utm_source=website-adr&utm_medium=mosaic&utm_campaign=website-aaa-icdr-council&_ga=2.139747571.1380300597.1622921385-1169892617.1622921385> accessed 25 July 2021

——, 'Virtual - Cases Statistics' <https://www.adr.org/> accessed 24 July 2021

Amnesty International, 'Human Rights Principles For Companies' (1998) <https://www.amnesty.org/download/Documents/148000/act700011998en.pdf> accessed 24 July 2021

——, 'Public Statement | 2005 UN Commission on Human Rights: Amnesty International Welcomes New UN Mechanism on Business and Human Rights' (2005) <https://www.amnesty.org/download/Documents/88000/ior410442005en.pdf> accessed 24 July 2021

Asghar AS, 'Public Interest Litigation: A Tool To Protect Fundamental Rights' (2011) <https://pljlawsite.com/2011art55.htm> accessed 25 July 2021

Association of Southeast Asian Nations, 'The 1987 ASEAN Agreement for the Promotion and

Protection of Investments' (*ASEAN*, 1987) <https://asean.org/?static_post=the-1987-asean-agreement-for-the-promotion-and-protection-of-investments> accessed 24 July 2021

Audiovisual Library of International Law, 'Lecture Series - Dr. Kamal Hossain' (*2011*) <https://legal.un.org/avl/ls/Hossain_D.html#> accessed 14 July 2021

Australian Government, 'Thailand-Australia Free Trade Agreement' (*Department of Foreign Affairs and Trade*, January 2005) <https://www.dfat.gov.au/trade/agreements/in-force/tafta/thailand-australia-free-trade-agreement> accessed 24 July 2021

Bangladesh Bank, 'Bangladesh Foreign Direct Investment | 2002-2020 Data' (*Trading Economics*, 2020) <https://tradingeconomics.com/bangladesh/foreign-direct-investment> accessed 14 July 2021

Bechtel, 'Tribunal Rules for Bechtel and GE in Dabhol Power Project Arbitration' (*Bechtel Newsroom*, 9 September 2003) <https://www.bechtel.com/newsroom/releases/2003/09/tribunal-rules-dabhol-power-project-arbitration/> accessed 27 June 2021

BIAC, 'Bangladesh International Arbitration Centre' (2011) <https://www.biac.org.bd/> accessed 26 July 2021

BIDA, 'Bangladesh Investment Development Authority' (2016) <http://bida.gov.bd/?page_id=494> accessed 26 July 2021

BRC, 'Bangladesh Regulatory Commission' (2003) <http://www.berc.org.bd/> accessed 26 July 2021

Brooks DH, Fan EX and Sumulong LR, 'Foreign Direct Investment in Developing Asia: Trends, Effects, and Likely Issues for the Forthcoming WTO Negotiations' (*ERD Working Paper Series No. 38*, 2003) <https://www.think-asia.org/bitstream/handle/11540/1524/wp038.pdf?sequence=1> accessed 25 July 2021

Brownsword R, 'An Introduction to Legal Research' (*Report from Wellcome Trust*, 2006) <www.scribd.com/doc/14260230/An-Introduction-to-Legal-Research> accessed 26 July 2021

Commission I-ACA, 'Union of International Associations' (*Inter-American Commercial Arbitration Commission*, 2013) <https://uia.org/s/or/en/1100004109> accessed 24 July 2021

Commission of the European Communities, 'Lome IV' (*Commission of the European Communities, Brussels*, 1990) <http://aei.pitt.edu/7561/1/31735055261238-1.pdf> accessed 24 July 2021

Daujotas R, 'ICSID "Foreign" Investment Requirement in Case of Borrowed Funds' (*Dr. Rimantas Daujotas Advokatas*, 12 April 2015) <http://rdaujotas.com/publications/icsid-foreign-investment-requirement-in-case-of-borrowed-funds/> accessed 27 June 2021

Development O for EC and, 'OECD Guidelines for Multinational Enterprises' (*OECD Guidelines for Multinational Enterprises*, 2013) <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 24 July 2021

Devnath A, 'Record Exports Seen Rising as Bangladesh Woos U.S. Consumers - Bloomberg' (*Bloomberg*, 24 January 2016) <https://www.bloomberg.com/news/articles/2016-01-24/record-exports-seen-rising-in-this-fast-growing-asian-economy> accessed 22 June 2021

DFDL, 'Bangladesh Investment Guide 2018' (*DFDL*, 2018) <https://www.dfdl.com/resources/publications/investment-guides/bangladesh-investment-guide-2018/> accessed 22 June 2021

Dhar B and Chalapati Rao K, 'India's FDI Inflows: Trends and Concepts' (*Munich Personal RePEc Archive*, 2011) <https://mpra.ub.uni-muenchen.de/29153/1/MPRA_paper_29153.pdf> accessed 25 July 2021

DIAC, 'Delhi International Arbitration Centre' <http://www.dacdelhi.org/> accessed 25 July 2021

Felter C, Renwick D and Chatzky A, 'Mercosur: South America's Fractious Trade Bloc' (*Council on Foreign Relations*, 10 July 2019) <https://www.cfr.org/backgrounder/mercosur-south-americas-fractious-trade-bloc> accessed 24 July 2021

FICCI, 'Foreign Investors' Chamber of Commerce & Industry Bangladesh ' (1963) <https://ficci.org.bd/> accessed 26 July 2021

Fraser JM, 'Lessons from the Independent Private Power Experience in Pakistan' (*Energy and Mining Sector Board Discussion Paper No. 14*, 2005) <https://documents1.worldbank.org/curated/en/729661468285358780/pdf/337700rev0Less1rivate0Energy1SB1N14.pdf> accessed 25 July 2021

Government of Bangladesh, 'Bilateral Treaties' (*Ministry of Industries Peoples' Republic of Bangladesh*, 18 September 2017) <https://moind.gov.bd/site/page/f7aa7575-5196-476b-907b-3ea65e885717> accessed 26 June 2021

Government of India Ministry of Finance, 'Press Information Bureau I Model Text for the Indian Bilateral Investment Treaty' (*Press Information Bureau Government of India Ministry of Finance*, 2015) <https://pib.gov.in/newsite/PrintRelease.aspx?relid=133412> accessed 24 July 2021

Government of the People's Republic of Bangladesh, 'The Code of Civil Procedure, 1908' (*Laws of Bangladesh*, 1908) <http://bdlaws.minlaw.gov.bd/act-86.html> accessed 19 July 2021

——, 'The Constitution of the People's Republic of Bangladesh 1972' (*Laws of Bangladesh*, 1972) <http://bdlaws.minlaw.gov.bd/act-367.html> accessed 19 July 2021

——, 'The Foreign Private Investment (Promotion and Protection) Act 1980' (*Laws of Bangladesh*, 1980) <http://bdlaws.minlaw.gov.bd/act-597.html> accessed 19 July 2021

——, 'The Arbitration Act 2001' (*Laws of Bangladesh*, 2001) <See, section 1-18 of the Arbitration Act 2001.> accessed 19 July 2021

Greg Jones, 'Proper Judicial Activism ' (*HEIN ONLINE*, 2001) <https://heinonline.org/HOL/LandingPage?handle=hein.journals/regulr14&div=11&id=&page=> accessed 30 July 2021

ICCB, 'International Chamber of Commerce Bangladesh' (1994) <https://iccbangladesh.org.bd/category/latest-news/> accessed 26 July 2021

International Committee of The Red Cross (ICRC), 'Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land.' (*Treaties, States Parties and Commentaries*, 1907) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6> accessed 27 July 2021

International Monetary Fund (IMF), 'World Economic Outlook ' (*International Monetary Fund*, 2018) <https://www.imf.org/external/datamapper/NGDPDPC@WEO/OEMDC/ADVEC/WEOWORLD/BGD> accessed 14 July 2021

JAMS, 'Local Solutions. Global Reach. Arbitration Institution' <https://www.jamsadr.com/about/>

accessed 25 July 2021

Javorcik BS and Spatareanu M, 'To Share or Not To Share: Does Local Participation Matter for Spillovers from Foreign Direct Investment?' (*Rutgers University Newark*, 2006) <https://ideas.repec.org/p/run/wpaper/2006-001.html> accessed 25 July 2021

Joshua Paine, 'Cairn Energy v India: Retroactive Taxation, Fair and Equitable Treatment and the General Principles Method' (*European Journal of International Law*, 13 January 2021) <https://www.ejiltalk.org/cairn-energy-v-india-retroactive-taxation-fair-and-equitable-treatment-and-the-general-principles-method/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2> accessed 16 July 2021

Law Commission of India, 'Arrears and Backlog: Creating Additional Judicial (Wo)Manpower' (2014) <https://lawcommissionofindia.nic.in/reports/Report_No.245.pdf> accessed 25 July 2021

Mann H and others, 'IISD Model International Agreement on Investment for Sustainable Development | Negotiators' Handbook | Second Edition' (*International Institute for Sustainable Development*, 2006) <https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf> accessed 24 July 2021

'Maxim Naumchenko, Andrey Poluektov and Tenoch Holdings Limited v. Republic of India, PCA Case No. 2013-23 | Italaw' <https://www.italaw.com/cases/1933> accessed 27 June 2021

MCIA, 'Mumbai Centre for International Arbitration ' <https://mcia.org.in/> accessed 25 July 2021

Ministry of Finance, 'List of Countries with Whom Bilateral Investment Promotion and Protection Agreements (BIPA) Has Been Signed' (*Government of India*, December 2013) <https://www.finmin.nic.in/list-countries-whom-bilateral-investment-promotion-and-protection-agreements-bipa-has-been-signed> accessed 26 June 2021

Mohammad Hasan Habib, ' The International Arbitration Review: Bangladesh' (*The Law Reviews*, 4 July 2021) <https://thelawreviews.co.uk/title/the-international-arbitration-review/bangladesh> accessed 26 July 2021

Multilateral Investment Guarantee Agency (MIGA), 'Establishing The Multilateral Investment Guarantee Agency' (*Convention*, 2010) <https://www.miga.org/sites/default/files/archive/Documents/MIGA Convention (April 2018).pdf> accessed 24 July 2021

Nani Palkhivala, 'Nani Palkhivala Arbitration Centre' <http://www.nparbitration.com/> accessed 25 July 2021

OECD, 'Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention' (1967) 13 <https://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf>

Office of the United States Trade Representative, 'United States Concludes Review of Model Bilateral Investment Treaty | United States Trade Representative' (*Office of the United States Trade Representative*, 2012) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/april/united-states-concludes-review-model-bilateral-inves> accessed 25 July 2021

——, 'CAFTA-DR (Dominican Republic-Central America FTA) | United States Trade Representative' (2021) <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-

central-america-fta> accessed 24 July 2021

Office Of The United States Trade Representative, 'United States-Mexico-Canada Agreement' (1 July 2020) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> accessed 24 July 2021

Organization of American States, 'North American Free Trade Agreement' (*Foreign Trade Information System*) <http://www.sice.oas.org/trade/nafta/chap-111.asp#:~:text=Article 1105%3A Minimum Standard of,and full protection and security> accessed 24 July 2021

Press Information Bureau G of I, 'Signing of Joint Interpretative Note (JIN) to Bilateral Investment Agreement Between India and Bangladesh ' (*Press Information Bureau, Government of India*, 2017) <http://dea.gov.in/sites/default/files/Signed Copy of JIN.pdf> accessed 24 July 2021

Ramkumar Khatiwada, 'Re-Negotiating the Bilateral Investment Treaties: Is India Moving in the Right Direction ' (2016) *Academia.edu* <https://www.academia.edu/31870844/Re_negotiating_the_Bilateral_Investment_Treaties_Is_India_Moving_in_the_Right_Direction> accessed 25 July 2021

Republic of India, 'Model Text of the Indian Biletaral Investment Treaty' (*UNCTAD Investment Policy Hub*, 2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download> accessed 24 July 2021

Ruggie JG, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Project, Respect and Remedy" Framework' (*United Nations Digital Library*, 2011) <https://digitallibrary.un.org/record/705860?ln=en> accessed 27 July 2021

Sachs G, 'Global Economic Paper No: 134|How Solid Are the BRICs?' (*línea). Web*, 2005) <https://www.goldmansachs.com/insights/archive/archive-pdfs/how-solid.pdf> accessed 26 July 2021

Sahoo P, 'Foreign Direct Investment in South Asia: Policy, Trends, Impact and Determinants' (*ADB Institute Discussion Paper No. 56*, 2006) <https://www.adb.org/sites/default/files/publication/156693/adbi-dp56.pdf> accessed 27 June 2021

Suescun de Roa F, 'Comments on the ICSID Award Saipem v. Bangladesh: Would Its Rationale Be Applicable in Future Cases?' (*CPR International Institute for Conflict Prevention & Resolution*, 5 May 2011) <https://www.cpradr.org/news-publications/articles/2011-05-05-comments-on-the-icsid-award-saipem-v-bangladesh-would-its-rationale-be-applicable-in-future-cases-2011-writing-contest-winner> accessed 1 July 2021

Sun X, 'Foreign Direct Investment and Economic Development | What Do the States Need To Do?' (*Foreign Investment Advisory Service for the Capacity Development Workshops and Global Forum on Reinventing Government on Globalization, Role of the State and Enabling Environment, United Nations*, 2002) <https://docs.igihe.com/IMG/pdf/unpan006348.pdf> accessed 24 July 2021

T. Editors of Encyclopaedia Britannica, 'Jay Treaty' (*Encyclopedia Britannica*, 2020) <https://www.britannica.com/event/Jay-Treaty> accessed 27 July 2021

Tarcisio Gazzini, 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties ' (*Investment Treaty News (An online quarterly journal on investment law and policy from a sustainable development perspective)*, 2017) <https://www.iisd.org/system/files/publications/iisd-itn-september-2017-english.pdf> accessed 24 July 2021

Taylor A, 'Bhopal: The World's Worst Industrial Disaster, 30 Years Later' (*The Atlantic*, 2014) <https://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/> accessed 1 August 2021

The Kingdom of Morocco, 'Moroccan Model BIT' (*Investment Policy Hub*, 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download> accessed 24 July 2021

The Kingdom of the Netherlands, 'The Netherlands Model Investment Agreement' (*UNCTAD Investment Policy Hub*, 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> accessed 24 July 2021

UN Centre on Transnational Corporations, 'Key Concepts in International Investment Arrangements and Their Relevance to Negotiations on International Transactions in Services' (*United Nations Digital Library*, 1990) <https://digitallibrary.un.org/record/87176?ln=en> accessed 27 July 2021

UNCTAD, 'Bangladesh - Germany BIT (1981) | International Investment Agreements Navigator ' (*UNCTAD Investment Policy Hub*) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/370/bangladesh---germany-bit-1981-> accessed 27 July 2021

——, 'Bangladesh - India BIT (2009) | International Investment Agreements Navigator' (*UNCTAD Investment Policy Hub*) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/371/bangladesh---india-bit-2009-> accessed 27 July 2021

United Nations, 'Havana Charter for an International Trade Organization' (1948) <https://treaties.un.org/doc/source/docs/E_CONF.2_78-E.pdf> accessed 24 July 2021

——, 'Yearbook of the International Law Commission' (1957) II

——, 'The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (*The New York Arbitration Convention*, 10 June 1958) <https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf> accessed 26 July 2021

——, 'UNCITRAL Model Law on International Commercial Arbitration ' (*United Nations Commission On International Trade Law*, 2006) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 25 July 2021

United Nations (UN), 'International Investment Instruments: A Compendium Volume II Regional Instruments' (*United Nations Conference on Trade and Development Geneva*, 1996) 527 <https://unctad.org/system/files/official-document/dtci30vol2_en.pdf> accessed 24 July 2021

United Nations General Assembly, 'Report of the International Law Commission | Fifty-Eighth Session' (*International Law Commission*, 2006) A/61/10 <http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf>

United Nations UNCTAD, 'Investor State Dispute Settlement: A Sequel' (*IIA Issues Note*, 2014) 230 <http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf> accessed 27 June 2021

——, 'Recent Developments in Investor-State Dispute Settlement (ISDS)' (*United Nations Conference on Trade and Development* \ *IIA Issues Note*, 2014) <https://unctad.org/system/files/official-document/webdiaepcb2014d3_en.pdf> accessed 27 June 2021

——, ‘Investment Policy Framework’ (*United Nation’s Conference on Trade and Development (UNCTAD)*, 2015) 1 <https://investmentpolicy.unctad.org/investment-policy-framework> accessed 16 July 2021

——, ‘Recent Trends in IIAS and ISDS’ (*United Nations Conference on Trade and Development \ IIA Issues Note*, 2015) <https://unctad.org/system/files/official-document/webdiaepcb2015d1_en.pdf> accessed 27 June 2021

——, ‘Country Fact Sheet: India’ (*World Investment Report*, 2020) <https://unctad.org/system/files/non-official-document/wir_fs_in_en.pdf> accessed 27 June 2021

——, ‘Afghanistan Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ (*UNCTAD Investment Policy Hub*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/1/afghanistan> accessed 26 June 2021

——, ‘Bangladesh Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ (2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh> accessed 26 July 2021

——, ‘International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ (*UNCTAD Investment Policy Hub*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 26 June 2021

——, ‘Nepal Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ (*UNCTAD Investment Policy Hub*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/147/nepal> accessed 26 June 2021

——, ‘Pakistan Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator’ (*UNCTAD Investment Policy Hub*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh> accessed 26 June 2021

——, ‘Sri Lanka Bilateral Investment Treaties (BITs) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub’ (*UNCTAD Investment Policy Hub*, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/198/sri-lanka> accessed 26 June 2021

——, ‘World Investment Report | UNCTAD’ (*United Nations Conference on Trade and Development.*, 2021) <https://unctad.org/topic/investment/world-investment-report> accessed 14 July 2021

United States of America, ‘The US Model BIT 2004’ (2004) <https://ustr.gov/sites/default/files/U.S. model BIT.pdf> accessed 25 July 2021

US Department of State, ‘Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty’ (*The US Department of State*, September 2009) <https://2009-2017.state.gov/e/eb/rls/othr/2009/131098.htm> accessed 24 July 2021

Zhan JJ, ‘FDI Statistics: A Critical Review and Policy Implications’ (*World Association of Investment Promotion Agencies (WAIPA)*, 2006) <https://www.yumpu.com/en/document/read/35119002/fdi-statistics-a-critical-review-and-policy-implications-waipa> accessed 25 July 2021

APPENDIX A

The Wording of FET Provisions in Current Bangladeshi BITs

Country	Date of Signature	Date of Enforcement	FET Provision
Cambodia	17/06/2014	(not in force)	Article 3(2) states, Each Contracting Party shall accord to investments of investors of the other Contracting Party "fair and equitable treatment" and "full protection and security" in accordance with the law and regulations of the Host State, and the customary or international law standard of treatment and protection.
Germany	06/05/1981	14/09/1986	Article 3(1) states, Investments by nationals or companies of either Contracting Party shall enjoy full protection as well as security in the territory of the other Contracting Party. Amended in 2008 in which article 2 (2) Each Contracting State shall in its territory in every case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under this Treaty. Subsection (3) states, Neither Contracting State shall in its territory impair by arbitrary or discriminatory measures the activity of investors of the other Contracting State with regard to investments, such as in particular the management, maintenance, use, enjoyment or disposal of such investments. This provision shall be without prejudice to Article 7 (3).
Bahrain	22/12/2015	(not in force)	Article 2 (2) states, Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
Belarus	12/11/2012	(not in force)	Article 3 (2) states, Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection in the territory of the other Contracting Party under this Agreement. Each Contracting Party shall: in no way impair by unreasonable or discriminatory · measures the management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party; observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.
Belgo-Luxembourg Economic Union	22/05/1981	15/09/1987	Article 2 (2) states, Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or

			disposal of investments in its territory of nationals or companies of the other Contracting Party”
Austria	21/12/2000	01/12/2001	Article 3(1) states, Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security. Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and shall in no case be less than that required by international law. Article 3(2) states, A Contracting Party shall not impair by unreasonable or discriminatory measures the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment by investors of the other Contracting Party. Article 3(3) states, Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, treatment no less favourable than that it accords to its own investors and their investments or to investors of any third country and their investments with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favourable to the investor.
China	12/09/1996	25/03/1997	Article 3(1) states, Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.
France	10/09/1985	09/10/1986	Article 4 states, The investments of the nationals or companies of each of the two contracting parties are continuously receiving fair and equitable treatment as well as full protection of security in other contracting party. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party.
United States of America	12/03/1986	25/07/1989	Article 2 states, Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and shall in no case be less than that required by international law. Neither Party shall in any way impair by arbitrary

			and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party. Each Party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party. Amended in 2012 Article 5: Minimum Standard of Treatment 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law
Turkey	12/11/1987	(terminated)	Article 2 states, Each Party shall permit in its territory investments and activities associated therewith, on a basis no less favourable than that accorded in like situations to investments of national companies of any third country, and within the framework of its laws and regulations, no less favourable than that accorded in like situations to investments of its own nationals and companies.
Turkey	12/04/2012	20/05/2019	Article 2(2) states, Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, enjoyment, extension, or disposal of such investments by unreasonable or discriminatory measures.
Thailand	09/06/2002	12/01/2003	Article 2(2) states, Investments of investors or either Contracting Party shall all time be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in anyway impair by

			unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory or investors of the other Contracting Party.
Thailand	30/03/1988	(terminated)	Article 2 states, Each Contracting Party shall in its territory accord to nationals or companies of the other Contracting Party as regards the management, use, enjoyment or disposal of their investments, treatment which is fair and equitable and not less favourable than that which it accords to its own nationals and companies or to the nationals and companies of any third State.
Denmark	05/11/2009	27/02/2013	Article 3(1) states, Each Contracting Party shall in its territory accord to investments made by investors of the other' 'Contracting Part. fair and· equitable treatment which in no case shall be less favourable than that accorded to its own investors or to I investments of any third state, whichever is the more favourable from the point of view of the investor. Article 3(2) states, Each Contracting party shall in its territory accord to investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third State, whichever of these standards is the more favourable from the point of view of the investor.
India	09/02/2009	07/07/2011	Article 3 states, Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and policy. 1. Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. Amended in 2016 Article 3(1) states, No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv)manifestly abusive treatment, such as coercion, duress and harassment.

Indonesia	09/02/1998	22/04/1999	Article 2 states, Investments of investors of either contracting party shall all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other contracting party.
Iran	29/04/2001	05/12/2002	Article 4 states, Investments of natural and legal persons or either Contracting Party elected within the territory of the other Contracting Party, shall receive the host Contracting Party's full legal protection and fair treatment not less favourable than that accorded to its own investors to investors of any third slate, whichever is more favourable.
Italy	20/03/1990	20/09/1994	Article 2 states, Both Contracting Parties shall at all times ensure fair and equitable treatment of the investments of investors of the other Contracting Party. Both Contracting Parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.
Japan	10/11/1998	25/08/1999	Article 3 states, Investors of either Contracting Party shall within the territory of the other Contracting Party be accorded treatment no less favourable than that accorded to investors of any third country in respect of investments. Investments and returns of investors of either Contracting Party shall receive the most constant protection and security, within the territory of the other Contacting Party.
North Korea	21/06/1999	(not in force)	Article 3 states, Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each contracting Party to investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments. Made within its territory investors of any third State, if this latter treatment is more favourable. Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments.
South Korea	18/06/1986	06/10/1998	Article 4 states, 1. a) Investments of nationals or companies of one Contracting Party in the territory of the other

			Contracting Party, as also the returns therefrom, shall receive treatment which is fair and equitable and not less favourable than that accorded in respect of the investments and returns of the nationals and companies of the latter Contracting Party or of any third State. b) Each Contracting Party shall in its territory accord to nationals or companies of the other Contracting Party as regards the managements, use, enjoyment or disposal of their investments, treatment which is fair and equitable and not less favourable than that which it accords to its own nationals and companies or to the nationals and companies of any third State. Investments of nationals or companies of one Contracting Party in the territory of the other Contracting Party shall enjoy the most constant protection and security under the laws of the latter Contracting Party.
Malaysia	12/10/1994	20/08/1996	Article 2 states, Investments of investors of each Contracting Party shall at all times be accorded equitable treatment and shall enjoy full and adequate protection and security in the territory of the other Contracting Party.
Netherlands	01/11/1994	01/06/1996	Article 3 states, 1) Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. 2) More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be, less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned. Amended in 2018 Article 9 Treatment of investors and of covered investments 1. Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party. In addition, each Contracting Party shall accord to such investments full physical security and protection. 2. A Contracting Party breaches the aforementioned obligation of fair and equitable treatment where a measure or series of measures constitutes: a) Denial of justice in criminal, civil or administrative proceedings; b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; c) Manifest arbitrariness;

			d) Direct or targeted indirect discrimination on wrongful grounds, such as gender, race, nationality, sexual orientation or religious belief; e) Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct; or f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Contracting Parties in accordance with paragraph 3 of this Article. 3. The Contracting Parties shall, upon request of a Contracting Party, review the content of the obligation to provide fair and equitable treatment and may complement this list through a joint interpretative declaration within the meaning of Article 31, paragraph 3, sub a, of the Vienna Convention on the Law of Treaties. 4. When applying paragraph 2 of this Article, a Tribunal may take into account whether a Contracting Party made a specific representation to an investor to induce an investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Contracting Party subsequently frustrated.
Pakistan	24/10/1995	(not in force)	Article 3(2) states, Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of such investments by unreasonable or discriminatory measures.
Philippines	08/09/1997	01/08/1998	Article 3 states, Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.
Poland	08/07/1997	19/11/1999	Article 3(2) states, Each Contracting Party shall ensure fair and equitable treatment within its territory for the investors of the other Contracting party. This treatment shall not be less favourable than that granted by each Contracting Party 10 Investments made within its territory by us own investors or made within its territory by investors of any third state. if this latter treatment is more favourable.
Kuwait	04/05/2016	**(**not in force)	Article 3 (2) states,

			Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party in a manner consistent with recognised principles of its laws and regulations and the provisions of this Agreement.
Romania	13/03/1987	31/10/1987	Article 3 states, Each Contracting Party shall accord, in its territory to the investments of capital and investors of the other Contracting Party, a treatment not less favourable than that which it accords to investments and investors of any third States. (National treatment).
Singapore	24/06/2004	19/11/2004	Article 3 states, Investment of investors of each Contracting Party shall at all times be accorded equitable treatment and shall enjoy full and adequate protection and security in the territory of the other Contracting Party.
Switzerland	14/10/2000	03/09/2001	Article 4 states, Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments. Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.
United Arab Emirates	17/01/2011	(not in force)	Article 3 states, Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full and adequate protection and security in the territory of the other Contracting Party. Each Contracting Party shall endeavour in its territory to the necessary measures as may be applicable for granting of appropriate facilities, incentives and other forms of encouragement for investments made by investors of the other Contracting Party.
United Kingdom	19/06/1980	19/06/1980	Article 2 states, Investments of nationals or companies/ of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable, discriminatory measures the management, maintenance, use, enjoyment disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may

			have entered into with regard to investments of nationals or company of the other Contracting Party.
Uzbekistan	18/07/2000	24/01/2001	Article 3 states, Each Contracting party, under its laws shall maintain diverse forms of mutual investments and provide economic cooperation by means of protection in its territory of investments of investors of other contracting Party.
Vietnam	01/05/2005	(not in force)	Article 2 states, Investments of investor of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection of security in the territory of the other Contracting Party.

APPENDIX B

Bilateral Investment Treaties (BITs) with Bangladesh

No.	Country	Status	Date of Signature	Date of Entry Into Force	BIT Text
1	Cambodia	Signed	17/06/2014		
2	Turkey	In force	12/04/2012	20/05/2019	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/274/download
3	United Arab Emirates	Signed	17/01/2011		https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/276/download
4	Denmark	In force	05/11/2009	27/02/2013	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5125/download
5	India	In force	09/02/2009	07/07/2011	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/265/download; https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf
6	Viet Nam	Signed	01/05/2005		https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5131/download
7	Singapore	In force	24/06/2004	19/11/2004	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4885/download
8	Thailand	In force	09/07/2002	12/01/2003	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5130/download
9	Islamic Republic of Iran	In force	29/04/2001	05/12/2002	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/267/download
10	Austria	In force	21/12/2000	01/12/2001	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/170/download

11	Switzerland	In force	14/10/2000	03/09/2001	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4807/download
12	Uzbekistan	In force	18/07/2000	24/01/2001	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/279/download
13	Dem. People's Rep. of Korea	Signed	21/06/1999		https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5128/download
14	Japan	In force	10/11/1998	25/08/1999	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/269/download
15	Indonesia	In force	09/02/1998	22/04/1999	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/266/download
16	Philippines	In force	08/09/1997	01/08/1998	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/272/download
17	Poland	In force	08/07/1997	19/11/1999	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5127/download
18	China	In force	12/09/1996	25/03/1997	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/571/download
19	Pakistan	Signed	24/10/1995		https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2137/download
20	Netherlands	In force	01/11/1994	01/06/1996	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/271/download
21	Malaysia	In force	12/10/1994	20/08/1996	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5126/download
22	Italy	In force	20/03/1990	20/09/1994	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/268/download
23	Thailand	Terminated; Replaced by 12/01/2003	30/03/1988		https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3343/download

24	Turkey	Terminated; Replaced by 20/05/2019	12/11/1987	21/06/1990	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/275/download
25	Romania	In force	13/03/1987	31/10/1987	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5129/download
26	Republic of Korea	In force	18/06/1986	06/10/1988	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/270/download
27	United States of America	In force	12/03/1986	25/07/1989	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/278/download; https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf
28	France	In force	10/09/1985	09/10/1986	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/263/download
29	BLEU (Belgium-Luxembourg Economic Union)	In force	22/05/1981	15/09/1987	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/262/download
30	Germany	In force	06/05/1981	14/09/1986	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/264/download
31	United Kingdom	In force	19/06/1980	19/06/1980	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/277/download
32	Kuwait	Signed (not in force)	04/05/2016	-	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6817/download
33	Belarus	Signed (not in force)	12/11/2012	-	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6999/download
34	Bahrin	Signed (not in force)	12/12/2015	-	https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/7018/download

APPENDIX C

Levels of Protections (UNCTAD FET variations) across all Bangladeshi BITs by Country

A	B	C	D	E
No FET obligation	**FET without any reference to international law or any further criteria (referred to as unqualified, autonomous or self-standing FET standard)**	**FET linked to international law**	**FET standard linked to the minimum standard of treatment of aliens under customary international law**	**FET with additional substantive content (denial of justice, unreasonable/discriminatory measures, breach of other treaty obligations, accounting for the level of development**
	Austria	Austria	Cambodia	Austria
	Belgo-Luxembourg Economic Union	China	India	Belgo-Luxembourg Economic Union
	France	Denmark	Netherlands	Denmark
	Germany	India	Pakistan	France
	Indonesia	Iran	Turkey	Indonesia
	Italy	Japan	United Kingdom	Italy
	Malaysia	Netherlands	United States of America	Netherlands
	Philippines	North Korea		North Korea
	Singapore	Poland		Philippines
	Switzerland	Romania		South Korea
	Thailand	South Korea		Switzerland
	Vietnam	Switzerland		Thailand
		United Arab Emirates		Turkey
		United Kingdom		United Arab Emirates
		United States of America		United Kingdom
		Uzbekistan		

APPENDIX D

THE BANGLADESHI ARBITRATION ACT, 2001

[Act No. I of 2001]

[24th January, 2001]

An Act to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations.

Whereas it is expedient and necessary to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations;

It is hereby enacted as follows:-

CHAPTER I
INTRODUCTORY

1. Short title, extent and commencement.-(1) This Act may be called the Arbitration Act,2001.
   (2) It extends to the whole of Bangladesh.
   (3) It shall come into force on such date as the Government shall, by notification inthe official Gazzette, appoint.

CHAPTER II
General Provisions

2. Definitions.- In this Act, unless there is anything repugnant in the subject or context, -

   (a) "Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of thedeceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;

   (b) "Court" means District Judge's Court and includes Additional Judge's Court appointed by the Government for discharging the functions of District Judge's Court under this Act through Gazette notification;

   (c) "International Commercial Arbitration" means an Arbitration relating to disputes arising out of legal 'relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is —

      (i) "an individual who is a national of or habitually resident in, any countryother than Bangladesh; or

      (ii) a body corporate which is incorporated in any country other than Bangladesh; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh, or

(iv) the Government of a foreign country;

(d) "Limitation Act" means Limitation Act, 1908 (IX of 1908);

(e) "Code of Civil Procedure" means Code of Civil Procedure, 1 908(Act V of 1908);

(f) "Specified state" means a spec state declared by the Government under section47 of this Act;

(g) "party" means a party to an ' agreement;

(h) "Chief Justice" means the Chief Justice of Bangladesh;

(i) "Rules" means any rules made under this Act;

(j) "Person" means a statutory or other organizations, company and association and includes partnership firm;

(k) "Foreign arbitral award" means an award which is made in pursuance of an Arbitration agreement in the territory of any state other than Bangladesh but it does not include an award made in the territory of a specified state;

(1) "Evidence Act" means Evidence Act, 1872 (Act I of 1872);

(m) "Arbitration" means any arbitration whether or not administered by permanent institution;

(n) "Arbitration agreement" means an agreement by the parties to submit to Arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(o) "Arbitration tribunal" means a sole Arbitrator or a panel of Arbitrator.

(p) "Arbitral award" means a decision moxie by the arbitral tribunal on the issue in dispute;

(q) "High Court Division" means High Court Division of the Supreme Court of Bangladesh.

3. Scope.-(1) This Act shall apply where the place of Arbitration is in Bangladesh.

(2) Notwithstanding anything contained in sub-section (1) of this section, the provisions of sections 45, 46, and 47 shall also apply to the arbitration f the place of that arbitration is outside Bangladesh.

(3) This Act shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

(4) Where any arbitration agreement is entered into before or after the

commencement of this Act, the provisions thereof shall apply to the arbitration proceedings in Bangladesh relating to the dispute arising out of that agreement.

4. Construction of References.— (1) Where this Act, except section 36, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person to determine that Issue.

(2) Where this Act –

(a) refers to the fact that the parties have agreed or that they may agree, or

(b) in any other way refers to an agreement of the parties, that agreementshall include any arbitration rules referred to in that agreement.

(3) Where this Act other than clause (a) of sub-section (3) of section 35 or clause (a) of sub-section (2) of section 41, refers to a claim, it shall also apply to a counter- claim, and where it refers to a defence, it shall also apply to a defence to that counter-claim.

5. Receipt of written communications.-(1) Unless otherwise agreed by the parties-

(a) any written communication, notice or summons is deemed to have been received f it Is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received f itis sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) The communication, notice or summons, as the case may be, shall be deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communication, notice or summons, as the case may be, in respect of proceedings of any judicial authority.

6. Waiver of right to object.-A party who knows that-

(a) any provision of this Act from which the parties may derogate, or.

(b) any requirement under the arbitration agreement, has not been complied with andyet proceeds with the arbitration without stating his objection to such non compliance without undue delay or, f a time limit is provided therefor within such period of time, shall be deemed to have waived his right to so object.

7. Jurisdiction of Court in respect of matters covered by arbitration agreement.- Notwithstanding anything contained in any other law for the time being in force, where any of the parties to the arbitration agreement files a legal proceedings in a Court against the other party, no judicial authority shall hear any legal proceedings except in so far as provided by this Act.

7A. Powers of court and High Court Division to make interim orders:- (1) Notwithstanding anything contained in section 7 unless the parties agree otherwise, upon prayer of either parties, before or during continuance of the proceedings or until enforcement of the award under section 44

or 45 in the case of international commercial arbitration the High Court Division and in the case of other arbitrations the court may pass order in the following matters:

(a) To appoint guardian for minor or insane to conduct on his/her behalf arbitral proceedings.

(b) To take into interim custody of or sale of or other protective measures in respect of goods or property included in the arbitration agreement.

(c) To restrain any party to transfer certain property or pass injunction on transfer of such property which is intended to create impediment on the way of enforcement of award.

(d) To empower any person to seize, preserve, inspect, to take photograph, collect specimen, examine, to take evidence of any goods or property included in arbitration agreement and for that purpose to enter into the land or building in possession of any party.

(e) To issue ad interim injunction;

(f) To appoint receiver; and

(g) To take any other interim protective measures which may appear reasonable or appropriate to the court or the High Court Division.

(2) The similar powers of the court or the High Court Division as are available in relation to any other legal proceedings shall be available to the court or the High Court Division as the case may be, while passing orders under sub section (1).

(3) Before passing order upon application received under sub-section (1) the court orthe High Court Division shall serve notice upon the other party:

Provided that f the court or the High Court Division is satisfied that in the event the orderis not passed instantaneously, the purpose of making interim measures shall be frustrated,there shall be no necessity of serving such notice.

(4) If the court or the High Court Division is satisfied that Arbitration Tribunal hasno power to initiate proceedings in any matter under sub-section (1) or the Arbitration Tribunal has failed to pass order in such matter, the Court or the HighCourt Division as the case may be, shall be competent to pass order under this section.

(5) The Court or the High Court Division f considers appropriate shall be competent to cancel, alter or amend the order passed under this section.

(6) Where any Arbitration Tribunal or any institution or person empowered in any matters relating to orders passed under sub-section (1) passed any order in such matters, the order passed by the court or High Court Division as the case may be, in the same matter, shall be entirely or the relevant part thereof inoperative.

8. Administrative assistance._ In order to facilitate the conduct of the arbitral proceedings, the parties, or the arbitration tribunal with the consent of the parties, may arrange for administrative assistance by a suitable person.

CHAPTER III
Arbitration Agreement

9. Form of arbitration agreement._ (1) An arbitration agreement may be in the form of art arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing and an arbitration agreement shall bedeemed to be in writing f it is contained in –

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams, Fax, e-mail or other means oftelecommunication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence ofthe agreement is alleged by one party and not denied by the other.

Explanation- The reference in a contract is a document containing an arbitration clause constitutes an arbitration agreement f the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

10. Arbitrability of the dispute.-(1) Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may, at any time before filinga written statement, apply to the Court before which the proceedings are pending to refer the matter to arbitration,

(2) Thereupon, the Court shall, f it is satisfied that an arbitration agreement exists, refer the parties to arbitration and stay the proceedings, unless the Court finds that the arbitration agreement is void, inoperative or is incapable of determinationby arbitration.

(3) Notwithstanding that an application has been made under sub-section (1) and thatthe issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

CHAPTER 117
Composition of Arbitral Tribunal

11. Number of arbitrators._ (1) Subject to the provisions of sub-section (3), the parties are free to determine the number of arbitrators.

(2) Failing the determination of a number referred to in sub-section (1) the tribunal shall consist of three arbitrators.

(3) Unless otherwise agreed by the parties, where they appoint an even number of arbitrators, the appointed arbitrators shall jointly appoint an additional arbitrator who shall act as a chairman of the tribunal.

12. Appointment of arbitrators._ (1) Subject to the provisions of this Act, the parties

are freeto agree on a procedure for appointing the arbitrator or arbitrators.

(2) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(3) Failing any agreement referred to in sub-section (1).

(a) in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitration within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made upon request ofa party-

(i) by the District Judge in case of arbitration other than international commercial arbitration, and

(ii) in case of international commercial arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall be Chairman of the arbitral tribunal

(4) If the appointment procedure in sub-section (3) applies and

(a) a party fails to appoint an arbitrator within thirty days of the receipt of a request to do so from the other party or,

(b) the appointed arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon the application of a party –

(c) by the District Judge except in case of international commercial arbitration, and

(d) by the Chief Justice or by any other Judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration.

(5) The third arbitrator appointed under clause (b) of sub- section (4) shall be the Chairman of the said tribunal.

(6) If more than one arbitrator are appointed under sub-section (4) the District Judge, or the Chief Justice or any other Judge of the Supreme Court designated by the Chief Justice, as the case may be, shall appoint one person from among the said arbitrators to be the Chairman of the arbitral tribunal.

(7) Where, under an appointment procedure agreed upon by the parties -

(a) a party fails to act as required under such procedure; or

(b) the parties, or the arbitrators, fail to reach an agreement under the same procedure; or

(c) a person or any third party fails to perform any function assigned to him under that procedure, unless the agreement on the appointment procedureprovides other means to take the necessary measure for securing the appointment a party may apply to-

(d) the District Judge except in case of international commercial

arbitration and the District Judge shall appoint the Chairman of the tribunal along with the other arbitrators,

(e) the Chief Justice or any Judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration and theChief Justice or the Judge of the Supreme Court as designated by the Chief Justice shall appoint the Chairman of the tribunal along with other arbitrators.

(8) The appointment of the arbitrator or arbitrators under sub-sections (3), (4) and (7)shall be made within sixty days from the receipt of the application thereof.

(9) The Chief Justice, or a Judge of the Supreme Court as designated by the Chief Justice, or the District Judge, as the case may be, in appointing an arbitrator under this section, shall have due regard to any qual required to the arbitrator under the agreement between the parties, and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(10) In the case of appointment of a sole arbitrator or third arbitrator in an international commercial arbitration, the Chief Justice or the Judge of the Supreme Court designated by the Chief Justice, as the case may be, may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(11) The Chief Justice or the District Judge, as the case may be, may make such scheme as he may deem appropriate for dealing with matters under this section.

(12) The decision under sub-sections (3), (4) and (7) of the Chief Justice or the Judge of the Supreme Court designated by the Chief Justice or the District Judge, as thecase may be, shall be final.

(13) The Chief Justice may entrust a Judge with the duties for a particular case orcases or for discharging the entire duties and may fix up the tenure of that Judge for the purposes of this section.

Explanation- In this section "District Judge" means that District Judge within whose local jurisdiction the concerned arbitration agreement has been entered into.

13. Grounds for challenge.- (1) When a person is requested to accept appointment as an arbitrator, he shall first disclose any circumstances likely to give rise to justifiable d is to his independence or impartiality.

(2) An arbitrator, shall from the time of his appointment and throughout the arbitral proceedings, without delay, disclose to the parties any circumstances referred to in sub-section (1) unless they have already been so informed by him.

(3) An arbitrator may be challenged only f circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose

appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

14. Challenge procedure.-(1) Subject to sub-section (6), the parties shall be free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within thirty days after becoming aware of the circumstances referred to in sub-section (3) of section 13, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2), withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge within thirty days from the date of filing the written statement referred to in sub-section (2).

(4) Any party aggrieved by the decision of the arbitral tribunal under sub-section (3),may prefer an appeal to the High Court Division within thirty days from the date of the said decision,

(5) The High Court Division shall decide the matter within ninety days from the dateon which it is filed.

(6) If a challenge under any procedure agreed upon by the parties or under the procedures under sub-section (3) or the appeal preferred against the decision is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an award.

15. Termination of arbitrator's mandate.-(1) The mandate of an arbitrator shall terminate.-

(a) he withdraws himself from office:
(b) he dies;
(c) all the parties agree on the termination of his mandate; or
(d) he is unable to perform his functions of his office or for other reasons fails to act without undue delay and withdraws from his office or the parties agree on the termination of his mandate.

(2) If arty arbitrator has incurred disqualifications referred to in clause (d) of sub-section (1) fails to withdraw himself from his office and all the parties fail to agree on his termination, then on the application of any party within the prescribed period by rules —

(a) the District Judge, in case of other arbitrations excepting international commercial arbitration;

(b) the Chief Justice or a Judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration may terminate the said arbitrator

(3) Where the parties are agreed upon, the termination shall be enforceable by the person agreed by the parties,

(4) If an arbitrator withdraws himself from his office or where all the parties agree on the termination of the mandate of an arbitrator under the circumstances

as referred to in clause(d) of sub-section (1), it shall not imply acceptance of the validity on any ground referred to in this clause or in sub section (3) of section 13.

Explanation- In this section "District Judge" means that District Judge within whose local jurisdiction the concerned arbitration agreement has been entered into.

16. Substitution of an arbitrator whose mandate has been terminated.- (1) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the provisions applicable to the appointment to the arbitrator whose mandate has been terminated.

(2) In the absence of any agreement between the parties –

(a) the substitute arbitrator shall, at the discretion of the arbitral tribunal continue thehearings from the stage at which the mandate of the arbitrator has been terminated.

(b) Any order or decision of the arbitral tribunal shall not be Invalid before the termination of the mandate of an arbitrator due to such termination.

CHAPTER V
Jurisdiction of Arbitration Tribunals

17. Competence of arbitration tribunal to rule on its own jurisdiction.-Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction on any questions including the following issues, namely –

(a) whether there is existence of a valid arbitration agreement.

(b) whether the Arbitral Tribunal is properly constituted;

(c) whether the arbitration agreement is against the public policy;

(d) whether the arbitration agreement is incapable of being performed; and,

(e) whether the matters have been submitted to arbitration in accordance with the arbitration agreement.

18. Severability of agreement.-An arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement while giving decision for the purpose of determining the jurisdiction of the arbitral tribunal.

19. Objection as to the jurisdiction of the arbitral tribunal.-(1) An objection that the tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

(2) An objection during the course of the arbitral proceedings that the tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority occurs.

(3) The arbitral tribunal may in either of the cases referred to in sub-sections (1) and (2), admit a later plea f it considers the delay justified.

(4) The arbitral tribunal shall decide on an objection referred to in sub-sections (1) and (2), and where the arbitral tribunal takes a decision rejecting the plea,

it shall continue with the arbitral proceedings and make an award.

(5) A party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of an arbitrator.

20. Powers of the High Court Division in deciding jurisdiction.-(1) The High Court Division, may on the application of any of the parties to the arbitration agreement, after serving notice upon all other parties, determine any question as to the jurisdiction of the arbitral tribunal.

(2) No application under this section shall be taken into account, unless the High Court Division is satisfied that-

(a) the determination of the question is likely to produce substantial savingsin costs;

(b) the application was submitted without any delay; and

(c) there is good reason why the matter should be decided by the Court.

(3) The application shall state— the reasons on which the matter should be decidedby the High Court Division.

(4) Unless otherwise agreed by the parties, where any application is pending before the High Court Division under this section the arbitral tribunal shall continue arbitration proceedings and make an arbitral award.

21. Powers of the arbitration tribunal to make interim orders.-(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect ofthe subject matter of the dispute, and no appeal shall lie against this order.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).

(3) No order under this section shall be passed without giving a notice to the other parties:

Provided that the arbitral tribunal may, where it appears that the object of taking interim measure under this section would be defeated by the delay, dispense with such notice.

(4) An order of an arbitral tribunal requiring the taking of interim measures may be enforced by the court, on an application made therefor, by the party requesting the taking of such interim measures.

(5) The application filed before the Court for the enforcement of the interim measures under sub-section (4) shall be deemed not to be incompatible with section 7 or with arbitration agreement or a waiver of the agreement.

22. Settlement other than arbitration.-(1) It shall not be incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute otherwise than by arbitration and with the agreement of all the parties, the arbitral tribunal may use mediation, conciliation or any other procedures at anytime during the arbitral

proceedingsto encourage settlement.

(2) If during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms,

(3) An arbitral award on agreed terms shall be made in accordance with section 38 and shall state that it is an arbitral award on agreed terms.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award made in respect of the dispute.

CHAPTER VI
Conduct of arbitral Proceedings

23. General Responsibilities of the arbitral tribunal.- (1) The arbitral tribunal shall deal with any of the dispute submitted to it fairly and impartially and for this purpose –

(a) each party shall be given reasonable opportunity to present his case orally or in writing or both, and

(b) each party shall be given reasonable opportunity to examine all the documents and other relevant materials filed by other party or any other person concerned before the tribunal,

(2) The arbitral tribunal shall deal with a dispute submitted to it as quickly as possible.

(3) The arbitral tribunal in conducting proceedings shall act fairly and impartially indeciding procedure and evidence and in exercising other powers conferred on it.

24. The arbitral tribunal not bound by the Code of Civil Procedure and the Evidence Act.- The arbitral tribunal shall not be bound to follow the provisions of the Code of Civil Procedure and the Evidence Act in disposing of a dispute under this Act.

25. Determination of rules of procedure.-(1) Subject to this Act the arbitral tribunal shall follow the procedure to be agreed on all or any by the parties in conducting its proceedings.

(2) In the absence of any agreement as to the procedure referred to in sub-section (1), the arbitral tribunal shall, subject to this Act, decide, procedural and evidential matters in conducting its proceedings.

(3) Without prejudice to the powers of the parties to include by agreement, or of the arbitral tribunal to include, any other procedural and evidential matters, procedural and evidentialmatters include—

(a) time and place of holding the proceedings either in whole or in part;

(b) language of the proceedings and to supply translation of a documentconcerned;

(c) written statement of claim, specimen copy of defence, time of submission and range of amendment.

(d) publication of document and presentation thereof,

(e) the questions asked to the parties and replies thereof (1) written or oralevidence as to the admissibility, relevance and weight of any materials;

(g) power of the arbitral tribunal in examining the issue of fact and issue oflaw.

(h) submission or presentation of oral or documentary evidence,

(4) The arbitral tribunal may fix the time to enforce its orders and extend the timefixed by it.

26. Place of arbitration.- (1) The parties shall be free to agree on the place of arbitration.

(2) Failing such agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

27. Notwithstanding anything contained in sub-section (1), or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.Commencement of arbitral proceedings.-Unless otherwise agreed by the parties, theproceedings shall be deemed to have commenced if -

(a) any dispute arises where the concerned arbitration agreement applies; and

(b) any party to the agreement -

(i) has received from another party to the agreement a notice requiring that party to refer, or to concur in the reference of the dispute to arbitration; or

(ii) has received from another party to the agreement a notice requiring that party to appoint an arbitral tribunal or to join or concur in, or approve the appointment of, an arbitral tribunal in relation to the dispute.

28. Consolidation of Proceedings and concurrent hearings.-(1) The parties shall be free to agree upon this respect that-

(a) any arbitration proceedings shall be consolidated with other arbitral proceedings;

(b) concurrent hearings shall be held on such terms as may be agreed.

(2) The arbitral tribunal shall have no power to pass any order to consolidate the proceedings or for concurrent hearing, unless the same is given by the parties on agreed terms to the tribunal.

29. Statements of claim and defence.-(1) Within the period of time determined by the tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed.

(2) The parties may submit with their statements all documents they consider to be relevantor may add a reference to the documents or other evidence they will submit

in future.

(3) Except otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the proceedings, unless the tribunal considers it inappropriate to allow the amendment or supplement for the sake of fairness or having regard to the delay in making it.

30. Hearings and the proceedings.-(1) Unless otherwise agreed by the parties, the tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials;

Provided that the tribunal shall hold oral hearings, at an appropriate stage of the proceedings, either on a request by a party, or of its own motion, unless the parties have agreed that no oral hearing shall be held.

(2) The parties shall be given sufficient prior notice of any hearing and of any meeting of the tribunal for the purposes of inspection of documents, goods or other property.

(3) All statements, documents or other information supplied to, or applications made to the tribunal by one party shall be communicated to the other party, and any expert report or

evidentiary document on which the tribunal may rely in making its decision shall be communicated to the parties.

31. Legal or other representation.-Unless otherwise agreed by the parties, a party to an arbitral proceeding may be represented In the proceedings by the lawyer or other person chosen by him.

32. Power to appoint experts, legal advisers or assessors. (1) Unless otherwise agreed by the parties, the arbitral tribunal may-

(a) appoint expert or legal adviser to report to it on spec Issues to be determined by the tribunal; and

(b) appoint assessor to assist it on technical matters; and

(c) require a party to give the expert, legal adviser or the assessor, as the case may be, any relevant information or to produce, or to provide accessto, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties.—

(a) if a party or the arbitral tribunal so requests, the expert, legal adviser or the assessor, as the case may be, shall after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue;

(b) the expert, legal adviser or the assessor, as the case may be, shall, on the request of a party, make available to that party all documents, goods or other property in the possession of him with which he was provided in order to prepare his report;

(c) the parties shall be given reasonable opportunity to comment on the report, information, opinion or advice submitted in the tribunal by the expert, legal adviser or the assessor.

33. Summons to witnesses.- (1) The arbitral tribunal, or a party to the proceedings with the approval of the tribunal, may apply to the Court for issuing summons upon any person necessary for examining, or submitting materials or appearing, or producing before the tribunal for both the purposes, as the case maybe, and the Court shall issue such summons.

(2) A person shall not be compelled under any summons issued under sub-section (1) to answer any question or produce any documents or materials which that person could not be compelled to answer or produce at the trial in an action before the Court.

(3) Persons failing to attend before the tribunal in accordance with such summons as issued under sub-section (1) or making any other default, or refusing to perform, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like punishments by order of the Court on the representations of the arbitraltribunal as they would incur for the like offences in suits tried before the Court.

34. Evidence before the arbitral tribunal-Unless otherwise agreed by the parties-

(a) evidence may be given before the arbitral tribunal orally or in writing or by affidavit,

(b) the arbitral tribunal may administer an oath or affirmation to a witness subject to his consent.

35. Powers of the arbitral tribunal in case of default of the parties._ (1) The parties shall be free to agree on the powers of the arbitral tribunal in case of a party's failure to do anything necessary for the proper and expeditious conduct of the arbitration.

(2) Where under sub-section (1) of section 29—

(a) any claimant fails to communicate his statement of claim, the tribunal shall terminate the proceedings, and

(b) the respondent fails to communicate his statement of defence, the tribunal shall continue the proceeding without treating that failure in itself as an admission of the allegations by the claimant.

(3) If the arbitral tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay —

(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or

(b) has caused, or is likely to cause, serious prejudice to the respondent, the arbitral tribunal may make an award dismissing the claim.

(4) If without showing sufficient cause a party— (a) fails to attend or be represented at an oral hearing of which due notice was given: or

(b) where matters are to be dealt with in writing fails, after due notice, to submit written evidence or make written submissions, the arbitral tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf and may make an award on the basis of the evidence before it.

(5) If without showing sufficient cause a party fails to comply with any order or directions of the arbitral tribunal, the arbitral tribunal may make an order to comply with such order or directions within such time as it may deem fit.

(6) If a claimant fails to comply with an order of the arbitral tribunal to provide security for costs, the arbitral tribunal may make an award dismissing his claim.

(7) If a party falls to comply with any other kind of order not referred to in any of thesub-sections of this section, then the arbitral tribunal may—

(a) direct that the party in default shall not be entitled to rely upon anyallegation or material which was the subject-matter of the order;

(b) draw such adverse inferences from the act of non compliance as thecircumstances justify,

(c) proceed to an award on the basis of such materials as have been properlyprovided to it: or

(d) make such order, as it thinks fit, as to the payment of costs of thearbitration incurred in consequence of the non-compliance.

CHAPTER VII
Making of arbitral award and termination of proceedings

36. Rules applicable to substance of dispute.-(1) The arbitral tribunal shall decide the dispute in accordance with the rules of law as are designated by the parties as applicable to the substance of the dispute:

Provided that any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive lawof that country.

(2) Failing any designation of the law under sub-section (1) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(3) The arbitral tribunal shall decide in accordance with the terms of the contract taking into account the usages of the concerned matter, if any, for ends of justice.

37. Decision making by panel of arbitrators.-(1) Unless otherwise agreed by the parties, in arbitralproceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

(2) Notwithstanding anything contained in sub-section (1), f authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the Chairman of the arbitral tribunal.

38. Form and contents of arbitral award._ (1) An arbitral award shall be moxie in writing andshall be signed by the arbitrator or arbitrators.

(2) In arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) No reasons shall have to be stated by the arbitral tribunal where the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreedterms under section 22.

(4) The arbitral award shall state its date and the place of arbitration as determined inaccordance with section 26 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a copy signed by the arbitrator or arbitrators shall be delivered to each party.

(6) Unless otherwise agreed by the parties—

(a) Where and in so far as an arbitral award is for the payment of money, thearbitral tribunal may include in the sum for which the award is moxie Interest, at such rate as it deems reasonable, on the whole or any part of money, for the whole or any part of the period between the date on whichthe cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent per annum which is more than the usual Bank rate from the date of the award to the date of payment.

Explanation— "Bank Rate" under this sub-section means the rate of interest as determined by the Bangladesh Bank from time to time,

(7) Unless otherwise agreed by the parties -

(a) The costs of an arbitration shall be fixed by the arbitral tribunal

(b) The arbitral tribunal shall specify

(i) the party entitled to costs;

(ii) the party who shall pay the costs;

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Explanation— Under this sub-section, 'arbitration costs includes reasonable costs relating to the fees and expenses of the arbitrators and witnesses; legal fees and expenses, any administration fees of the institution supervising the arbitration and any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

39. Award to be final and binding.-(1) An arbitral award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on both the parties and on any persons claiming through or under them.

(2) Notwithstanding anything contained in sub-section (1) the right of a person to challenge the arbitral award in accordance with the provisions of this Act shall not be affected.

40. Correction and interpretation of awards etc.-(1) Within fourteen days from the receipts of the arbitral award, unless another period of time has been agreed upon by the parties-

(a) a party with notice to the other party—

(i) may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors ofa similar nature occurring in the award;

(ii) may request the arbitral tribunal to modify divisible part of the award which has not been sent to the tribunal or f sent it does notaffect the arbitral award on the matters sent to the tribunal.

(b) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction, or give the interpretation as the case may be, within fourteen days from the receipt of the request or where the parties agree upon the longer period of time on the request of the arbitral tribunal, within that agreed longer period of time.

(3) The arbitral tribunal may correct any computation errors, any clerical or typographical errors or any other errors of similar nature occurring in the award referred to in clause (a) of sub section (1) within fourteen days from the date of the arbitral award.

(4) Under this section any correction, modification or interpretation, as the case may be, shall form part of the arbitral award.

(5) Unless otherwise agreed by the parties, a party with a notice to the other party, may request, within fourteen days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in thearbitral proceedings but omitted from the arbitral award.

(6) If the arbitral tribunal considers the request made under sub-section (5) to be justified, it shall make the additional arbitral award within sixty days from the date of receipt of such request.

(7) The provisions of sections 38 and 39 shall apply to a correction, mod or interpretation of the arbitral award or to an additional arbitral award made under this section.

41. Termination of proceedings.- (1) The arbitral proceedings shall be terminated by the finalarbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where –

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings; or

(c) the arbitral tribunal finds that the continuation of the proceedings unnecessary or impossible.

(3) Subject to the provisions of section 40, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

CHAPTER VIII
Recourse against arbitral award

42. Application for setting aside arbitral award.- (1) The Court may set aside any arbitral award under this Act other than an award made in an international commercial arbitration on the application of a party within sixty days from the receipt of the award.

(2) The High Court Division may set aside any arbitral award made in an international commercial arbitration held in Bangladesh on the application of a party within sixty days from the receipt of the award.

43. Grounds for setting aside arbitral award._ (1) An arbitral award may be set aside if—

(a) the party making the application furnishes proof that-

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decisionon matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which, contains decisions on matters not submitted to arbitration may be set aside;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act.

(b) The court or the High Court Division, as the case may be, is satisfied that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh;

(ii) the arbitral award is prima facie opposed to the law for the time being in force in Bangladesh;

(iii) the arbitral award is in conflict with the public policy of Bangladesh; or

(iv) the arbitral award is induced or affected by fraud or corruption.

(2) Where an application is made to set aside an award, the court or the High Court Division, as the case may be, may order that any money payable by the award shall be deposited in the Court or the High Court Division, as the case may be, orotherwise secured pending the determination of the application.

Explanation.-The expression "Court" in this section means the Court within the local limits of whose jurisdiction the arbitral award has been finally made and signed.

CHAPTER IX
Enforcement of arbitral award

44. Enforcement of arbitral award.- Where the time for making an application to set aside thearbitral award under section 42 has expired, or such application having been mode, has been refused, the award shall be enforced under the Code of Civil Procedure, in the same manner as f it were a decree of the Court.

Explanation.- The expression "Court" in this section means the Court within the local limits of whose jurisdiction the arbitral award has been finally made and signed.

CHAPTER X
Recognition and enforcement of certain foreign arbitral awards

45. Recognition and enforcement of Foreign arbitral awards.— (1) Notwithstanding anythingcontained in any law for the time being in force, subject to the provisions of section 46—

a) any foreign award which would be enforceable shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Bangladesh.

b) a foreign arbitral award shall on the application being made to it by any party, be enforced by execution by the Court under the Code of Civil Procedure, in the same manner as f it were a decree of the Court.

(2) An application for the execution of a foreign arbitral award shall be accompaniedby —

(a) the original arbitral award or a copy thereof duly authenticated in the

manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(3) If the award or agreement to be produced under sub section (2) is in English or inany other languages excepting Bangla, the party seeking to enforce the award under sub section (1), shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to thelaw in force in Bangladesh.

Explanation.-The expression 'Court" shall mean the District Judge's Court exercising the jurisdiction within the district of Dhaka for the purposes of this section.

46. Grounds for refusing recognition or execution of foreign arbitral awards.-(1) Recognition or execution of foreign arbitral award may be refused only on the following grounds, namely-

(a) if the party against whom it is invoked furnishes proof to the Court that

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which theparties have subjected it;

(iii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case; or

(iv) the concerned foreign arbitral award contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, f the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in absence of such agreement was not in accordance with the law ofthe country where the arbitration took place;

(vi) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country inwhich, or under the law of which, that award was made; or

(b) the court in which recognition or execution of the foreign arbitral awardis sought, finds that –

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh; or

(ii) the recognition and execution of the foreign arbitral award is inconflict with the public policy of Bangladesh.

(2) If an application for setting aside or suspension of the enforcement of the foreign arbitral award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-section (1) the Court may, f it considers it proper, adjourn the decision on the enforcement of the foreign arbitral award and may also, on the application of the party claiming enforcement of the foreign award, order the other party to give suitable security.

47. Power of Government to declare specified state.-For the purposes of this chapter, the Government may, by notification in the official Gazette, declare a state as a specified state.

CHAPTER XI
Appeals

48. Appeals.-An appeal shall lie from the following orders of the Court to the High CourtDivision, namely -

(a) setting aside or refusing to set aside an arbitral award under sub-section

(1) of section 42;

(b) refusing to enforce the arbitral award under section 44;

(c) refusing to recognize or enforce any foreign arbitral au under section 45.

CHAPTER X
Miscellaneous

49. Deposit of costs etc._ (1) The Arbitral tribunal may fix the amount of the deposit as an advance for the costs referred to in sub-section (7) of section 38, which it expects will be incurred in respect of the claim submitted to it;

Provided that where, apart from the claim, a counter-claim has been submitted to the arbitral tribunal it may fix separate amount of deposit for the claim and counter-claim.

(2) The deposit referred to in sub-section (1) shall be payable in equal shares by the parties;

Provided that where one party fails to pay his share of the deposit, the other party may pay that share;

Provided further that where the other party also does not pay the aforesaid share in respect of the claim or the counter claim, the arbitral tribunal may terminate the arbitral proceedings in respect of such claim or counter claim or refuse to make an award to the parties.

(3) Upon termination of the arbitral proceedings, the arbitral tribunal shall render an accounting to the parties of the deposits received and shall return any unspent balance to the party or parties, as the case may be.

50. Dispute as to arbitrator's remuneration or costs.-(1) If in arty case art arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, the court may, on an application in this behalf, order that-

(a) the arbitral tribunal shall deliver the award to the applicant on payment into court by the applicant of the costs demanded; and

(b) the Court shall, after such inquiry, f any, as it thinks fit, further order thatout of the money so paid into Court there shall be paid to the arbitral tribunal by way of costs such sum as the court may consider reasonable and that the balance of the money if any, shall be refunded to the applicant.

(2) An application under sub-section (1) may be made by any party where the fees demanded have not been fixed by written agreement between him and the arbitraltribunal, and the tribunal shall be entitled to appear and be heard on any such application.

(3) The Court may make such orders as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the arbitral award contains no sufficient provision concerning them.

(4) Subject to the provisions of sub-section (1) and to any provision to the contrary in the arbitration agreement, the arbitral tribunal shall have a lien on the arbitral award for any unpaid costs of the arbitration.

51. Arbitration agreement not to be discharged by death of parties thereto.-(1) Unless otherwise agreed by the parties-

(a) an arbitration agreement shrill not be discharged by reason of the death of any party thereto, but shall in such event be enforceable by or against the legal representative of the deceased;

(b) the mandate of an arbitrator shall not be affected by the death of any party by whom he was appointed.

(2) Nothing in this section shall affect the operation of any law relating to abatement of right through the death of a person.

52. Provision in case of bankruptcy.-(1) Where it is provided by a term in a contract to whichan insolvent is a party that any dispute arising therefrom or in connection therewith shall be submitted to arbitration, the said term shall, f the receiver adopts the contract, be enforceable by or against him so far as it relates to any such dispute.

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement is required to be determined in connection with, or for the purpose of the bankruptcy proceedings,

(a) then, f the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement; and

(b) the Bankruptcy Court may, f it is of opinion that, having regard to all circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

Explanation._ In this section "Bankruptcy Act" means: "Bankruptcy Act" 1997 (Act No. X of 1997) and 'Receiver" means the receiver as explained in clause (4) of section 2 of the Bankruptcy Act.

53. Jurisdiction.-Notwithstanding anything contained elsewhere in this Act, or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Act has been made in a Court-

(a) that court alone shall have jurisdiction over the arbitral proceedings; and

(b) all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court.

54. Application of this Act to other laws providing for arbitration.-Nothing of this Act shall apply to the Industrial Relations Ordinance, 1969 (XXXIII of 1969) or to any other law making special provisions for arbitration.

55. Limitation.-(1) Subject to the provisions of this Act, the Limitation Act, shall apply to arbitrations under this Act as they apply to proceedings in Court.

(2) For the purposes of this section and the Limitation Act, an arbitration shall be deemed to have commenced on the date referred to in section 27.

(3) Where an arbitration agreement to submit future disputes to arbitration provided that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, thecourt may, on such terms, f any, as the interest of justice, may require, extend the time for such period as it thinks proper.

(4) Where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act.

56. Publication of a text in English._ After the commencement of this Act the Government shall, by notification in the official Gazette, publish an authentic text in English which shall be known as the Authentic English Text of this Act:

Provided that in the event of any conflict between this Act and the English text, this Act shall prevail

CHAPTER XIII
Supplementary Provisions

57. Power of the Government to make rules._ Subject to the provisions of section 58, the Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act.

58. Power of the Supreme Court to make rules in certain cases.-The Supreme Court may, with the approval of the President make rules consistent with this Act, for regulating the proceedings of the High Court Division or the Court under this Act.

CHAPTER X
Repeals and Savings

59. Repeal and savings.-(1) The Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940, hereinafter mentioned as the Acts, are hereby repealed.

(2) Notwithstanding such repeal, the provisions of the enactments as referred to sub- section (1) shall apply to all arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties, as f this Act was not made.

The End

APPENDIX E

2012 U.S. Model Bilateral Investment Treaty

TREATY BETWEEN

THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF [Country] CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of [Country] (hereinafter the "Parties");

Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment; Have agreed as follows:

SECTION A

Article 1: Definitions

For purposes of this Treaty:

"central level of government" means:

(a) for the United States, the federal level of government; and

(b) for [Country], [____].

"Centre" means the International Centre for Settlement of Investment Disputes ("ICSID") established by the ICSID Convention.

"claimant" means an investor of a Party that is a party to an investment dispute with the other Party.

"covered investment" means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.

"disputing parties" means the claimant and the respondent.

"disputing party" means either the claimant or the respondent.

"enterprise" means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

"enterprise of a Party" means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

"existing" means in effect on the date of entry into force of this Treaty.

"freely usable currency" means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement*.

"GATS" means the *General Agreement on Trade in Services*, contained in Annex 1B to the WTO Agreement.

"government procurement" means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale.

"ICSID Additional Facility Rules" means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*.

"ICSID Convention" means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, March 18, 1965.

[**"Inter-American Convention"** means the *Inter-American Convention on International Commercial Arbitration*, done at Panama, January 30, 1975.]

"investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;[859]

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to

[859] Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

domestic law;[860][861] and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

"investment agreement" means a written agreement[862] between a national authority[863] of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

(a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;

(b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or

(c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

"investment authorization"[864] means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party.

"investor of a non-Party" means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party.

"investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

"measure" includes any law, regulation, procedure, requirement, or practice.

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[860] Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

[861] The term "investment" does not include an order or judgment entered in a judicial or administrative action.

[862] "Written agreement" refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 30[Governing Law](2). For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

[863] For purposes of this definition, "national authority" means (a) for the United States, an authority at the central level of government; and (b) for [Country], [ ].

[864] For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

"national" means:

(a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; and

(b) for [Country], [____].

"New York Convention" means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958.

"non-disputing Party" means the Party that is not a party to an investment dispute.

"person" means a natural person or an enterprise.

"person of a Party" means a national or an enterprise of a Party.

"protected information" means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law.

"regional level of government" means:

(a) for the United States, a state of the United States, the District of Columbia, or Puerto Rico; and

(b) for [Country], [____].

"respondent" means the Party that is a party to an investment dispute.

"Secretary-General" means the Secretary-General of ICSID.

"state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.

"territory" means:

(a) with respect to the United States,

(i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico;

(ii) the foreign trade zones located in the United States and Puerto Rico.

(b) with respect to [Country,] [____].

(c) with respect to each Party, the territorial sea and any area beyond the territorial sea of the Party within which, in accordance with customary

international law as reflected in the United Nations Convention on the Law of the Sea, the Party may exercise sovereign rights or jurisdiction.

"TRIPS Agreement" means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement.[865]

"UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law.

"WTO Agreement" means the *Marrakesh Agreement Establishing the World Trade Organization*, done on April 15, 1994.

Article 2: Scope and Coverage

1. This Treaty applies to measures adopted or maintained by a Party relating to:

   (a) investors of the other Party;

   (b) covered investments; and

   (c) with respect to Articles 8 [Performance Requirements], 12 [Investment and Environment], and 13 [Investment and Labor], all investments in the territory of the Party.

2. A Party's obligations under Section A shall apply:

   (a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party;[866] and

   (b) to the political subdivisions of that Party.

3. For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this

[865] For greater certainty, "TRIPS Agreement" includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.
[866] For greater certainty, government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.

Treaty.

Article 3: National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

Article 4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory**.**

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 5: Minimum Standard of Treatment[867]

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

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and

[867] Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

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

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

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

4. Notwithstanding Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

(b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4), *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].

Article 6: Expropriation and Compensation[868]

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

[868] Article 6 [Expropriation] shall be interpreted in accordance with Annexes A and B.

(c) on payment of prompt, adequate, and effective compensation; and

(d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

Article 7: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

(d) payments made under a contract, including a loan agreement;

(e) payments made pursuant to Article 5 [Minimum Standard of Treatment](4) and (5) and Article 6 [Expropriation and Compensation]; and

(f) payments arising out of a dispute.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offenses;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

Article 8: Performance Requirements

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:[869]

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

[869] For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.

(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; or

(h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party[870]; or

(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology,

so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

[870] For purposes of this Article, the term "technology of the Party or of persons of the Party" includes technology that is owned by the Party or persons of the Party, and technology for which the Party holds, or persons of the Party hold, an exclusive license.

(b) Paragraphs 1(f) and (h) do not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.[871]

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

(e) Paragraphs 1(b), (c), (f), (g), and (h), and 2(a) and (b), do not apply to government procurement.

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

[871] The Parties recognize that a patent does not necessarily confer market power.

Article 9: Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 10: Publication of Laws and Decisions Respecting Investment

1. Each Party shall ensure that its:

(a) laws, regulations, procedures, and administrative rulings of general application; and

(b) adjudicatory decisions

respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.

2. For purposes of this Article, "administrative ruling of general application" means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:

(a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or

(b) a ruling that adjudicates with respect to a particular act or practice.

Article 11: Transparency

1. The Parties agree to consult periodically on ways to improve the transparency practices set out in this Article, Article 10 and Article 29.

2. Publication

To the extent possible, each Party shall:

(a) publish in advance any measure referred to in Article 10(1)(a) that it proposes to adopt; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

3. With respect to proposed regulations of general application of its central level of government respecting any matter covered by this Treaty that are published in accordance with paragraph 2(a), each Party:

(a) shall publish the proposed regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets;

(b) should in most cases publish the proposed regulations not less than 60 days before the date public comments are due;

(c) shall include in the publication an explanation of the purpose of and rationale for the proposed regulations; and

(d) shall, at the time it adopts final regulations, address significant, substantive comments received during the comment period and explain substantive revisions that it made to the proposed regulations in its official journal or in a prominent location on a government Internet site.

4. With respect to regulations of general application that are adopted by its central level of government respecting any matter covered by this Treaty, each Party:

(a) shall publish the regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets; and

(b) shall include in the publication an explanation of the purpose of and rationale for the regulations.

5. Provision of Information

(a) On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure that the requesting Party considers might materially affect the operation of this Treaty or otherwise substantially affect its interests under this Treaty.

(b) Any request or information under this paragraph shall be provided to the other Party through the relevant contact points.

(c) Any information provided under this paragraph shall be without prejudice as to whether the measure is consistent with this Treaty.

6. Administrative Proceedings

With a view to administering in a consistent, impartial, and reasonable manner all measures referred to in Article 10(1)(a), each Party shall ensure that in its administrative proceedings applying such measures to particular covered investments or investors of the other Party in specific cases:

(a) wherever possible, covered investments or investors of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;

(b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and

(c) its procedures are in accordance with domestic law.

7. Review and Appeal

(a) Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

(b) Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:

(i) a reasonable opportunity to support or defend their respective positions; and

(ii) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

(c) Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

8. Standards-Setting

(a) Each Party shall allow persons of the other Party to participate in the development of standards and technical regulations by its central government bodies.[872] Each Party shall allow persons of the other Party to participate in the development of these measures, and the development of conformity assessment procedures by its central government bodies, on terms no less favorable than those it accords to its own persons.

(b) Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of standards by those bodies. Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of these standards, and the development of conformity assessment procedures by those bodies, on terms no less favorable than those they accord to persons of the Party.

(c) Subparagraphs 8(a) and 8(b) do not apply to:

(i) sanitary and phytosanitary measures as defined in Annex A of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures; or

(ii) purchasing specifications prepared by a governmental body for its production or consumption requirements.

(d) For purposes of subparagraphs 8(a) and 8(b), “central government body”, “standards”, “technical regulations” and “conformity assessment procedures” have the meanings assigned to those terms in Annex 1 of the WTO Agreement on Technical Barriers to Trade. Consistent with Annex 1, the three latter terms do not include standards, technical regulations or conformity assessment procedures `for the supply of a service.

[872] A Party may satisfy this obligation by, for example, providing interested persons a reasonable opportunity to provide comments on the measure it proposes to develop and taking those comments into account in the development of the measure.

1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws[873] in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

4. For purposes of this Article, "environmental law" means each Party's statutes or regulations,[874] or provisions thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through the:

(a) prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or

(c) protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas,

in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

5. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

[873] Paragraph 2 shall not apply where a Party waives or derogates from an environmental law pursuant to a provision in law providing for waivers or derogations.

[874] For the United States, "statutes or regulations" for the purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

6. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

7. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Article 13: Investment and Labor

1. The Parties reaffirm their respective obligations as members of the International Labor Organization ("ILO") and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. For purposes of this Article, "labor laws" means each Party's statutes or regulations,[875] or provisions thereof, that are directly related to the following:

(a) freedom of association;

(b) the effective recognition of the right to collective bargaining;

(c) the elimination of all forms of forced or compulsory labor;

(d) the effective abolition of child labor and a prohibition on the worst forms of child labor;

(e) the elimination of discrimination in respect of employment and occupation; and

(f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

[875] For the United States, "statutes or regulations" for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

4. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

5. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Article 14: Non-Conforming Measures

1. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

(i) the central level of government, as set out by that Party in its Schedule to Annex I or Annex III,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I or Annex III, or

(iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], or 9 [Senior Management and Boards of Directors].

2. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Treaty and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of

the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

5. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to:

(a) government procurement; or

(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

Article 15: Special Formalities and Information Requirements

1. Nothing in Article 3 [National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Treaty.

2. Notwithstanding Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment], a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 16: Non-Derogation

This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favorable than that accorded by this Treaty:

1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;

2. international legal obligations of a Party; or

3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

Article 17: Denial of Benefits

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is

an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non- Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

Article 18: Essential Security

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Article 19: Disclosure of Information

Nothing in this Treaty shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 20: Financial Services

1. Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system.[876] Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.

[876] It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions, as well as the maintenance of the safety and financial and operational integrity of payment and clearing systems.

2. (a) Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 [Transfers] or Article 8 [Performance Requirements].[877]

(b) For purposes of this paragraph, "public entity" means a central bank or monetary authority of a Party.

3. Where a claimant submits a claim to arbitration under Section B [Investor-State Dispute Settlement], and the respondent invokes paragraph 1 or 2 as a defense, the following provisions shall apply:

(a) The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B, submit in writing to the competent financial authorities[878] of both Parties a request for a joint determination on the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. The respondent shall promptly provide the tribunal, if constituted, a copy of such request. The arbitration may proceed with respect to the claim only as provided in subparagraph (d).

(b) The competent financial authorities of both Parties shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. The determination shall be binding on the tribunal.

(c) If the competent financial authorities of both Parties, within 120 days of the date by which they have both received the respondent's written request for a joint determination under subparagraph (a), have not made a determination as described in that subparagraph, the tribunal shall decide the issue or issues left unresolved by the competent financial authorities. The provisions of Section B shall apply, except as modified by this subparagraph.

(i) In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to the particular sector of financial services in which the dispute arises shall be taken into account in the appointment of the presiding arbitrator.

(ii) If, before the respondent submits the request for a joint determination in conformance with subparagraph (a), the presiding arbitrator has been appointed pursuant to Article 27(3), such arbitrator shall be replaced on the request of either disputing party and the tribunal shall be reconstituted consistent with subparagraph (c)(i). If, within 30 days of the date the arbitration proceedings are resumed under subparagraph (d), the disputing parties have not

[877] For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

[878] For purposes of this Article, "competent financial authorities" means, for the United States, the Department of the Treasury for banking and other financial services, and the Office of the United States Trade Representative, in coordination with the Department of Commerce and other agencies, for insurance; and for [Country], [ ].

agreed on the appointment of a new presiding arbitrator, the Secretary-General, on the request of a disputing party, shall appoint the presiding arbitrator consistent with subparagraph (c)(i).

(iii) The tribunal shall draw no inference regarding the application of paragraph 1 or 2 from the fact that the competent financial authorities have not made a determination as described in subparagraph (a).

(iv) The non-disputing Party may make oral and written submissions to the tribunal regarding the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. Unless it makes such a submission, the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position on paragraph 1 or 2 not inconsistent with that of the respondent.

(d) The arbitration referred to in subparagraph (a) may proceed with respect to the claim:

(i) 10 days after the date the competent financial authorities' joint determination has been received by both the disputing parties and, if constituted, the tribunal; or

(ii) 10 days after the expiration of the 120-day period provided to the competent financial authorities in subparagraph (c).

(e) On the request of the respondent made within 30 days after the expiration of the 120-day period for a joint determination referred to in subparagraph (c), or, if the tribunal has not been constituted as of the expiration of the 120-day period, within 30 days after the tribunal is constituted, the tribunal shall address and decide the issue or issues left unresolved by the competent financial authorities as referred to in subparagraph (c) prior to deciding the merits of the claim for which paragraph 1 or 2 has been invoked by the respondent as a defense. Failure of the respondent to make such a request is without prejudice to the right of the respondent to invoke paragraph 1 or 2 as a defense at any appropriate phase of the arbitration.

4. Where a dispute arises under Section C and the competent financial authorities of one Party provide written notice to the competent financial authorities of the other Party that the dispute involves financial services, Section C shall apply except as modified by this paragraph and paragraph 5.

(a) The competent financial authorities of both Parties shall make themselves available for consultations with each other regarding the dispute, and shall have 180 days from the date such notice is received to transmit a report on their consultations to the Parties. A Party may submit the dispute to arbitration under Section C only after the expiration of that 180-day period.

(b) Either Party may make any such report available to a tribunal constituted under Section C to decide the dispute referred to in this paragraph or a similar dispute, or to a tribunal constituted under Section B to decide a claim arising out of the same events or circumstances that gave rise to the dispute under Section C.

5. Where a Party submits a dispute involving financial services to arbitration under

Section C in conformance with paragraph 4, and on the request of either Party within 30 days of the date the dispute is submitted to arbitration, each Party shall, in the appointment of all arbitrators not yet appointed, take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

6. Notwithstanding Article 11(2)-(4) [Transparency – Publication], each Party, to the extent practicable,

(a) shall publish in advance any regulations of general application relating to financial services that it proposes to adopt and the purpose of the regulation;

(b) shall provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations; and

(c) should at the time it adopts final regulations, address in writing significant substantive comments received from interested persons with respect to the proposed regulations.

7. The terms "financial service" or "financial services" shall have the same meaning as in subparagraph 5(a) of the Annex on Financial Services of the GATS.

8. For greater certainty, nothing in this Treaty shall be construed to prevent the adoption or enforcement by a party of measures relating to investors of the other Party, or covered investments, in financial institutions that are necessary to secure compliance with laws or regulations that are not inconsistent with this Treaty, including those related to the prevention of deceptive and fraudulent practices or that deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions.

Article 21: Taxation

1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures.

2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:

(a) the claimant has first referred to the competent tax authorities[879] of both Parties in writing the issue of whether that taxation measure involves an expropriation; and

[879] For the purposes of this Article, the "competent tax authorities" means:
(a) for the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury; and

(b) for [Country], [ ].

(b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

3. Subject to paragraph 4, Article 8 [Performance Requirements] (2) through (4) shall apply to all taxation measures.

4. Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Treaty and that convention.

Article 22: Entry into Force, Duration, and Termination

1. This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.

2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.

3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

SECTION B

Article 23: Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

Article 24: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach, provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

(d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for

Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Treaty.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

Article 25: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the

ICSID Additional Facility Rules for written consent of the parties to the dispute; [and]

(b) Article II of the New York Convention for an "agreement in writing[."] [;" and

(c) Article I of the Inter-American Convention for an "agreement."]

Article 26: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Treaty; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 24(1)(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 24(1)(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 24(1)(a)) and the claimant or the enterprise (for claims brought under Article 24(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

Article 27: Selection of Arbitrators

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. Subject to Article 20(3), if a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant referred to in Article 24(1)(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant referred to in Article 24(1)(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 28: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.

3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 24. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

(b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10.

10. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [*Amicus* Submissions] and Article 33 [Consolidation];

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes

protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

Article 30: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws;[880] and

(ii) such rules of international law as may be applicable.

3. A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

[880] The "law of the respondent" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

Article 31: Interpretation of Annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II, or III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 90 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties, each acting through its representative designated for purposes of this Article, shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 90 days, the tribunal shall decide the issue.

Article 32: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 33: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

(a) the names and addresses of all the disputing parties sought to be covered by the order;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of the non- disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 24(1) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims;

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) instruct a tribunal previously established under Article 27 [Selection of Arbitrators] to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 24(1) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

(a) the name and address of the claimant;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 27 [Selection of Arbitrators] shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 27 [Selection of Arbitrators] be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 34: Awards

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest; and

(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorney's fees in accordance with this Treaty and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 24(1)(b):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A tribunal may not award punitive damages.

4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

6. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention,

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 24(3)(d),

(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or

(ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

7. Each Party shall provide for the enforcement of an award in its territory.

8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37 [State-State Dispute Settlement]. Without prejudice to other remedies available under applicable rules of international law, the requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Treaty; and

(b) a recommendation that the respondent abide by or comply with the final award.

9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention [or the Inter-American Convention] regardless of whether proceedings have been taken under paragraph 8.

10. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention [and Article I of the Inter-American Convention].

Article 35: Annexes and Footnotes

The Annexes and footnotes shall form an integral part of this Treaty.

Article 36: Service of Documents

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex C.

SECTION C

Article 37: State-State Dispute Settlement

1. Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except as modified by the Parties or this Treaty.

2. Unless the Parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each Party and the third, who shall be the presiding arbitrator, appointed by agreement of the Parties. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of either Party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

3. Expenses incurred by the arbitrators, and other costs of the proceedings, shall be paid for equally by the Parties. However, the tribunal may, in its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

4. Articles 28(3) [*Amicus Curiae* Submissions], 29 [Investor-State Transparency], 30(1) and (3) [Governing Law], and 31 [Interpretation of Annexes] shall apply *mutatis mutandis* to arbitrations under this Article.

5. Paragraphs 1 through 4 shall not apply to a matter arising under Article 12 or Article 13.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at [city] this [number] day of [month, year], in the English and [foreign] languages, each text being equally authentic.

FOR THE GOVERNMENT OF
OF THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT
[Country]:

APPENDIX F

Model Text for the Indian Bilateral Investment Treaty

BILATERAL INVESTMENT TREATY

BETWEEN

THE GOVERNMENT OF THE

REPUBLIC OF

INDIA

AND

_____

Preamble

The Government of the Republic of India and the Government of the Republic of -----
---------- (hereinafter referred to as the "**Party**" individually or the "**Parties**" collectively);

Desiring to promote bilateral cooperation between the Parties with respect to foreign investments; and

Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development,

Reaffirming the right of Parties to regulate investments in their territory in accordance with their law and policy objectives.

Have agreed as follows:

Chapter I – Preliminary Article 1

Definitions

For the purposes of this Treaty:

1.1 "**confidential information**" means business confidential information, e.g. confidential commercial, financial or technical information which could result in material loss or gain or prejudice a disputing party's competitive position, and information that is privileged or otherwise protected from disclosure under the law of a Party;

1.2 "**Designated Representative**" means:

(i) for India, Secretary/Additional Secretary/Joint Secretary, Department of Economic Affairs, Ministry of Finance, Government of India.

(ii) for ----------

1.3 "**enterprise**" means:

(i) any legal entity constituted, organised and operated in compliance with the law of a Party, including any company, corporation, limited liability partnership or a joint venture; and

(ii) a branch of any such entity established in the territory of a Party in accordance with its law and carrying out business activities there.

1.4 **"investment"** means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made. An enterprise may possess the following assets:

(a) shares, stocks and other forms of equity instruments of the enterprise or in another enterprise;

(b) a debt instrument or security of another enterprise;

(c) a loan to another enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years;

(d) licenses, permits, authorisations or similar rights conferred in accordance with the law of a Party;

(e) rights conferred by contracts of a long-term nature such as those to cultivate, extract or exploit natural resources in accordance with the law of a Party, or

(f) Copyrights, know-how and intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of a Party; and

(g) moveable or immovable property and related rights;

(h) any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value;

For greater clarity, investment does not include the following assets of an enterprise:

(i) portfolio investments of the enterprise or in another enterprise;

(ii) debt securities issued by a government or government-owned or controlled enterprise, or loans to a government or government-owned or controlled enterprise;
(iii) any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the enterprise incurred before the commencement of substantial business operations of the enterprise in the territory of the Party where the investment is made;
(iv) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party;
(v) goodwill, brand value, market share or similar intangible rights;
(vi) claims to money that arise solely from the extension of credit in connection with any commercial transaction;
(vii) an order or judgment sought or entered in any judicial, administrative or arbitral proceeding;
(viii) any other claims to money that do not involve the kind of interests or operations set out in the definition of investment in this Treaty.

1.5 "**investor**" means a natural or juridical person of a Party, other than a branch or representative office, that has made an investment in the territory of the other Party; For the purposes of this definition, a "**juridical person**" means:

(a) a legal entity that is constituted, organised and operated under the law of that Party and that has substantial business activities in the territory of that Party; or
(b) a legal entity that is constituted, organised and operated under the laws of that Party and that is directly or indirectly owned or controlled by a natural person of that Party or by a legal entity mentioned under sub- clause (a) herein.

1.6 "**law**" includes:
(i) the Constitution, legislation, subordinate/delegated legislation, laws & bylaws, rules & regulations, ordinance, notifications, policies, guidelines, procedures, administrative measures/executive actions at all levels of government, as amended, interpreted or modified from time to time;
(ii) decisions, judgments, orders and decrees by Courts, regulatory authorities, judicial and administrative institutions having the force of law within the territory of a Party.

1.7 "**local government**" includes:
(i) An urban local body, municipal corporation or village level government; or
(ii) an enterprise owned or controlled by an urban local body, a municipal corporation or a village level government.

1.8 "**measure**" includes a law, regulation, rule, procedure, decision, administrative action, requirement or practice.

1.9 "**natural person**" means a national or citizen of a Party in accordance with its law and regulations. A natural person who is a dual national or citizen shall be deemed to be exclusively a national or citizen of the country of her or his dominant and effective nationality/citizenship, where she/he ordinarily or permanently resides.

1.10 "**PCA Optional Rules**" means the Permanent Court of Arbitration Optional Rules for Arbitration Disputes between Two States, 20 October 1992.

1.11 The term "**Pre-investment activity**" includes any activities undertaken by the investor or its enterprise prior to the establishment of the investment in accordance with the law of the Party where the investment is made. Any activity undertaken by the investor or its investment pursuant to compliance with sectoral limitations on foreign equity, and other limits and conditions applicable under any law relating to the admission of investments in the Party where the investment is made in specific sectors falls within the meaning of "**Pre- investment activity**".

1.12 "**Sub-national government**" means a State Government or a Union Territory administration in the case of India but does not include local governments; and -
---- in case of ------

1.13 "**Territory**" means:

(i) In respect of India: the territory of the Republic of India in accordance with the Constitution of India, including its territorial waters and the airspace above it and other maritime zones including the Exclusive Economic Zone and continental shelf over which the Republic of India has sovereignty, sovereign rights, or exclusive jurisdiction in accordance with its law and the l982 United Nations Convention on the Law of the Sea and international law.

(ii) In respect of --------

1.14 "**WTO Agreement**" means the Marrakesh Agreement Establishing the World Trade Organization, done at Marrakesh on 15 April, 1994.

1.15 The Annexures, Provisos and Footnotes in this Treaty constitute an integral part of this Treaty and are to be accorded the same effect as other provisions in this Treaty.

Article 2

Scope and General Provisions

2.1 This Treaty shall apply to measures adopted or maintained by a Party relating to investments of investors of another Party in its territory, in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter, and which have been admitted by a Party in accordance with its law, regulations and policies as applicable from time to time.

2.2 Subject to the provisions of Chapter III of this Treaty, nothing in this Treaty shall extend to any Pre-investment activity related to establishment, acquisition or

expansion of any investment, or to any measure related to such Pre-investment activities, including terms and conditions under such measure which continue to apply post-investment to the management, conduct, operation, sale or other disposition of such investments.

2.3 This Treaty shall not apply to claims arising out of events which occurred, or claims which have been raised prior to the entry into force of this Treaty.

2.4 This Treaty shall not apply to:

(i) any measure by a local government;

(ii) any law or measure regarding taxation, including measures taken to enforce taxation obligations.

For greater certainty, it is clarified that where the State in which investment is made decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be non- justiciable and it shall not be open to any arbitration tribunal to review such decision.

(iii) the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the international obligations of Parties under the WTO Agreement.

(iv) government procurement by a Party;

(v) subsidies or grants provided by a Party;

(vi) services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this provision, a service supplied in the exercise of governmental authority means any service which is not supplied on a commercial basis.

Chapter II: Obligations of Parties Article 3

Treatment of investments

3.1 No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law[881] through:

(i) Denial of justice in any judicial or administrative proceedings; or

(ii) fundamental breach of due process; or

(iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or

(iv) manifestly abusive treatment, such as coercion, duress and harassment.

3.2 Each Party shall accord in its territory to investments of the other Party and to investors with respect to their investments full protection and security. For greater certainty, “full protection and security” only refers to a Party’s obligations relating to physical security of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever.

[881] For greater certainty, it is clarified that “customary international law” only results from a general and consistent practice of States that they follow from a sense of legal obligation.

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

3.4 In considering an alleged breach of this article, a Tribunal shall take account of whether the investor or, as appropriate, the locally-established enterprise, pursued action for remedies before domestic courts or tribunals prior to initiating a claim under this Treaty.

Article 4 National Treatment

4.1 Each Party shall not apply to investor or to investments made by investors of the other Party, measures that accord less favourable treatment than that it accords, in like circumstances,[882] to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory.

4.2 The treatment accorded by a Party under Article 4.1 means, with respect to a Sub-national government, treatment no less favourable than the treatment accorded, in like circumstances, by that Sub-national government to investors, and to investments of investors, of the Party of which it forms a part.

Article 5 Expropriation

5.1 Neither Party may nationalize or expropriate an investment of an investor (hereinafter "**expropriate**") of the other Party either directly or through measures having an effect equivalent to expropriation, except for reasons of public purpose[883], in accordance with the due process of law and on payment of adequate compensation. Such compensation shall be adequate and be at least equivalent to the fair market value of the expropriated investment immediately on the day before the expropriation takes place ("**date of expropriation**"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

5.2 Payment of compensation shall be made in a freely convertible currency. Interest on payment of compensation, where applicable, shall be paid in simple interest at a commercially reasonable rate from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable in accordance with Article 6.

5.3 The Parties confirm their shared understanding that:

a) Expropriation may be direct or indirect:

(i) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and

[882] For greater certainty, whether treatment is accorded in "like circumstances" depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives. These circumstances include, but are not limited to, (a) the goods or services consumed or produced by the investment; (b) the actual and potential impact of the investment on third persons, the local community, or the environment, (c) whether the investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the investment.

[883] For the avoidance of doubt, where India is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in its Law relating to land acquisition and any questions as to "public purpose" and compensation shall be determined in accordance with the procedure specified in such Law.

(i) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

b) The determination of whether a measure or a series of measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, that takes into consideration:

(i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

(ii) the duration of the measure or series of measures of a Party;

(iii) the character of the measure or series of measures, notably their object, context and intent; and

(iv) whether a measure by a Party breaches the Party's prior binding written commitment to the investor whether by contract, licence or other legal document.

5.4 For the avoidance of doubt, the Parties agree that an action taken by a Party in its commercial capacity shall not constitute expropriation or any other measure having similar effect.

5.5 Non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article.

5.6 In considering an alleged breach of this Article, a Tribunal shall take account of whether the investor or, as appropriate, the locally-established enterprise, pursued action for remedies before domestic courts or tribunals prior to initiating a claim under this Treaty.

Article 6 Transfers

6.1 Subject to its law, each Party shall permit all funds of an investor of the other Party related to an investment in its territory to be freely transferred and on a non-discriminatory basis. Such funds may include:

(i) contributions to capital;

(ii) profits, dividends, capital gains and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
(iii) interest, royalty payments, management fees, and technical assistance and other fees;
(iv) payments made under a contract, including a loan agreement;
(v) payments made pursuant to Article 5 [Expropriation], Article 7[Compensation for losses] and under Chapter IV.

6.2 Unless otherwise agreed to between the Parties, currency transfer under Article 6.1 shall be permitted in the currency of the original investment or any other convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer.

6.3 Nothing in this Treaty shall prevent a Party from conditioning or preventing a transfer through a good faith application of its law, including actions relating to:

i. bankruptcy, insolvency or the protection of the rights of the creditors;
ii. compliance with judicial, arbitral or administrative decisions and awards;
iii. compliance with labour obligations;
iv. financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
v. issuing, trading or dealing in securities, futures, options, or derivatives;
vi. compliance with the law on taxation;
vii. criminal or penal offences and the recovery of the proceeds of crime;
viii. social security, public retirement, or compulsory savings schemes, including provident funds, retirement gratuity programs and employees insurance programs;
ix. severance entitlements of employees;
x. requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Party; and
xi. in the case of India, requirements to lock-in initial capital investments, as provided in India's Foreign Direct Investment (FDI) Policy, where applicable, provided that, any new measure which would require a lock-in period for investments will not apply to existing investments.

6.4 Notwithstanding anything in Article 6.1 and 6.2 to the contrary, the Parties may temporarily restrict transfers in the event of serious balance-of-payments difficulties or threat thereof, or in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

Article 7 Compensation for Losses

Each Party shall accord to investors of another Party, and to investments by such investors, non-discriminatory treatment with respect to measures, including restitution, indemnification, compensation or other settlement, it adopts or maintains relating to losses suffered by investments in its territory owing to war or other armed conflict, civil strife, state of national emergency or a natural disaster.

Article 8 Subrogation

8.1 If a Party or its designated agency makes a payment to any of its investors under a guarantee or a contract of insurance it has entered into in respect of an investment, the other Party shall recognize the validity of the subrogation in favour of such Party or agency thereof to any right or title held by the investor.

8.2 A Party or its designated agency thereof which is subrogated to the rights of an investor in accordance with paragraph 1 of this Article shall be entitled in all circumstances to the same rights as those of the investor in respect of the investment. Such rights may be exercised by the Party or its designated agency thereof, or by the investor if the Party or any agency thereof so authorizes.

Article 9 Entry and Sojourn of Personnel

9.1 Subject to its law relating to the entry and sojourn of non-citizens and on the basis of reciprocity, each Party shall permit natural persons of the other Party employed by the investor or the locally established enterprise to enter and remain in its territory for the purpose of engaging in activities connected with the investment.

9.2 For the purposes of this Article, "**natural person of the other Party**" means a natural person who resides in the territory of that Party or elsewhere, and who under the law of that other Party:

(i) is a national of that other Party; or

(ii) has the right of permanent residence in that other Party, provided that such other Party accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, and notifies the same after the entry into force of this Agreement or under any bilateral or multilateral agreement on trade in services entered into between the Parties. Such notification shall include the assurance to assume, with respect to the permanent residents, in accordance with its laws and regulations, the same responsibilities that such other Party bears with respect to its nationals. For the purpose of clarification, no Party is obliged to accord to permanent residents of another Party treatment more favourable than would be accorded by that other Party to such permanent residents.

Article 10 Transparency

10.1 Each Party shall, to the extent possible, ensure that its laws, regulations, procedures, and administrative rulings of general application in respect of any matter covered by this Treaty are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.

10.2 Each Party shall, as provided for in its laws and regulations:
(i) publish any such measure that it proposes to adopt; and
(ii) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

10.3 Each Party shall, upon request by the other Party, promptly respond to specific questions from and provide information to the other Party with respect to matters referred to in Article 10.1.

10.4 Nothing in this Treaty shall require a Party to furnish or allow access to confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular juridical persons, public or private.

Chapter III – Investor obligations Article 11

Compliance with laws

The parties reaffirm and recognize that:

(i) Investors and their investments shall comply with all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation and disposition of investments.
(ii) Investors and their investments shall not, either prior to or after the establishment of an investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts.
(iii) Investors and their investments shall comply with the provisions of law of the Parties concerning taxation, including timely payment of their tax liabilities.
(iv) An investor shall provide such information as the Parties may require concerning the investment in question and the corporate history and practices of the investor, for purposes of decision making in relation to that investment or solely for statistical purposes.

Article 12

Corporate Social Responsibility

Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.

Chapter IV

Settlement of Disputes between an Investor and a Party

Article 13 Scope and Definitions

13.1 Without prejudice to the rights and obligations of the Parties under Chapter V, this Chapter establishes a mechanism for the settlement of disputes between an investor and a Defending Party.

13.2 This Chapter shall only apply to a dispute between a Party and an investor of the other Party with respect to its investment, arising out of an alleged breach of an obligation of a Party under Chapter II of this Treaty, other than the obligation under Articles 9 and 10 of this Treaty.

13.3 A Tribunal constituted under this Chapter shall only decide claims in respect of a breach of this Treaty as set out in Chapter II, except under Articles 9 and 10, and not disputes arising solely from an alleged breach of a contract between a Party and an investor. Such disputes shall only be resolved by the domestic courts or in accordance with the dispute resolution provisions set out in the relevant contract.

13.4 An investor may not submit a claim to arbitration under this Chapter if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms.

13.5 In addition to other limits on its jurisdiction, a Tribunal constituted under this Chapter shall not have the jurisdiction to:

(i) review the merits of a decision made by a judicial authority of the Parties; or
(ii) accept jurisdiction over any claim that is or has been subject of an arbitration under Chapter V.

13.6 A dispute between an investor and a Party shall proceed sequentially in accordance with this Chapter.

13.7 For the purposes of this Chapter:

(i) "**Defending Party**" means a Party against which a claim is made under this Article.
(ii) "**disputing party**" means a Defending Party or a disputing investor.
(iii) "**disputing parties**" means a disputing investor and a Defending Party.
(iv) "**disputing investor**" means an investor of a Party that makes a claim against another Party on its behalf under this Article, and where relevant, includes an investor of a Party that makes a claim on behalf of the locally established enterprise.
(v) "**ICSID**" means the International Centre for Settlement of Investment Disputes.
(vi) "**ICSID Additional Facility Rules**" means the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Dispute.

(vii) "**ICSID Convention**" means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington on 18 March 1965.

(viii) "**New York Convention**" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.

(ix) "**Non-disputing Party**" means the Party to this Treaty which is not a party to a dispute under Chapter IV of this Treaty.

(x) "**UNCITRAL Arbitration Rules**" means the arbitration rules of the United Nations Commission on International Trade Law.

Article 14

Proceedings under different international agreements

14.1 Where claims are brought pursuant to this Chapter and another international agreement and:

(a) there is a potential for overlapping compensation; or

(b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Chapter,

a Tribunal constituted under this Chapter shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings brought pursuant to another international agreement are taken into account in its decision, order or award.

Article 15

Conditions Precedent to Submission of a Claim to Arbitration

15.1 In respect of a claim that the Defending Party has breached an obligation under Chapter II, other than an obligation under Article 9 or 10, a disputing investor must first submit its claim before the relevant domestic courts or administrative bodies of the Defending Party for the purpose of pursuing domestic remedies in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed. Such claim before the relevant domestic courts or administrative bodies of the Defending Party must be submitted within one (1) year from the date on which the investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the investment, or the investor with respect to its investment, had incurred loss or damage as a result.

For greater certainty, in demonstrating compliance with the obligation to exhaust local remedies, the investor shall not assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action.

Provided, however, that the requirement to exhaust local remedies shall not be applicable if the

investor or the locally established enterprise can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed by the investor.

15.2 Where applicable, if, after exhausting all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question, no resolution has been reached satisfactory to the investor, the investor may commence a proceeding under this chapter by transmitting a notice of dispute ("**notice of dispute**") to the Defending Party.

15.3 The notice of dispute shall: specify the name and address of the disputing investor or the enterprise, where applicable; set out the factual basis of the claim, including the measures at issue; specify the provisions of the Treaty alleged to have been breached and any other relevant provisions; demonstrate compliance with Article 15.1 and 15.2, where applicable; specify the relief sought and the approximate amount of damages claimed; and furnish evidence establishing that the disputing investor is an investor of the other Party.

15.4 For no less than six (6) months after receipt of the notice of dispute, the disputing parties shall use their best efforts to try to resolve the dispute amicably through meaningful consultation, negotiation or other third party procedures. In all such cases, the place of such consultation or negotiation or settlement shall be the capital city of the Defending Party.

15.5 In the event that the disputing parties cannot settle the dispute amicably, a disputing investor may submit a claim to arbitration pursuant to this Treaty, but only if the following additional conditions are satisfied:

(i) not more than six (6) years have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the disputing investor with respect to its investment, had incurred loss or damage as a result; or

(ii) where applicable, not more than twelve (12) months have elapsed from the conclusion of domestic proceedings pursuant to 15.1.

(iii) the disputing investor or the locally established enterprise have waived their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Defending Party that is alleged to be a breach referred to in Article 13.2.

(iv) where the claim submitted by the disputing investor is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the disputing investor owns or controls, that enterprise has waived its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Defending Party that is alleged to be a breach referred to in Article 13.2.

(v) At least 90 days before submitting any claim to arbitration, the disputing investor has transmitted to the Defending Party a written notice of its intention to submit the claim to arbitration ("n**otice of arbitration**"). The notice of arbitration shall:

a. attach the notice of dispute and the record of its transmission to the Defending Party with the details thereof;

b. provide the consent to arbitration by the disputing investor, or where applicable, by the locally established enterprise, in accordance with the procedures set out in this Treaty;
c. provide the waiver as required under Article 15.5 (iii) or (iv), as applicable; provided that a waiver from the enterprise under Article 15.5 (iii) or (iv) shall not be required only where the Defending Party has deprived the disputing investor of control of an enterprise;
d. specify the name of the arbitrator appointed by the disputing investor.

Article 16

Submission of Claim to Arbitration

16.1 A disputing investor who meets the conditions precedent provided for in Article 15 may submit the claim to arbitration under:
(a) the ICSID Convention, provided that both the Parties full members of the Convention;
(b) the Additional Facility Rules of ICSID, provided that either Party, but not both, is a member of the ICSID Convention; or
(c) the UNCITRAL Arbitration Rules.

16.2 The applicable arbitration rules shall govern the arbitration except to the extent modified by this Chapter, and supplemented by any subsequent rules adopted by the Parties.

16.3 A claim is submitted to arbitration under this Chapter when:
(a) the request for arbitration under paragraph (1) of Article 36 of the ICSID Convention is received by the Secretary-General of ICSID;
(b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General of ICSID; or
(c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the Defending Party.

16.4 Delivery of notice and other documents on a Party shall be made to the Designated Representative for each Party.

Article 17 Consent to Arbitration

17.1 Each Party consents to the submission of a claim to arbitration in accordance with the terms of this Agreement.

17.2 The consent given in Article 17.1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties; and
(b) Article II of the New York Convention for an agreement in writing.

Article 18 Appointment of Arbitrators

18.1 The arbitral Tribunal shall consist of three arbitrators with relevant expertise or experience in public international law, international trade and international investment law, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent of, and not be affiliated with or take instructions from a disputing party or the government of a Party with regard to trade and investment matters. Arbitrators shall not take instructions from any organisation, government or disputing party with regard to matters related to the dispute.

18.2 One arbitrator shall be appointed by each of the disputing parties and the third arbitrator ("**Presiding Arbitrator**") shall be appointed by agreement of the co-arbitrators and the disputing parties.

18.3 If a Tribunal has not been constituted within one hundred twenty days (*120*) days from the date that a Claim is submitted to arbitration under this Article, the appointing authority under this Article shall be the following:

a. in case of an arbitration submitted under ICSID Convention or the ICSID Additional Facility Rules, the Secretary-General of ICSID;
b. in case of an arbitration submitted under the UNCITRAL Rules, the Secretary-General of the Permanent Court of Arbitration;

Provided that if the appointing authority referred to is sub-paragraph (a) or (b) of Article 18.3 is a national of a Party, the appointing authority shall be in the following order: the President, the Vice-President or the next most senior Judge of the International Court of Justice who is not a national of either Party.

18.4 The appointing authority shall appoint in her/his discretion and after consultation with the disputing parties, the arbitrator or arbitrators not yet appointed.

Article 19

Prevention of Conflict of Interest of Arbitrators and Challenges

19.1 Every arbitrator appointed to resolve disputes under this Treaty shall during the entire arbitration proceedings be impartial, independent and free of any actual or potential conflict of interest.

19.2 Upon nomination and, if appointed, every arbitrator shall, on an ongoing basis, disclose in writing any circumstances that may, in the eyes of the disputing parties, give rise to doubts as to her/his independence, impartiality, or freedom from conflicts of interest. This includes any items listed in Article 19.10 and any other relevant circumstances pertaining to the subject matter of the dispute, and to existing or past, direct or indirect, financial, personal, business, or professional relationships with any of the parties, legal counsel, representatives, witnesses, or co-arbitrators. Such disclosure shall be made immediately upon the arbitrator acquiring knowledge of such circumstances, and shall be made to the co-arbitrators, the parties to the arbitration and the appointing authority, if any, making an appointment. Neither the ability of those individuals or entities to access this information independently, nor the availability of

that information in the public domain, will relieve any arbitrator of his or her affirmative duty to make these disclosures. Doubts regarding whether disclosure is required shall be resolved in favour of such disclosure.

19.3 A disputing party may challenge an arbitrator appointed under this Treaty:

(a) if facts or circumstances exist that may, in the eyes of the parties, give rise to justifiable doubts as to the arbitrator's independence, impartiality or freedom from conflicts of interest; or

(b) in the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of the arbitrator performing his or her functions, Provided that no such challenge may be initiated after fifteen days of that party: (i) learning of the relevant facts or circumstances through a disclosure made under Article 19.2 by the arbitrator, or (iii) otherwise becoming aware of the relevant facts or circumstances relevant to a challenge under Article 19.3, whichever is later.

19.4 The notice of challenge shall be communicated to the disputing party, to the arbitrator who is challenged, to the other arbitrators and to the appointing authority under Article 18.3. The notice of challenge shall state the reasons for the challenge.

19.5 When an arbitrator has been challenged by a disputing party, all disputing parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

19.6 If, within 15 days from the date of the notice of challenge, the disputing parties do not agree to the challenge or the challenged arbitrator does not withdraw, the disputing party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority as specified under Article 18.3.

19.7 The appointing authority as specified under Article 18.3 shall accept the challenge made under Article 19.3 if, even in the absence of actual bias, there are circumstances that would give rise to justifiable doubts as to the arbitrator's lack of independence, impartiality, freedom from conflicts of interest, or ability to perform his or her role, in the eyes of an objective third party.

19.8 In any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in the Treaty and the arbitration rules that were applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a disputing party to the arbitration had failed to exercise its right to appoint or to participate in the appointment.

19.9 If an arbitrator is replaced, the proceedings may resume at the stage where the arbitrator who was replaced ceased to perform his or her functions unless otherwise agreed by the disputing parties.

19.10 A justifiable doubt as to an arbitrator's independence or impartiality or freedom from conflicts of interest shall be deemed to exist on account of the following factors, including if:

a. The arbitrator or her/his associates or relatives have an interest in the outcome of the particular arbitration;
b. The arbitrator is or has been a legal representative/advisor of the appointing party or an affiliate of the appointing party in the preceding three (*3*) years prior to the commencement of arbitration;
c. The arbitrator is a lawyer in the same law firm as the counsel to one of the parties;
d. The arbitrator is acting concurrently with the lawyer or law firm of one of the parties in another dispute;
e. The arbitrator's law firm is currently rendering or has rendered services to one of the parties or to an affiliate of one of the parties out of which such law firm derives financial interest;
f. The arbitrator has received a full briefing of the merits or procedural aspects of the dispute from the appointing party or her/his counsel prior to her/his appointment;
g. The arbitrator is a manager, director or member of the governing body, or has a similar controlling influence by virtue of shareholding or otherwise in one of the parties;
h. The arbitrator has publicly advocated a fixed position regarding an issue on the case that is being arbitrated.

19.11 The Parties shall by mutual agreement and after completion of their respective procedures adopt a separate code of conduct for arbitrators to be applied in disputes arising out of this Treaty, which may replace or supplement the existing rules in application. Such a code and may address topics such as disclosure obligations, the independence and impartiality of arbitrators and confidentiality.

Article 20

Conduct of Arbitral Proceedings

20.1 Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a country that is a party to the New York Convention, selected in accordance with:

(a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or
(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.

20.2 Unless otherwise agreed by the disputing parties, the Tribunal may determine a place for meetings and hearings and the legal seat of arbitration. In doing so, the Tribunal shall take into consideration the convenience of the disputing parties and the arbitrators, the location of the subject matter, the proximity of

the evidence, and give special consideration to the capital city of the Defending Party.

20.3 When considering matters of evidence or production of documents, the Tribunal shall not have any powers to compel production of documents which the Defending Party claims are protected from disclosure under the rules on confidentiality or privilege under its law.

Article 21

Dismissal of Frivolous Claims

21.1 Without prejudice to a Tribunal's authority to address other objections, a Tribunal shall address and decide as a preliminary question any objection by the Defending Party that a claim submitted by the investor is: (a) not within the scope of the Tribunal's jurisdiction, or (b) manifestly without legal merit or unfounded as a matter of law.

21.2 Such objection shall be submitted to the Tribunal as soon as possible after the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the Defending Party to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the Tribunal fixes for the Defending Party to submit its response to the amendment).

21.3 On receipt of an objection under this Article, the Tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question and issue a decision or award on the objection, stating the grounds therefor. In deciding an objection under this Article, the Tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof). The Tribunal may also consider any relevant facts not in dispute.

21.4 The Tribunal shall issue an award under this Article no later than 150 days after the date of the receipt of the request under Article 21.2. However, if a Defending Party requests a hearing, the Tribunal may take an additional 30 days to issue the decision or award.

21.5 The Defending Party does not waive any objection as to competence or any argument on the merits merely because the Defending Party did or did not raise an objection or make use of the expedited procedure set out this Article.

21.6 When it decides on a preliminary objection by a Defending Party under Article 21.2 or 21.3, the Tribunal may, if warranted, award to the prevailing Defending Party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the Tribunal shall consider whether either the claim by the disputing investor or the objection by the Defending Party was frivolous, and shall provide the disputing parties a reasonable opportunity to present its cases.

Article 22

Transparency in arbitral proceedings

22.1 Subject to applicable law regarding protection of confidential information, the Defending Party shall make available to the public the following documents relating to a dispute under this Chapter:

a. the notice of dispute and the notice of arbitration;
b. pleadings and other written submissions on jurisdiction and the merits submitted to the Tribunal, including submissions by a Non- disputing Party;
c. Transcripts of hearings, where available; and
d. decisions, orders and awards issued by the Tribunal.

22.2 Hearings for the presentation of evidence or for oral argument ("**hearings**") shall be made public in accordance with the following provisions:

a. Where there is a need to protect confidential information or protect the safety of participants in the proceedings, the Tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.
b. The Tribunal shall make logistical arrangements to facilitate public access to hearings, including by organizing attendance through video links or such other means as it deems appropriate. However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

22.3 An award of a Tribunal rendered under this Article shall be publicly available, subject to the redaction of confidential information. Where a Defending Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, all other documents submitted to, or issued by, the Tribunal shall also be publicly available, subject to the redaction of confidential information.

22.4 The Non-disputing Party may make oral and written submissions to the Tribunal regarding the interpretation of this Treaty.

Article 23

Burden of Proof and Governing Law

23.1 This Treaty shall be interpreted in the context of the high level of deference that international law accords to States with regard to their development and implementation of domestic policies.

23.2 The disputing investor at all times bears the burden of establishing: (a) jurisdiction; (b) the existence of an obligation under Chapter II of this Treaty, other than the obligation under Article 9 or 10; (c) a breach of such obligation;

(c) that the investment, or the investor with respect to its investment, has suffered actual and non-speculative losses as a result of the breach; and (e) that those losses were foreseeable and directly caused by the breach.

23.3 The governing law for interpretation of this Treaty by a Tribunal constituted under this Article shall be: (a) this Treaty; (b) the general principles of public international law

relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the Parties are party; and (c) for matters relating to domestic law, the law of the Defending Party.

Article 24

Joint Interpretations

24.1 Interpretations of specific provisions and decisions on application of this Treaty issued subsequently by the Parties in accordance with this Treaty shall be binding on tribunals established under this Article upon issuance of such interpretations or decisions.

24.2 In accordance with the Vienna Convention of the Law of Treaties, 1969 and customary international law, other evidence of the Parties subsequent agreement and practice regarding interpretation or application of this Treaty shall constitute authoritative interpretations of this Treaty and must be taken into account by tribunals under this Chapter.

24.3 The Tribunal may, on its own account or at the request of a Defending Party, request the joint interpretation of any provision of this Treaty that is subject of a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the Tribunal within sixty (60) days of the request. Without prejudice to the rights of the Parties under Article 24.1 and 24.2, if the Parties fail to submit a decision to the Tribunal within sixty (60) days, any interpretation issued individually by a Party shall be forwarded to the disputing parties and the Tribunal, which may take into account such interpretation.

Article 25

Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, and unless the disputing parties disapprove, a Tribunal may appoint experts to report to it in writing on any factual issue concerning environmental, health, safety, technical or other scientific matters raised by a disputing party, subject to such terms and conditions as the disputing parties may agree.

Article 26

Award

26.1 An award shall include a judgement as to whether there has been a breach by the Defending Party of any rights conferred under this Treaty in respect of the disputing

investor and its investment and the legal basis and the reasons for its decisions.

26.2 The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both disputing parties to the arbitration.

26.3 A tribunal can only award monetary compensation for a breach of the obligations under Chapter II of the Treaty. Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided by a Party. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure, or other mitigating factors.[884]

26.4 A tribunal may not award punitive or moral damages or any injunctive relief against either of the Parties under any circumstance.

Article 27

Finality and enforcement of awards

27.1 An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case and the tribunal must clearly state those limitations in the text of the award.

27.2 Subject to Article 27.3, a disputing party shall abide by and comply with an award without delay.

27.3 A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules

(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or

(ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

27.4. Each Party shall provide for the enforcement of an award in its territory in accordance with its law.

27.5 A claim that is submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.

[884] Mitigating factors can include, current and past use of the investment, the history of its acquisition and purpose, compensation received by the investor from other sources, any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor.

Article 28

Costs

The disputing parties shall share the costs of the arbitration, with arbitrator fees, expenses, allowances and other administrative costs. The disputing parties shall also bear the cost of its representation in the arbitral proceedings. The Tribunal may, however, in its discretion direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing parties and this determination shall be final and binding on both disputing parties.

Article 29

Appeals Facility

The Parties may by agreement or after the completion of their respective procedures regarding the enforcement of this Treaty may establish an institutional mechanism[885] to develop an appellate body or similar mechanism to review awards rendered by tribunals under this chapter. Such appellate body or similar mechanism may be designed to provide coherence to the interpretation of provisions in this Treaty. In developing such a mechanism, the Parties may take into account the following issues, among others:

a) the nature and composition of an appellate body or similar mechanism;
b) the scope and standard of review of such an appellate body;
c) transparency of proceedings of the appellate body;
d) the effect of decisions by an appellate body or similar mechanism;
e) the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 20.1 of this Treaty; and
f) the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.

Article 30

Diplomatic Exchange between Parties

30.1 If a disputing investor has commenced a dispute against a Defending Party under this Chapter, the Non-disputing Party shall not give diplomatic protection, or bring an international claim, in respect of such dispute between one of its investors and the Defending Party, unless the Defending Party has failed to abide by and comply with an award or the decisions of its courts, as the case may be, in accordance with this

[885] This may include an appellate mechanism for reviewing investor-state disputes established under a separate multilateral agreement in future.

Chapter and other applicable law regarding recognition and enforcement of foreign judgments and arbitral awards.

30.2 Nothing in this Chapter precludes a Defending Party from requesting consultations or seeking agreement with the other Party on issues of interpretation or application of the Treaty. In response to such a request, the other Party shall engage in good faith consultations on the matters requested.

Chapter V: State-State Dispute Settlement

Article 31 Disputes between Parties

31.1 Disputes between the Parties concerning:

(i) the interpretation or application of this Treaty, or

(ii) whether there has been compliance with obligations to consult in good faith under Articles 30 or 36,

should, as far as possible, be settled through consultation or negotiation, which may include the use of non-binding third-party mediation or other mechanisms.

31.2 If a dispute between the Parties cannot be settled within six months from the time the dispute arose, it shall upon the request of either Party be submitted to a Tribunal.

31.3 Such a Tribunal shall be constituted for each individual case in the following way: Within two months of the receipt of the request for arbitration, each Party shall appoint one member of the Tribunal. Those two members shall then select a national of a third State who, on approval by the two Parties, shall be appointed Chairman of the Tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

31.4 If within the periods specified in Article 31.3 the necessary appointment(s) have not been made, either Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointment(s). If the President is a national of either Party or if he or she is otherwise prevented from discharging the said function, the Vice President shall be invited to make the necessary appointment(s). If the Vice President is a national of either Party or if he or she too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointment(s).

31.5 The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Parties.

31.6 The Parties to the arbitration shall share the costs of the arbitration, including the arbitrator fees, expenses, allowances and other administrative costs. Each Party shall bear the cost of its representation in the arbitral proceedings. The Tribunal may, however, in its discretion direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing Parties and this determination shall be binding on both disputing Parties.

31.7 The Tribunal shall decide all questions relating to its competence and, subject to any agreement between the disputing Parties, determine its own procedure, taking into account the PCA Optional Rules.

Chapter VI: Exceptions

Article 32 General Exceptions

32.1 Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a non- discriminatory basis that are necessary[886] to:

(i) protect public morals or maintaining public order;

(ii) protect human, animal or plant life or health;

(iii) ensure compliance with law and regulations that are not inconsistent with the provisions of this Agreement;

(iv) protect and conserve the environment, including all living and non- living natural resources;

(v) protect national treasures or monuments of artistic, cultural, historic or archaeological value.

32.2 Nothing in this Treaty shall apply to non-discriminatory measures of general application taken by a central bank or monetary authority of a Party in pursuit of monetary and related credit policies or exchange rate policies. This paragraph is without prejudice to a Party's rights and obligations under Article 6.

32.3 Nothing in this Treaty shall affect the rights and obligations of Parties as members of the International Monetary Fund under the IMF Articles of Agreement, as applicable from time to time, including the use of exchange actions which are in conformity with the IMF Articles of Agreement. In case of any inconsistency between the provisions of this Agreement and the IMF Articles of Agreement, the latter shall prevail.

Article 33

Security Exceptions

33.1 Nothing in this Treaty shall be construed:

(i) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(ii) to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to:

(a) action relating to fissionable and fusionable materials or the materials from which they are derived;

(b) action taken in time of war or other emergency in domestic or international relations;

(c) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for

[886] In considering whether a measure is "necessary", the Tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to a Party

the purpose of supplying a military establishment;

(d) action taken so as to protect critical public infrastructure including communication, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructure;

(e) any policy, requirement or measure including, without limitation, a requirement obtaining (or denying) any security clearance to any company, personnel or equipment; or

(iii) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

33.2 Each Party shall inform the other Party to the fullest extent possible of measures taken under Article 33.1 and of their termination.

33.3 Nothing in this Chapter shall be construed to require a Party to accord the benefits of this Treaty to an investor of the other Party where a Party adopts or maintains measures in any legislation or regulations which it considers necessary for the protection of its essential security interests with respect to a non-Party or an investor of a non-Party that would be violated or circumvented if the benefits of this Chapter were accorded to such juridical person or to its investments.

33.4 This Article shall be interpreted in accordance with the understanding of the Parties on security exceptions as set out in Annex 1, which shall form an integral part of this Treaty.

Chapter VII: Final Provisions

Article 34

Relationship with other Treaties

34.1 This Treaty or any action taken hereunder shall not affect the rights and obligations of the Parties under any other Agreements to which they are parties.

34.2 Any inconsistency, or question regarding the relationship between this Treaty and another bilateral agreement between the Parties, or a multilateral agreement to which both Parties are a party, shall be resolved in accordance with the Vienna Convention on the Law of Treaties.

Article 35

Denial of Benefits

A Party may at any time, including after the institution of arbitration proceedings in accordance with Chapter IV of this Treaty, deny the benefits of this Treaty to:

(i) an investment or investor owned or controlled, directly or indirectly, by persons of a non-Party or of the denying Party; or

(ii) an investment or investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty.

Article 36

Consultations and Periodic Review

36.1 Either Party may request, and the other Party shall promptly agree to, consultations in good faith on any issue regarding the interpretation, application, implementation, execution or any other matter including, but not limited to:

(i) reviewing the implementation of this Treaty;

(ii) reviewing the interpretation or application of this Treaty;

(iii) exchanging legal information; and

(iv) subject to Article 30, addressing disputes arising under Chapter IV of this Treaty or any other disputes arising out of investment.

36.2 Further to consultations under this Article, the Parties may take any action as they may jointly decide, including making and adopting rules supplementing the applicable arbitral rules under Chapter IV or Chapter V of this Treaty, issuing binding interpretations of this Treaty, and adopting joint measures in order to improve the effectiveness of this Treaty.

36.3 The Parties shall meet every five years after the entry into force of this Treaty to consult and review the operation and effectiveness of this Treaty.

Article 37

Amendments

37.1 This Treaty may be amended at any time at the request of either Party. The requesting Party must submit its request in written form explaining the grounds on which the amendment shall be made. The other Party shall consult with the requesting Party regarding the proposed amendment and must also respond to the request in writing.

37.2 This Treaty will stand automatically amended at all times to the extent that the Parties agree. Any agreement to amend the treaty pursuant to this Article must be expressed in writing, whether in a single written instrument or through an exchange of diplomatic notes. These amendments shall be binding on the tribunals constituted under Chapter IV or Chapter V of this Treaty and a tribunal award must be consistent with all amendments to this Treaty.

Article 38

Entry into force, duration and termination

38.1 This Treaty shall be subject to ratification and shall enter into force on the date of exchange of instruments of ratification.

38.2 This Treaty shall remain in force for a period of ten years and shall lapse thereafter unless the Parties expressly agree in writing that it shall be renewed. This Treaty may be terminated anytime after its entry into force if either Party gives to the other Party a prior notice in writing twelve (*12*) months in advance stating its intention to terminate the Treaty. The Treaty shall stand terminated immediately after the expiry of the twelve (*12*) month notice period.

38.3 In respect of investments made prior to the date when the termination of this Treaty becomes effective, the provisions of this Treaty shall remain in force for a period of five years.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Treaty.

Done at_____on this_____day of_____in two originals each in the Hindi, English and (languages), all texts being equally authoritative.

In case of any divergence in interpretation, the English text shall prevail.

For the Government of the Republic of India

For the Government of the Republic of _____

Annex 1: Security Exceptions

The Parties confirm the following understanding with respect to interpretation and/or implementation of Article 33 of this Treaty:

(i) the measures referred to in Article 33.3 are measures where the intention and objective of the Party imposing the measures is for the protection of its essential security interests. These measures shall be imposed on a non-discriminatory basis and may be found in any of its legislation or regulations:

a. In the case of India, the applicable measures referred to in Article 33.3 are currently set out in the regulations framed under the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder. India shall, upon request by the other Party, provide information on the measures concerned;

b. In the case of other Party ------

Where the Party asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is for the protection of its essential security interests protected by Article 33, any decision of such Party taken on such security considerations and its decision to invoke Article 33 at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. It shall not be open to any arbitral tribunal constituted under Chapter IV or Chapter V of this Treaty to review any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the Tribunal.

Annex A Customary International Law

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

Annex B Expropriation

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

Annex C

Service of Documents on a Party

United States

Notices and other documents shall be served on the United States by delivery to:

Executive Director (L/EX)
Office of the Legal Adviser
Department of State
Washington, D.C. 20520
United States of America

[Country]

Notices and other documents shall be served on [Country] by delivery to:

[insert place of delivery of notices and other documents for [Country]]