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Ying Zhu*

FAIR AND EQUITABLE TREATMENT OF FOREIGN INVESTORS IN AN ERA OF SUSTAINABLE DEVELOPMENT*

ABSTRACT

The long-existing debate surrounding the environmental impacts of investment liberalism has been intensified by the rapid growth of an international investment regime, which now consists of more than 3,000 international investment agreements (“IIAs”) and more than 700 investor-state arbitration cases. Many scholars, states, and non-governmental organizations (“NGOs”) fear this effective investment protection regime may intrude on or “chill” the host state’s sovereign right to regulate public interests, including environmental protection. An unsolved task for arbitral tribunals is to distinguish non-compensable legitimate environmental regulation from regulatory conduct that triggers compensation paid by host states to foreign investors.

This article provides a methodology to solve this task by focusing on one of the most prominent standards of treatment in IIAs—the Fair and Equitable Treatment (“FET”) Standard. The FET standard requires host states to provide fair and equitable treatment to foreign investors in their territories. Based on an examination of existing jurisprudence, this article analyzes four models adopted by tribunals in crafting the general threshold of the FET standard in environment-related investment cases and examines the tribunals’ diverse approaches to assessing the stability and due process of the host state’s environmental regulation. Ultimately, this article proposes a methodology to harmonize the chaos in jurisprudence: without specific commitments made by a host state to a foreign investor, the host state’s environmental regulation does not violate the FET standard, as long as the regulation is reasonable to achieve a genuine environmental protection objective and is applied non-discriminatorily and with due process.

INTRODUCTION

The long-existing debate¹ surrounding the environmental impacts of investment liberalism has been intensified by the rapid growth of an international investment regime, which now consists of more than 3,000 international investment agreements (“IIAs”) and more than 700 investor-state arbitration cases.² This regime provides substantive and procedural protection to foreign investments under international law: states are required to accord national treatment, most-favored-nation treatment, and fair and equitable treatment to foreign investors; states are also prohibited from expropriation or activities “tantamount to expropriation” unless prompt, adequate and effective compensation is provided to foreign investors.³ If the host state breaches these substantive obligations, the foreign investor may bring claims against the host state before an international arbitral tribunal.⁴ Since the 1990s, there has been an increasing number of investment arbitration cases in which states’ environmental regulations have been claimed as a violation of international investment obligations. As a result, many scholars,⁵ states,⁶ and NGOs⁷ fear that this effective investment protection regime may

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1. The environmental impacts of foreign direct investments remain controversial. According to the “pollution havens” hypothesis, profit-seeking foreign capital tends to flow to the countries with the lowest environmental standard and thus creates “pollution havens.” A related hypothesis is that countries tend to compete with each other to lower their environmental standards to attract foreign investments, resulting in a “race to the bottom.” Nonetheless, many scholars argued that these general hypotheses lack empirical proof. See generally Gunnar S. Eskeland & Ann E. Harrison, *Moving to Greener Pastures? Multinationals and the Pollution Haven Hypothesis*, 70 J. DEV. ECON. 1 (2003).

2. UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2017, 111, 114–15 (2017), http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

3. These standards of treatment are typical provisions in most bilateral and multilateral investment treaties. See JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 30–31 (2011).

4. This regime is known as the Investor-State Dispute Settlement (ISDS) mechanism established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) in 1965. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

5. See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA’s Chapter 11*, 33 GEO. WASH. INT’L L. REV. 651 (2001).

6. The United States modified its Model BIT since 2004 to narrow down the protection of foreign investors provided by certain key provisions, including FET and indirect expropriation. The EU attempted to reform both the making and implementation of investment treaties, by claiming an exclusive competence of concluding investment treaties under the Lisbon Treaty, and by proposing a permanent international investment court in place of the existing investor-state arbitration mechanism. Some developing countries (including Bolivia, Ecuador and Venezuela) took more radical steps by withdrawing from the ICSID Convention. For further analysis on the backlash against international investment arbitration in state practice, see Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT’L L. 43, 45–46 (2001); Stephan W. Schill,

intrude on or “chill” the host state’s sovereign right to regulate public interests, including environmental protection. This chilling effect can be two-fold: on the one hand, the host state’s unilateral environmental efforts may be claimed as a violation of international investment obligations;⁸ on the other hand, the host state’s implementation of international environmental law may be claimed as a violation of international investment law.⁹

One particular criticism of such chilling effect is centered on the Fair and Equitable Treatment (“FET”) Standard. The FET standard is one of the most prominent standards in international investment law and arbitration. Today, most bilateral and multilateral investment treaties provide FET clauses, and FET has been the most frequently invoked standard in investment arbitration.¹⁰ By definition, the FET standard requires host states to accord “fair and equitable treatment” to foreign investors in their territories. Although “fair and equitable treatment” is a well-known term of art in overseas investment protection, its exact thresholds and contents remain inconsistent and controversial. An unsolved task for arbitral tribunals is to refine the broad and vague FET standard to distinguish legitimate environmental regulatory conduct from distortion of foreign investment under the guise of environmental protection.¹¹

W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law, 22 EUR. J. INT’L L. 875, 895–96 (2011). See generally MICHAEL WAIBEL ET AL., *THE BACKLASH AGAINST INVESTMENT ARBITRATION* (2010).

7. See HOWARD MANN & KONRAD VON MOLTKE, INT’L INST. FOR SUSTAINABLE DEV., *NAFTA’S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT* (1999), <http://www.iisd.org/pdf/nafta.pdf>; KONRAD VON MOLTKE, INT’L INST. FOR SUSTAINABLE DEV., *AN INTERNATIONAL INVESTMENT REGIME? ISSUES OF SUSTAINABILITY* (2000), <https://www.iisd.org/pdf/investment.pdf>.

8. See, e.g., *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003); *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004); *Parkerings-Compagniet AS v. Republic of Lith.*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007); *Plama Consortium, Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008); *Yuri Bogdanov & Yulia Bogdanova v. Republic of Mold.*, SCC Case No. V091/2012, Final Award (Apr. 16, 2013); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton & Bilcon of Del., Inc. v. Gov’t of Can.*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015) [hereinafter *Bilcon*]; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (Nov. 3, 2015).

9. See, e.g., *S.D. Myers, Inc. v. Gov’t of Can.*, UNCITRAL, Partial Award (Nov. 13, 2000) (concerning the Basel Convention); *Glamis Gold, Ltd. v. United States*, Award (NAFTA Arb. Trib. June 8, 2009) (concerning the 1972 Convention on the Protection of the World Cultural Property and Natural Heritage); *Chemtura Corp. v. Gov’t of Can.*, UNCITRAL, Award (Aug. 2, 2010) (concerning, inter alia, the Aarhus Protocol on Persistent Organic Pollutants); *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award (May 16, 2012) (concerning the Inter-American Convention for the Protection and Conservation of Sea Turtles).

10. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 130 (2D ED. 2012); Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 357 (2005).

11. Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT’L LAW. 87, 106 (2005); Rudolf Dolzer, *Fair and Equitable Treatment: Today’s Contours*, 12 SANTA CLARA J. INT’L L. 7, 32–33 (2013) [hereinafter Dolzer, *Today’s Contours*]. Some commentators have submitted diverse and scattered proposals for solving this task. See J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465, 538 (1999) (concluding that the host state’s legitimate environmental regulations that have adverse economic

This article analyzes the existing jurisprudence in which the state's environmental regulation has been examined under the FET standard, and provides a methodology to distinguish non-compensable legitimate environmental regulation from regulatory conduct that triggers compensation paid by host states to foreign investors. Part I of the article analyzes the evolution of the FET standard in international investment law, and the new challenges for interpreting the FET standard in an era of sustainable development. Part II analyzes four models adopted by tribunals in crafting a general threshold of FET in environment-related cases. Part III examines the tribunals' different approaches in examining environmental regulation under the subcategories of the FET standard. Part IV discusses the situation where a state's environmental regulation is for the purpose of implementing the state's obligations under international environmental law and analyzes the role of environmental treaties in FET assessment. Part V proposes that a host state's environmental regulation does not violate the FET standard, as long as five elements are met: (1) there is a genuine environmental protection objective; (2) the regulation is reasonable to achieve such objective; (3) the regulation is applied non-discriminatorily; (4) the regulation is conducted with due process; and (5) there is no specific commitment made by the host state to the foreign investor.

I. THE EVOLUTION OF THE FET STANDARD AND NEW CHALLENGES IN AN ERA OF SUSTAINABLE DEVELOPMENT

One of the several major obligations of state parties under international investment treaties is to provide "fair and equitable" treatment to foreign investors from other state parties. The emergence of the FET standard has been viewed as a response to the request for a stable investment environment by capital-exporting countries after World War II.¹² Compared with contingent standards such as national treatment and most-favored-nation treatment, FET as a non-contingent standard, offers the host state less control over the standard of treatment for foreign

impacts on foreign investors do not create the foreign investors' right to compensation); Peter Muchlinski, 'Caveat investor'? *The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 INT'L & COMP. L. Q. 527, 527-28 (2006) (suggesting that investor conduct be considered in the determination of FET to strike a proper balance between investor protection and states' right to regulate); Jason Haynes, *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing*, 14 J. WORLD INV'T & TRADE 114, 142-45 (2013) (proposing to balance investors' interests and developing countries' right of regulatory change under the FET standard, mainly through drafting "clearer, qualified and more specific FET clauses," taking "a more vigorous proportionality analysis" in investment arbitration, and taking account of "investors' conduct in the calculation of compensation").

12. Stephen Vasciannie, *The Fair and Equitable Standard in International Investment law and Practice*, 70 BRIT. Y.B. INT'L L. 99, 107 (2000). Many commentators linked the FET standard to the concept of rule of law. See, e.g., Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J INT'L L. & POL. 43, 43 (2010) (proposing to use the concept of the rule of law to unify five subelements of the FET standard in arbitral awards, i.e. "reasonableness, consistency, non-discrimination, transparency, and due process"); Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 151 (2010).

investments and thereby assures a more certain investment environment.¹³ An early version of the FET standard appeared in Article 11(2) of the Havana Charter for the establishment of an International Trade Organization in 1948, assuring “just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another.”¹⁴

Although the Havana Charter failed to enter into force, this early model of the FET standard was subsequently incorporated into certain United States Friendship, Commerce and Navigation Treaties (FCN Treaties), with a reference either to “equitable” treatment or to “fair and equitable” treatment.¹⁵ For example, Article I (1) of the 1954 United States-Germany FCN Treaty provides the following: “[e]ach 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.”¹⁶ The subsequent 1959 Abs-Shawcross Draft Convention on Investment Abroad and the 1967 Organization for Economic Co-operation and Development (“OECD”) Draft Convention on the Protection of Foreign Property also refer to the states’ obligation to “ensure fair and equitable treatment to the property of the nationals of the other Parties.”¹⁷ The FET standard was subsequently written into bilateral investment treaties, which began to grow in numbers from the 1960s.¹⁸ Nowadays, a majority of bilateral and multilateral investment treaties have FET clauses.¹⁹ Even some Asian and Latin American countries that traditionally favored the use of national treatment rather than the FET standard for a better control of foreign investments, have incorporated FET clauses into their bilateral investment treaties.²⁰

Despite the popularity of the FET standard in treaty conclusion, there has been no uniform FET clause among investment treaties.²¹ In fact, the language of the FET clause differs significantly between treaties.²² Some treaties briefly require

13. Vasciannie, *supra* note 12, at 105–7; *see also Fair and Equitable Treatment Standard in International Investment Law* 2 (Org. for Econ. Co-operation & Dev., Working Paper No. 2004/3), <http://dx.doi.org/10.1787/675702255435>.

14. Havana Charter for an International Trade Organization, U.N. Doc. E/Conf. 2178, art. 11(2)(a)(i) (Mar. 24, 1948).

15. Vasciannie, *supra* note 12, at 110–11.

16. DOLZER & SCHREUER, *supra* note 10, at 130–31.

17. Article I of the 1959 Abs-Shawcross Draft Convention on Investment Abroad provides: “Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties.” Similarly, Article 1(a) of the 1967 OECD Draft Convention on the Protection of Foreign Property provides: “Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties.”

18. Vasciannie, *supra* note 12, at 113.

19. DOLZER & SCHREUER, *supra* note 10, at 130.

20. These countries include China, Malaysia, Thailand, Chile and Peru. *See Fair and Equitable Treatment Standard in International Investment Law*, *supra* note 13, at 2, 5.

21. *Id.* at 40. The MFN clause may to some extent help reconcile the heterogeneity of treaty language of FET.

22. For a survey of the drafting variation of the FET clause among investment treaties, see IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 15–52 (2008); UNITED NATIONS CONFERENCE ON TRADE & DEV., UNCTAD/DIAE/IA/2011/5, *FAIR AND EQUITABLE TREATMENT: UNCTAD SERIES ON ISSUES IN*

“fair and equitable treatment” in an unqualified form without further illustration;²³ some treaties link the FET standard to general international law;²⁴ some treaties equate the FET standard to the minimum standard of treatment in customary international law;²⁵ and others list specific examples of infringement of the FET standard.²⁶ The drafting variation of the FET clause appears not just “between” states, but also “within” a state: one state may conclude different versions of FET clauses with different countries, which subjects the environmental regulation in that country to inconsistent FET standards.²⁷

The variation in language used in FET clauses has contributed to the diverse interpretations of the FET standard in investment arbitration, especially concerning whether the FET should be interpreted as an autonomous treaty standard or as the minimum standard of treatment (“MST”) in customary

INTERNATIONAL INVESTMENT AGREEMENTS II, 17–35 (2012)
http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.

23. See, e.g., Agreement Between the Belgium-Luxembourg Economic Union and the Republic of Tajikistan on the Reciprocal Promotion and Protection of Investments, art. 3, Feb. 12, 2009; Agreement Between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments and Protocol, Au.-Ar., art. 4, Aug. 23, 1995.

24. See, e.g., Agreement Between the Government of the Republic of Croatia and the Government of the Sultanate of Oman on the Promotion and Reciprocal Protection of Investments, Cr.-Om., art. 3(2), May 4, 2009; Energy Charter Treaty art. 10, Dec. 17, 1994, 2080 U.N.T.S. 95.

25. See, e.g., North American Free Trade Agreement, Can.-Mex.-U.S., art. 1105, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. In 2001, the Free Trade Commission under the NAFTA issued its binding Notes of Interpretation [hereinafter the FTC Notes], stating that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.” The interpretation in the FTC Notes has also been incorporated into other U.S. investment treaties. See, e.g., United States-Oman Free Trade Agreement art. 10.5, Jan. 19, 2006.

26. See, e.g., ASEAN Comprehensive Investment Agreement art. 11(2)(a), Feb. 26, 2009 (prohibiting denial of justice); Agreement on the Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Sultanate of Oman, Neth.-Oman, art. 2(2) (2009) (prohibiting discriminatory measures).

27. Take Chinese BITs currently in force for example. Article 3(1) of the 2005 China-Spain BIT succinctly provides that: “Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party.” Agreement Between the People’s Republic of China and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments, China-Spain, art. 3(1), Nov. 14, 2005. On the other hand, Article 5 of the 2011 China-Uzbekistan BIT specifies the components of the FET standard, preventing states from willfully rejecting foreign investors from “fairly judicial proceedings” and from treating foreign investors “with obvious discriminatory or arbitrary measures.” Agreement Between the People’s Republic of China and the Republic of Uzbekistan on the Promotion and Reciprocal Protection of Investment, China-Uzb., art. 5, Apr. 19, 2011. By contrast, Article 4 of the 2012 China-Canada BIT refers the FET standard to the international law concept of minimum standard of treatment, stating that the FET standard does not “require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens as evidenced by general State practice accepted as law.” Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, art. 4, Sept. 19, 2012. Since these treaties employ inconsistent standards of fairness, a particular Chinese environmental measure may be seen as “fair and equitable” under one treaty but as “unfair or inequitable” under another.

international law (“CIL”).²⁸ Some cases are relatively easy because they involve treaties that specifically link the FET standard to the MST in CIL, although the exact threshold of the MST needs to be further defined. For example, the North American Free Trade Agreement (“NAFTA”) jurisprudence, after the issuance of the FTC Note of Interpretation of the treaty that explicitly states that the FET clause reflects the MST, consistently equated the FET standard with the MST requirement.²⁹ On the other hand, some treaties refer to “international law” in a general way or refrain from mentioning international law in their FET clauses. In such cases, the tribunals have adopted two different approaches: for the first approach, some tribunals interpreted the FET clause as an autonomous treaty standard different from the MST.³⁰ Other tribunals, adopting the second approach, held that an autonomous interpretation of the FET standard “is not different from” or “is not materially different from” the MST in CIL.³¹

Another reason for the inconsistent jurisprudence of the FET standard is the generality and vagueness of the terms “fair” and “equitable.” The FET standard has an inherent nature of broadness and impreciseness, which is designed on purpose: the very function of the FET standard is to prevent governmental acts that are inconsistent with the objective of the BIT but are not covered by other specific standards.³² Since most investment treaties do not specify the threshold and components of the FET standard, international investment tribunals have relatively broad discretion to decide whether the host state’s treatment of foreign investments is “fair” and “equitable” on a case-by-case basis. However, neither the autonomous interpretation of the FET nor the approach of equating the FET with the MST ensures an anchored threshold of the FET.

First, the FET, as an autonomous treaty standard, has been accorded different thresholds in investment arbitration. According to Article 31 of the 1969 Vienna Convention on the Law of Treaties (“VCLT”), the FET clause should be

28. Generally, the tribunals have tended to interpret the FET standard autonomously if the treaty does not refer the FET standard to the MST standard in customary international law. On the other hand, in the cases that the FET clause refers to the MST standard, the tribunals tend to follow the original text of the treaty and equate FET to MST. For a thorough analysis of the relationship between the FET standard and MST in international law, see MARTINS PAPARINSKIS, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* (2013).

29. *Bilcon*, *supra* note 8, ¶¶ 432–33; *Chemtura Corp. v. Gov’t of Can.*, UNCITRAL, Award, ¶¶ 120–21 (Aug. 2, 2010); *Glamis Gold, Ltd. v. United States*, Award, ¶ 599 (NAFTA Arb. Trib. June 8, 2009).

30. *Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶¶ 7.4.6 to .4.7 (Nov. 21, 2000); *Saluka Invs. B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶¶ 292–93 (Mar. 17, 2006); *Cont’l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 254 (Sept. 5, 2008); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Award, ¶ 127 (Dec. 27, 2010).

31. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 284 (May 12, 2005); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 361 (July 14, 2006); *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kaz.*, ICSID Case No. ARB/05/16, Award, ¶ 611 (July 29, 2008).

32. Dolzer, *Today’s Contours*, *supra* note 11, at 12. Christoph Schreuer also noted that the “lack of precision” of the FET standard “may be a virtue rather than a shortcoming,” since it allows tribunals to determine an infringement upon the investor’s rights “on the basis of a flexible standard.” Schreuer, *supra* note 10, at 365.

“interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³³ In their ordinary meaning, “fair” and “equitable” mean “just,” “even-handed,” “unbiased,” and “legitimate.”³⁴ However, as has been held by some tribunals, the broadness and vagueness of these terms make it hard to find an accurate definition.³⁵ Thus, the tribunal’s interpretation of the contexts of the FET clause and the objective of the investment treaty has a significant influence on the definition of the FET. Although most investment treaties’ main objective is to promote foreign investments, the tribunals have adopted different interpretation methods: some tribunals have tended to interpret the objective of investment protection excessively, resulting in a one-sided interpretation of the FET and over-protection of foreign investors.³⁶ Other tribunals held that the purpose of promoting foreign investments should be interpreted in a way that balances the foreign investor’s legitimate expectations and the host state’s right of regulatory change.³⁷

Second, inconsistent jurisprudence with respect to the threshold of FET has also existed in cases where tribunals have equated the FET standard with the MST. Among those tribunals, there have been heated debates over the question of whether the minimum standard of treatment has evolved since the *Neer* case³⁸ of 1926. Some tribunals insisted that the FET standard is equal to the *Neer* standard that requires an infringement of foreign investor’s rights to be outrageous or egregious to amount to a violation of MST.³⁹ On the contrary, some tribunals have correctly noted that the MST has evolved from the *Neer* standard and a violation of the FET standard does not need to be outrageous or egregious.⁴⁰

33. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

34. MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004). The tribunal derived these definitions from the *Concise Oxford Dictionary of Current English* (5th ed. 1964).

35. Saluka Invs. B.V., UNCITRAL, Partial Award, ¶ 297. For an excessive interpretation of the ordinary meaning of “fair and equitable,” see Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003).

36. Técnicas Medioambientales Tecmed S.A., ICSID Case No. ARB (AF)/00/2, Award, ¶ 156; MTD Equity Sdn. Bhd. & MTD Chile S.A., ICSID Case No. ARB/01/7, Award, ¶¶ 113–15.

37. Saluka Invs. B.V., UNCITRAL, Partial Award, ¶¶ 300–09; Cont’l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 258 (Sept. 5, 2008).

38. The *Neer* case concerned a claim of Mexico’s lack of diligence in investigating and prosecuting a murder of a U.S. citizen in Mexico. In this case, the U.S.-Mexico General Claims Commission decided that “the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful 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.” L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, 4 Rep. Int’l Arb. Awards 60, 61–62 (1926).

39. See, e.g., Glamis Gold, Ltd. v. United States, Award, ¶¶ 604–16 (NAFTA Arb. Trib. June 8, 2009); Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, ¶ 390 (Nov. 3, 2015).

40. ADF Grp Inc. v. United States, ICSID Case No. ARB (AF)/00/1, Award, ¶ 179 (Jan. 9, 2003) [hereinafter *ADF*]; Chemtura Corp. v. Gov’t of Can., UNCITRAL, Award, ¶ 121 (Aug. 2, 2010); Mondev Int’l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 115–16 (Oct. 11, 2002).

The vague nature and inconsistent jurisprudence of the FET standard have generated fear among scholars that the standard may be used by foreign investors as a “strategic offensive threat” against governmental regulation, resulting in a “regulatory chill” preventing environmental regulation.⁴¹ Some commentators have criticized the one-sidedness of the FET standard, submitting that the FET standard has been interpreted from the foreign investor’s perspectives, without due regard for the interests of other stakeholders such as local government, communities and environment.⁴² Other writers worry that the inherent vagueness of the FET standard may impose an unrealistically high requirement of “good governance,” such as the transparency requirement in *Tecmed v. Mexico*, that even the U.S. government might feel is difficult to satisfy.⁴³ On the other hand, some scholars are cautious with respect to the environmental exemption under investment treaties, noting that a state’s actions under the guise of environmental protection may be motivated by political or protectionist purposes as much as or even more than by environmental objectives.⁴⁴ The key question for investment tribunals remains: how can a proper distinction be made between the adverse treatment of a foreign investor by a host state that would constitute a violation of the FET standard and the host state’s legitimate sovereign right to regulate environmental issues? The tribunals have adopted diverse approaches in answering this question, as shown in the next three Parts.

II. THE GENERAL THRESHOLD OF FET IN ENVIRONMENT-RELATED INVESTMENT ARBITRATION: FOUR MODELS

The general threshold of the FET standard illustrates the basic benchmark against which the host state’s regulatory measures, including environmental regulation, are to be examined under the FET standard. However, the tribunals have reached no consensus on the threshold of the FET standard in environment-related investment disputes. As shown in the table below (Table 1), a state’s environmental regulation may be subject to different models of FET assessment.

41. Howard Mann, *NAFTA and the Environment: Lessons for the Future*, 13 TUL. ENVTL. L. J. 387, 405–06 (2000) (This early work noted that “[i]t is increasingly apparent that the private rights of foreign investors are being used not as a defensive protection against government abuse because an investor is a foreign-owned company, but as a strategic offensive threat to be wielded against government decision-makers rendering or considering decisions adverse to the interests of the company involved . . . [T]he result is the creation of a strong ‘regulatory chill’ that is preventing regulators from taking steps they believe need to be taken to protect the environment.”).

42. See, e.g., Howard Mann, *Is Fair and Equitable Fair, Equitable, Just, or Under Law?*, 100 AM. SOC’Y INT’L L. PROC. 74, 74 (2006); Fiona Marshall, *Fair and Equitable Treatment in International Investment Agreements*, ISSUES IN INTERNATIONAL INVESTMENT LAW: BACKGROUND PAPERS FOR THE DEVELOPING COUNTRY INVESTMENT NEGOTIATORS’ FORUM 16–17 (2007), https://www.iisd.org/pdf/2007/inv_fair_treatment.pdf; J. Roman Picherack, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far*, 9 J. WORLD INV. & TRADE 255, 287–88 (2008).

43. See, e.g., José E. Alvarez, *Contemporary Foreign Investment Law: An Empire of Law or the Law of Empire*, 60 ALA. L. REV. 943, 963–64 (2009).

44. Gantz, *supra* note 5, at 655–56; Roland Kläger, *Revising Treatment Standards— Fair and Equitable Treatment in Light of Sustainable Development*, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW 76 (Steffen Hindelang & Markus Krajewski eds., 2016).

Table 1: The General Thresholds of FET in Environment-related Investment Disputes

| Threshold Interpretation Method | High Threshold/ <i>Neer</i> Standard | Low Threshold/ Evolved <i>Neer</i> Standard |
|--|---|--|
| Autonomous Standard | <i>Biwater Unglaube</i> | <i>MTD Tecmed</i> |
| Minimum Standard of Treatment (MST) | <i>Glamis Gold Al Tamimi</i> | <i>Bilcon Chemtura Gold Reserve</i> |

A. The “Autonomous-Low” Model

The *Tecmed* case and the *MTD v. Chile* case offer typical examples of adopting the “Autonomous-Low” Model, which means both tribunals interpreted the FET standard as an autonomous treaty standard and established a low threshold for violating such standard.

The *Tecmed* case concerns the denial of an operating permit for a Spanish investor’s hazardous waste landfill located in Mexico. The FET clause in the 1995 Mexico-Spain BIT⁴⁵ only generally mentions international law without a specific reference to CIL. Article 4(1) of the BIT states that “[e]ach Contracting Party will guarantee in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party.”⁴⁶ The *Tecmed* tribunal held that the scope of the FET under Article 4(1) either results from “an autonomous interpretation, taking into account the text of Article 4(1) of the Agreement according to its ordinary meaning (Article 31(1) of the Vienna Convention) or from international law and the good faith principle.”⁴⁷ The tribunal did not refer the FET clause to the MST.⁴⁸ Moreover, the tribunal adopted a low

45. The 2006 version of the Mexico-Spain BIT refers to customary international law in the FET clause.

46. Agreement on the Promotion and Reciprocal Protection of Investments art. 4(1), Spain-Mex., June 23, 1995.

47. Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 155 (May 29, 2003).

48. The *Tecmed* tribunal cited the *Mondev* award stating that “[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.” *Id.* ¶ 153. But this citation was used to prove that the host state’s bad faith is not required for a violation of the FET. The *Tecmed* tribunal did not go further to address the MST.

threshold for determining a violation of the FET standard, by imposing a long list of demanding requirements on the host states:

The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.⁴⁹

The *Tecmed* tribunal held that this low threshold for violating the FET is not only in conformity with the ordinary meaning of the FET clause in the BIT,⁵⁰ but also in line with the intent of the parties to the BIT, which is “to strengthen and increase the security and trust of foreign investors that invest in the member States, thus maximizing the use of the economic resources of each Contracting Party by facilitating the economic contributions of their economic operators.”⁵¹

The *MTD* tribunal has adopted a similar approach. In this case, the foreign investor claimed that Chile’s refusal to rezone a piece of land based on urban development and environmental protection had violated the FET clause. The FET clause, in this case, was Article 2(2) of the BIT, which provides that “[i]nvestments of investors of either Contracting Party shall at all time be accorded fair and equitable treatment . . . “ without any reference to international law. The tribunal noted that “there is no reference to customary international law in the BIT in relation to fair and equitable treatment.”⁵² Accordingly, the tribunal interpreted the FET clause “in accordance with the norms of interpretation established by the Vienna Convention on the Law of the Treaties, which is binding on the State parties to the BIT.”⁵³ It first resorted to the Concise Oxford Dictionary of Current English to determine that the ordinary meaning of the terms “fair” and “equitable” is “just,” “even-handed,” “unbiased,” and “legitimate.”⁵⁴ The tribunal then examined the object and purpose of the BIT using the preamble’s aims of investment protection and promotion. Accordingly, the tribunal held that “in terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign

49. *Id.* ¶ 154.

50. *Id.* ¶ 155.

51. *Id.* ¶ 156.

52. *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 111 (May 25, 2004).

53. *Id.* ¶ 112.

54. *Id.* ¶ 113.

investment.”⁵⁵ However, the tribunal did not further illustrate this standard. Rather, the tribunal adopted the low threshold for violating the FET standard created by the *Tecmed* tribunal,⁵⁶ by succinctly holding that the *Tecmed* threshold “is the standard that the Tribunal will apply to the facts of this case.”⁵⁷

B. The “Autonomous-High” Model

As a second model, the *Biwater v. Canada* tribunal and the *Unglaube v. Costa Rica* tribunal have interpreted the FET standard as an autonomous treaty standard. Nonetheless, both tribunals blurred the distinction between an autonomous standard and the MST and concluded a high threshold for determining a violation of FET by reference to the cases equating FET to MST.

The *Biwater* case concerned the termination of a contract where the foreign investor operated a water and sewage system in Tanzania. In this case, the tribunal held that, since the FET clause in the BIT does not refer to the “well-known concept” of “minimum standard of treatment in customary international law” in particular, the Contracting Parties of the BIT “ought to be taken to have intended the adoption of an autonomous standard.”⁵⁸ However, the tribunal did not resort to the ordinary meaning of the FET clause or the objective of the BIT in order to determine the FET threshold. Rather, the tribunal referred to arbitral practice. Noting that “the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law,”⁵⁹ the tribunal examined both the arbitral awards adopting an autonomous standard of the FET and those awards equating the FET with the MST.⁶⁰ Particularly, the tribunal cited two NAFTA awards, *Waste Management v. Mexico* and *Thunderbird v. Mexico*, to prove that the threshold for finding a violation of the FET standard is a high one, requiring “a gross denial of justice or manifest arbitrariness falling below acceptable international standards.”⁶¹ The tribunal also took into account a series of pro-host state factors in the FET assessment, including:

the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct; the limit to legitimate expectations in circumstances

55. *Id.*

56. *Id.* ¶ 114.

57. *Id.* ¶ 115. Although both the *Tecmed* tribunal and the *MTD* tribunal interpreted the FET clause in accordance with Article 31(1) of the VCLT by taking account of the ordinary meaning of the FET clauses and the object of the BITs, their approaches have been criticized by the ICSID *ad hoc* annulment Committee in *MTD* as inconsistent with “the terms of the applicable investment treaty” and “different from those contained in or enforceable under the BIT.” *MTD Equity Sdn. Bhd. & MTD Chile S.A.*, Decision on the Application for Annulment, ¶ 167.

58. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 591 (July 24, 2008).

59. *Id.* ¶ 592.

60. *Id.* ¶¶ 596–601.

61. *Id.* ¶¶ 597–98. Although acknowledging that both awards adopted a MST rather than an autonomous treaty standard due to the special wording of the NAFTA, the tribunal held that the general threshold for violating the MST is appropriate in the context of the current BIT which has no reference to CIL. *Id.* ¶ 599. In this way, the tribunal seems to see no substantial difference between the thresholds of the autonomous standard of the FET and of the MST in CIL.

where an investor itself takes on risks in entering a particular investment environment; and the relevance of the parties' respective rights and obligations as set out in any relevant investment agreement.⁶²

The *Unglaube* tribunal adopted a similar approach. In this case, Costa Rica built a national park for protecting leatherback turtles in an area where the foreign investor's properties were located. In the view of the tribunal, either the autonomous standard of FET or the MST accords the tribunal the same responsibility to assess certain components of the FET standard, including "whether investors have been subjected to arbitrary or discriminatory treatment, to legal arrangements which violate due process, and in particular, whether the legitimate expectations of the investor . . . have been duly respected."⁶³ To assess these requirements, the tribunal had to "find the meaning of these terms under international law bearing in mind their ordinary meaning, the evolution of international law and the specific context in which they are used."⁶⁴ The tribunal noted the brief language of the FET clause in the BIT, which simply provides the host state's obligation to "accord investments fair and equitable treatment."⁶⁵ It also pointed out the brevity of the preamble of the BIT stating the intent of the parties to promote foreign investments.⁶⁶ Accordingly, the tribunal resorted to the previous cases, holding that "to prove a breach of the [FET] standard, a claimant must show more than mere legal error."⁶⁷ In particular, the tribunal cited the *Saluka Investments B.V. v. Czech Republic* award stating that the host state's action or decision must be "manifestly inconsistent, non-transparent, [or] unreasonable (*i.e.*, unrelated to some rational policy) . . . to amount to a violation of the FET clause."⁶⁸

C. The "MST-*Neer*" Model

In the cases (especially the NAFTA cases) where the investment treaties link the FET standard to the MST in CIL, some tribunals have adopted a "MST-*Neer*" Model, equating the FET standard to the MST standard in the *Neer* case. For example, the *Glamis Gold Ltd. v. United States* case concerned the U.S. government's regulatory measures against a mining company for the negative impacts of the mining project on local environment and culture. In this case, the tribunal held that the MST has been "effectively fr[ozen] . . . at the 1926 conception of egregiousness" due to the difficulty in proving a change in custom.⁶⁹ In particular, the tribunal denied the claimant's argument that numerous arbitral decisions establishing "a universe of 'fundamental' principles" could prove an evolvement of the MST.⁷⁰ The tribunal instead held that "Arbitral awards . . . do

62. *Id.* ¶ 601.

63. *Id.* ¶ 242.

64. *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, ¶ 244 (May 16, 2012).

65. *Id.* ¶¶ 240–41.

66. *Id.* ¶ 241.

67. *Id.* ¶¶ 245–46.

68. *Id.* ¶ 246. *See generally* *Saluka Invs. B.V. v. Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006).

69. *Glamis Gold, Ltd. v. United States*, Award, ¶ 604 (NAFTA Arb. Trib. June 8, 2009).

70. *Id.* ¶ 605.

not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law, as opposed to a treaty-based, or autonomous, interpretation.”⁷¹

Based on this understanding, the tribunal resorted solely to the arbitral awards referring to the MST (rather than to the autonomous standard).⁷² The tribunal first pointed out that the MST in the *Neer* case requires that “the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful 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.”⁷³ The question was whether this standard has evolved within the past one hundred years. The tribunal assumed two possible kinds of evolution: one is a “partial evolution,” which means the *Neer* standard has not evolved except for the change of international view regarding what is “shocking” and “outrageous;” the other is a “general evolution,” which means the MST has moved beyond the *Neer* standard.⁷⁴ The tribunal acknowledged only the partial evolution of the MST while rejecting a general evolution. Particularly, the tribunal held the MST has not evolved beyond the strict standard established in *Neer*, which “is evident in the abundant and continued use of adjective modifiers [such as “gross,” “manifest” and “shock”] throughout arbitral awards, evidencing a strict standard.”⁷⁵ In conclusion, the tribunal held:

It therefore appears that, although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1).⁷⁶

Almost the same rationale has been adopted in the *Al Tamimi v. Oman* case.⁷⁷ This case concerned a termination of a mining lease and an arrest of the foreign investor because of the investor’s unlawful operation of a mining project against Omani law, including its environmental law. The *Al Tamimi* tribunal,

71. *Id.*

72. *Id.* ¶¶ 607–08, 611.

73. *Id.* ¶ 612.

74. *Id.*

75. *Id.* ¶ 614. The tribunal referred to *International Thunderbird, S.D. Myers* and *Mondev*. However, the reference to *S.D. Myers* seems questionable (at least according to the *Glamis Gold* tribunal’s rationale that only those awards referring to CIL are relevant), since *S.D. Myers* was decided before the issuance of the FTC Notes that for the first time linked the FET clause in the NAFTA to customary international law. This misreading of the *S.D. Myers* award has also taken place in the *Al Tamimi* award. See Adel A. Hamadi *Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, ¶ 382 (Nov. 3, 2015). Moreover, the *Mondev* award also cannot serve the *Glamis Gold* tribunal’s conclusion, because the *Mondev* award expressly stated that “[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious.” See *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶116 (Oct. 11, 2002).

76. *Glamis Gold, Ltd., Award*, ¶ 616.

77. *Adel A Hamadi Al Tamimi*, ICSID Case No. ARB/11/33, Award, ¶¶ 382–90.

adopting the *Neer* standard, required the foreign investor to prove “a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law.”⁷⁸ It also held that “[a]lthough a number of subsequent arbitral decisions have acknowledged that with the passage of time the standard has likely advanced beyond these basic requirements, tribunals have continued to employ descriptions which emphasize the high threshold for breach.”⁷⁹

D. The “MST-Evolved *Neer*” Model

Adopting a different approach than *Glamis Gold* and *Al Tamimi*, the tribunals in *Chemtura v. Canada*, *Gold Reserve v. Venezuela*, and *Bilcon v. Canada* held that the MST has evolved from the *Neer* standard. In *Chemtura*, the foreign investor claimed that Canada’s ban on lindane products had violated the FET standard. The tribunal acknowledged the evolution of CIL as a result of the conclusion of BITs.⁸⁰ Citing the *Mondev v. United States* award, the tribunal held that:

[B]oth the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of “fair and equitable treatment” and “full protection and security” of foreign investments to what those terms - had they been current at the time - might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith . . . It [the term “customary international law”] is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce.⁸¹

A similar approach has been adopted in *Gold Reserve*, in which the tribunal held that “public international law principles have evolved since the *Neer* case and that the standard today is broader than that defined in the *Neer* case.”⁸² The tribunal also cited the *Mondev* award and Schwebel’s article to prove that the *Neer* standard is “far from what is fair and equitable” and is not controlling today.⁸³

78. *Id.* ¶ 390.

79. *Id.* ¶ 383. However, this statement which might be correct in the *Glamis Gold* award was inaccurate at the time of the *Al Tamimi* case, since the *Chemtura* tribunal and the *Gold Reserve* tribunal have adopted a low threshold for a breach of the FET.

80. *Chemtura Corp. v. Gov’t of Can.* UNCITRAL, Award, ¶¶ 121, 236 (Aug. 2, 2010).

81. *Id.* ¶ 121.

82. *Gold Reserve, Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 567 (Sept. 22, 2014).

83. *Id.*

Although both tribunals in *Chemtura* and *Gold Reserve* correctly stated that the MST standard has evolved since *Neer*, neither of them has specified the exact threshold of the evolved standard. The subsequent *Bilcon* tribunal made progress in this regard.

In *Bilcon*, a U.S. investor claimed that Canada's environmental assessment of its project had violated the FET clause. The *Bilcon* tribunal, on the one hand, held that "the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection."⁸⁴ On the other hand, the tribunal found that the threshold for a breach of the MST remains high,⁸⁵ and that "acts or omissions constituting a breach must be of a serious nature."⁸⁶ It could be assumed that the tribunal considered the threshold for breaching the MST as higher than a minor mistake but lower than outrageous behavior, with the exact threshold determined according to the specific context of each case. As further stated by the tribunal:

[T]here is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but that there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behavior. The formulation also recognizes the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach.⁸⁷

III. THE SUB-ELEMENTS OF FET IN ENVIRONMENT-RELATED INVESTMENT ARBITRATION

In addition to crafting a general threshold of the FET standard, the tribunals have also given content to the FET standard by incorporating several sub-elements, including stability and due process requirements. Although these sub-elements to some extent refine the broad FET standard, the question remains—how to interpret the stability and due process requirements of environmental measures to distinguish compensable infringement of investors' rights and non-compensable legitimate exercise of states' regulatory power?

A. Stability of Environmental Legal Framework

An essential element of the FET standard is the stability of the investment environment of the host state. The host state's change of law or reversal of its assurances after the investment is made, which frustrate the investor's legitimate expectations, can lead to a violation of the FET standard.⁸⁸ On the other hand, environmental law is inherently dynamic. The subject matter of environmental

84. *Bilcon*, *supra* note 8, ¶ 433.

85. *Id.* ¶ 441.

86. *Id.* ¶ 443.

87. *Id.* ¶ 444.

88. PSEG Global, Inc., N. Am. Coal Corp., & Konya Ilgin Elektrik Üretim ve Ticaret Ltd. Sirketi v. Republic of Turk., ICSID Case No. ARB/02/5, Award, ¶ 191 (Jan. 19, 2017); *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, ¶ 224 (Oct. 31, 2011).

law—the ecosystem—is by its nature highly dynamic and changes in a complex, nonlinear, and unpredictable way, which requires environmental law to be adjusted over time to reflect current ecological situations.⁸⁹ With the constant emergence of new scientific information regarding environmental degradation, environmental authorities need to either tighten or relax the existing environmental standards.⁹⁰ This tension between the dynamic nature of environmental law and the foreign investor's requirement of a stable legal environment has been seen in international investment arbitral cases.

1. Stability Requirement of Environmental Legislation

The *Glamis Gold* case concerns a Canadian gold mining company, Glamis, whose open-pit mining project in southeastern California has drawn local opposition due to its environmental and cultural impacts on designated Native American sites. The U.S. federal government denied the project's Plan of Operation (POO) based on the "undue impairment" standard that was newly enacted in DOI Solicitor John Leshy's legal opinion interpreting the Federal Land Policy and Management Act (FLMPA). The foreign investor claimed that the U.S. government's acts had frustrated its legitimate expectations based on the well-established "unnecessary or undue degradation" standard, the application of which would not have led to the denial of the project's POO.⁹¹

The tribunal agreed with the claimant that the shift of environmental standards "represented a significant change from settled practice and, arguably, surprised Claimant."⁹² Nonetheless, the tribunal also recognized that the shift in U.S. governmental policy was due to the fact that the government was faced with an issue of first impression and one that might raise constitutional concerns, considering that "no previous—or subsequent—EIS for any mining project in the CDCA [California Desert Conservation Area] had found a significant, unavoidable adverse impact to cultural resources and Native American sacred sites."⁹³

The tribunal pointed out that the issue before it was "whether a lengthy, reasoned legal opinion violates customary international law because it changes, in an arguably dramatic way, a previous law or prior legal interpretation upon which an investor has based its reasonable, investment-backed expectations."⁹⁴ For

89. Richard J. Hobbs, et al., *Evolving Ecological Understandings: The Implications of Ecosystem Dynamics*, in BEYOND NATURALNESS: RETHINKING PARK AND WILDERNESS STEWARDSHIP IN AN ERA OF RAPID CHANGE 37 (David N. Cole & Laurie Yung eds., 2010). Also, since ecosystems often change in a nonlinear way, it would be difficult (if not impossible) to invent fixed environmental rules based on a prediction of future path of ecological changes.

90. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 22 (2004).

91. The claimant asserted that, under the old standard, its POO would have been approved as long as it employs economically foreseeable mitigation, even if such approval will result in the damage of Native American sacred sites. The tribunal also agreed that "it appears indisputable that, under the decades-long rule of the 'unnecessary or undue degradation' standard, mining operators developed expectations that the discovery of Native American artifacts at a mining site could necessitate mitigation, but would not lead to denial of the project's POO." *Glamis Gold, Ltd. v. United States*, Award, ¶ 758 (NAFTA Arb. Trib. June 8, 2009).

92. *Id.* ¶ 759.

93. *Id.* ¶ 760.

94. *Id.* ¶ 761.

addressing this question, the tribunal noted that “it is not for an international tribunal to delve into the details of and justifications for domestic law.”⁹⁵ Rather, the tribunal used the *Neer* standard as a benchmark, holding that the M-Opinion did not violate the FET standard since it did not amount to “a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.”⁹⁶

Compared with *Glamis Gold*, the *Unglaube* case concerned a much subtler change in environmental legislation. In *Unglaube*, the investors argued that their reasonable expectations had been frustrated by Costa Rica’s interpretation of the language of the National Park Law.⁹⁷ In 1995, Costa Rica enacted the National Park Law to build a national marine park where endangered leatherback turtles could lay their eggs. This law provided that the boundary of the park was 125 meters “seaward from the ordinary high tide line,” within which the private lands would be expropriated to enable the construction of the park.⁹⁸ Ten years later, recognizing that the terminology “seaward” was clearly used in error and was actually intended to mean “in the opposite direction from the ocean,”⁹⁹ the 2005 opinion of the Attorney General of Costa Rica made an interpretation of the National Park Law, which corrected the problematic word “seaward,” and thus incorporated the investors’ properties, located within 125 meters landward from the ordinary high tide line, into the expropriation area.¹⁰⁰ This interpretation was subsequently ratified by the Supreme Court decision.¹⁰¹

The investors argued that the 2005 opinion frustrated legitimate expectations that none of their lands would be expropriated according to the term “seaward” in the 1995 National Park Law.¹⁰² However, the tribunal dismissed this claim by according deference to the Costa Rican authorities in the interpretation of Costa Rican Law. The tribunal held that “under the Constitution and laws of Costa Rica, it is the Attorney General and the Supreme Court who are empowered to give authoritative and final interpretation of the law,” and “it is not appropriate for this Tribunal to substitute an opinion of its own or make any finding of liability *unless*

95. *Id.* ¶ 762.

96. *Id.* (citing the Tribunal Holding, ¶ 616). The tribunal found that the M-Opinion did not violate the *Neer* standard, for the following reasons: first, the opinion was made within the scope of the Solicitor’s power and foreseeable actions, and thus was not arbitrary; second, the opinion did not exhibit a manifest lack of reasons because of its detailed analysis; third, the opinion did not exhibit blatant unfairness or evident discrimination because of its general applicability; fourth, there was no quasi-contractual relationship between the host standard the investor “whereby the State has purposely and specifically induced the investment”; and lastly, the opinion did not evince “a complete lack of due process.” *Id.* ¶¶ 763–68.

97. *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, ¶ 251 (May 16, 2012).

98. *Id.* ¶¶ 56–57.

99. *Id.* ¶ 104.

100. *Id.* ¶ 91.

101. *Id.*

102. *See id.* ¶ 251. The investors argued that this interpretation unlawfully extended the boundaries of the park to the “75-Meter Strip” within which the investor’s properties were located. *Id.* ¶ 197. The concept of the “75-Meter Strip” was a subtraction of the 50-meter strip of public land that was inalienable under Costa Rican law from the 125-meter strip provided in the National Park Law. *Id.* ¶ 62 n.27.

*the Attorney General and the Court are found to have acted in a manner which is arbitrary, discriminatory or otherwise shocking to the conscience.”*¹⁰³

2. Stability Requirement of Environmental Administration

The host states' adoption of a novel environmental review standard in its Environmental Impact Assessments (“EIA”) may conflict with the foreign investor's expectations relying on the pre-existing standard. In *Glamis Gold*, the investor claimed that the U.S. federal government's cultural review of its project was discriminatory because the investor's project was the first project to be assessed based on the novel concept of the Area of Traditional Cultural Concern (“ATCC”) created by the M-Opinion.¹⁰⁴ The tribunal dismissed this claim and held that the “novel” use of the ATCC was justified because it was based on the opinion of qualified professionals.¹⁰⁵ The tribunal stated that “[i]t is professionals such as these, with their technical background and expertise, not this Tribunal, who are the proper parties to determine whether, as Respondent argues, the use of the ATCC ‘accorded with standard archeological practice, which calls for a reduction in [the] survey interval when a number of archeological features in a given area are identified.’”¹⁰⁶ Although the experts produced by the investor challenged the technical accuracy of the use of the ATCC, the tribunal held that the respondent was justified in relying on the advice of the professionals, because “these professionals appear quite qualified for the task and they provided substantial evidentiary support for their conclusions.”¹⁰⁷

However, in *Bilcon*, the tribunal held that Canada's usage of a novel concept of “community core values” in the EIA constituted a violation of the FET clause, because it frustrated the foreign investor's legitimate expectations, constituted procedural injustice and was adopted in an arbitrary manner.¹⁰⁸ This case involved U.S. investors operating a mining quarry and marine terminal in Canada, which failed to pass the EIA conducted by Canadian governments because of its harmful impacts on “community core values”. “Community core values” was

103. *Id.* ¶ 253 (emphasis added).

104. The ATCC concept was adopted to protect the interests of a local tribe. The U.S. Bureau of Land Management (“BLM”) retained the KEA Environmental, Inc. (“KEA”) to conduct cultural studies of the potential effect of the investor's mining project. At first, the BLM instructed KEA to determine the existence of any “traditional cultural properties” (TCPs) in the project vicinity. However, the local tribe insisted that the project vicinity was merely a component of a larger area and that the whole area was sacred to the tribe. Due to such a “vast area of concern” by the tribe and the difficulty of confining it into TCPs, the KEA was later instructed by the BLM “to leave the boundaries of the TCPs open and instead evaluate the total ‘area of traditional cultural concern’ (‘ATCC’).” However, this ATCC concept was a novel concept that had no precedent in cultural reviews procedure. The claimant alleged that the novel use of the ATCC concept in the cultural review constituted a discriminatory treatment that violated the FET clause. *Glamis Gold, Ltd. v. United States*, Award, ¶¶ 103–04 & n.269 (NAFTA Arb. Trib. June 8, 2009).

105. *Id.* ¶ 783.

106. *Id.*

107. *Id.*

108. *Bilcon*, *supra* note 8, ¶¶ 589–91.

a novel concept that had not been referred to in any Canadian environmental legislation.¹⁰⁹

Although the tribunal acknowledged the right of the host state's "legislators to adopt different environmental assessment standards and processes than they had in place at the time of the Bilcon Project," the tribunal found that "[t]he problem in this case is whether the Investors' application was assessed in a manner that complied with the laws that Canada and Nova Scotia actually chose to adopt . . . [T]here was in fact a fundamental departure from the methodology required by Canadian and Nova Scotia law."¹¹⁰ It seems that the tribunal would not have found a violation of the FET if the novel standard of review had been adopted during the environmental law-making rather than the law-implementation process. In particular, the tribunal held that the novel usage of the concept of "community core values" frustrated the investors' reliance on the Canadian government's previous encouragement of the investment;¹¹¹ that the sudden adoption of the novel concept constituted procedural unfairness suffered by the investors;¹¹² and that the environmental review was arbitrary because the environmental review panel "effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law."¹¹³

Foreign investor's expectations may also be frustrated by tightened enforcement of environmental law. If the host state has tolerated an unlawful conduct for a significant period of time, the foreign investor may expect that that conduct, although unlawful 'in book,' will not be punished in reality. In *Gold Reserve*, Venezuela terminated the foreign investor's exploitation concessions partly because of the investor's failure to comply with the time-limits of exploitation provided by the Venezuelan mining law.¹¹⁴ However, the tribunal found that Venezuela raised no objection to the investor's activities for almost twenty years, during which period Venezuela was aware of the process, approved required studies taken by the investor, and granted permits to the investor to exploit natural resources.¹¹⁵ The tribunal thus held that the investor had "good reasons to rely on the continuing validity of its mining titles and rights and an expectation that it would obtain the required authorization to start the exploitation of the concessions."¹¹⁶

109. *See id.* ¶ 601.

110. *Id.* ¶¶ 599–600. This statement seems to contradict the tribunal's previous opinion about the international minimum standard that "all authorities agree that the mere breach of domestic law or any kind of unfairness does not violate the international minimum standard." *Id.* ¶ 436.

111. *Id.* ¶ 589.

112. *Id.* ¶ 590.

113. *Id.* ¶ 591.

114. *Gold Reserve, Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 438 (Sept. 22, 2014).

115. *See id.* ¶ 578.

116. *Id.* ¶ 579.

3. Stability Requirement of Environmental Adjudication

Novel concepts adopted in environmental adjudication may frustrate the foreign investor's expectations. In *Unglaube*, the foreign investors alleged that the Costa Rica Supreme Court decision frustrated their legitimate expectations by introducing the novel concept of a "buffer zone."¹¹⁷ As mentioned above, in 1995, Costa Rica enacted the National Park Law to provide a nesting habitat for endangered leatherback turtles. According to this law, Costa Rica was only entitled to expropriate the foreign investors' properties within the boundaries of the park.¹¹⁸ However, in 2008, the Constitutional Chamber of the Supreme Court, in its response to a petition brought by an environmental NGO arguing for stronger protection of turtles, decided that the government should conduct a comprehensive environmental impact study in the park's buffer zone (located within 500 meters of the boundaries of the park), during which time all the Environmental Viability Permits for properties inside the buffer zone would be suspended.¹¹⁹

The investors argued that this decision interfered with their properties outside the boundaries of the park, which was not authorized by the National Park Law.¹²⁰ The tribunal acknowledged the novelty of the concept of the buffer zone which "suddenly appeared in a Supreme Court decision" without being mentioned in legislation or endorsed by executive agencies.¹²¹ Moreover, the tribunal found that there was no scientific and technical basis for the establishment of this buffer zone.¹²² Accordingly, the tribunal "expressed significant reservations" with respect to the suspension imposed by the Supreme Court decision. However, the tribunal finally dismissed the investors' argument because the investors' rights were not significantly impeded by the suspension imposed by the Supreme Court's decision.¹²³

4. Conclusion

It has been widely accepted that the host state's change of environmental law in the *law-making* process does not by itself constitute a violation of the FET standard. However, the tribunals have taken two different approaches to decide whether a change in the environmental *law-implementation* process, such as the adoption of a new methodology in environmental adjudication or in the EIA process, breaches the FET: on the one hand, the *Unglaube* tribunal and the *Bilcon* tribunal blamed the novel methodology employed in environmental adjudication and EIA for its inconsistency with the host state's domestic law. The *Unglaube* tribunal also stressed that the novel methodology lacked scientific and technical

117. *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, ¶ 251 (May 16, 2012).

118. *Id.* ¶¶ 56–57.

119. *Id.* ¶¶ 78–79.

120. *Id.* ¶ 251.

121. *Id.* ¶ 255.

122. *Id.* ¶¶ 255, 231.

123. *Id.* ¶ 255. The tribunal found that the Supreme Court subsequently adopted a new set of guidelines which closely resembled to those set forth in the 1992 Agreement which the investors had approved and signed, and thus the tribunal was "not persuaded that the new [g]uidelines or the delay involved, significantly impeded or interfered with their property rights." *Id.*

basis. On the other, the *Glamis Gold* tribunal accorded discretion to the host state adopting the novel methodology in the EIA process and refused to make its own assessment of the scientific basis of such methodology.

Both approaches seem problematic. The latter approach, adopted in *Glamis Gold*, denies the tribunal's inherent responsibility of assessing the fairness and equitability of environmental measure in question.¹²⁴ The danger of this approach is that the host state may adopt novel environmental standards as a cloak for investment distortion purposes. The former approach adopted by the *Unglaube* tribunal and the *Bilcon* tribunal is also problematic since it wrongfully assesses environmental measures by using the host state's domestic law as a benchmark. A violation of national law does not necessarily result in a violation of international law. As the International Court of Justice ("ICJ") held in the *Electronica Sicula S.p.A., U.S. v. Italy* ("ELSI") case, "[w]hat is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision."¹²⁵

A better approach would be recognizing the tribunal's authority in assessing the fairness and equitability of the environmental measure in question, and meanwhile, obliging tribunals to take into account the dynamic and evolving nature of environmental regulation in such assessment. Novel rules in environmental legislation, administration and adjudication processes should not violate the FET standard, as long as they have rational scientific bases and are applied in a non-discriminatory way.¹²⁶

B. Due Process in Environmental Decision-making

The due process requirement in FET is related to a traditional concept in international law—denial of justice.¹²⁷ Although denial of justice originally concerned the administration of justice by courts, investment tribunals have

124. A similar approach was adopted by the *Chemtura* tribunal, which noted that the rule of an investment tribunal "is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies." *Chemtura Corp. v. Gov't of Can., UNCITRAL*, Award, ¶ 134 (Aug. 2, 2010).

125. *Electronica Sicula S.p.A. (ELSI)*, Judgment, 1989 I.C.J. REP. 15, , ¶ 73 (July 20). The Court specifically found that "[a] finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness . . . Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication." *Id.* ¶ 124. *See also* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, art. 3, Commentary 4, U.N. Doc. A/56/10 (2001).

126. This position was adopted by the tribunal in *Philip Morris*, which held that the FET provisions "do not preclude governments from enacting novel rules, even if these are in advance of international practice, provided these have some rational basis and are not discriminatory. [The FET provision] does not guarantee that nothing should be done by the host State for the first time." *Philip Morris Brands Sàrl v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7, Award, ¶ 430 (July 8, 2016).

127. *See* DOLZER & SCHREUER, *supra* note 10, at 154.

extended the applicable scope of this concept to include the host state's administrative activities.¹²⁸

1. *Independency*

The lack of independence of the environmental decision-making process, which harms the foreign investment, may lead to a violation of the FET standard. It would be relatively easier to determine a violation of FET, if the host state, as in *Biwater*, has promised an independent environmental decision-maker governing the investment, which has generated the foreign investor's legitimate expectations. On the other hand, if the host state has not made such a promise, the question would be whether and to what extent the FET standard inherently requires the independency of the host state's environmental decision-making process.

In *Biwater*, the foreign investor, BGT, claimed that Tanzania had violated the FET clause by, *inter alia*, failing to ensure an independent Energy and Water Utilities Regulatory Authority ("EWURA") that governed its investment.¹²⁹ The foreign investor highlighted the fact that Tanzania had made a detailed promise of the independency of the EWURA before the foreign investor made its investment.¹³⁰ The tribunal found that an independent regulator was critical and essential to the foreign investment and that the independence of the regulator was an important factor that was considered by BGT when it decided to invest in Tanzania.¹³¹ The tribunal also noted that Tanzania's failure to appoint an independent regulator was due to political reasons.¹³² Accordingly, the tribunal held that: "[i]n the Arbitral Tribunal's view, as a matter of principle, the failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard, in that it represents a departure from [the investor]'s legitimate expectations that an impartial regulator would be established."¹³³

128. *Id.* at 156. See *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kaz.*, ICSID Case No. ARB/05/16, Award, ¶ 623 (July 29, 2008); *Middle E. Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶ 143 (Apr. 12, 2002); see also *AES Summit Generation Ltd. & AES-Tisza Erőmű Kft v. Republic of Hung.*, ICSID Case No. ARB/07/22AES, Award, ¶ 9.3.40 (Sept. 23, 2010).

129. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 535 (July 24, 2008).

130. In 2001, prior to the foreign investor BGT's investment, Tanzania enacted an Act ("EWURA Act") to establish a new authority—the Energy and Water Utilities Regulatory Authority ("EWURA")—to govern the regulation of energy and water utilities. The EWURA Act ensured the independence of the EWURA in several respects: first, the EWURA "was to be governed by a Board of Directors consisting of seven members, rather than a sole decision maker"; second, the appointment of the Board of Directors should be scrutinized by a nomination committee, and should include consultation with industry organizations, chambers of commerce and specialist consultants; third, the members of the Board of Directors should not be any offices that may impinge on their political impartiality. *Id.* ¶ 537.

131. *Id.* ¶¶ 608–09.

132. *Id.* ¶ 610.

133. *Id.* ¶ 615. However, the tribunal subsequently found that Tanzania's breach of the FET standard "had no negative impact on BGT," because the Minister of the EWURA, as Interim Regulator, complied with the duties under the EWURA Act and he conducted those duties in good faith. Therefore, the

In *Bilcon*, the foreign investor argued that Canada failed to appoint members of the environmental assessment panel who should have been “unbiased and free from any conflict of interest relative to the project,” because two of the panel members had previously been involved in a local environmental advocacy group, and the third panel member had academic interest in greater community participation.¹³⁴ However, the tribunal found that these arguments only provided a possible explanatory context for the decision of the environmental panel,¹³⁵ and that “the evidence d[id] not demonstrate that Canada’s choice of Panel members was improper under either domestic or international standards.”¹³⁶

In *Gold Reserve*, Venezuela terminated two concessions of the foreign investment based on “internal memoranda analyzing the state of the concessionaire’s compliance, prepared by the same officials on exactly the same dates.”¹³⁷ The tribunal held “[t]he need to terminate the two Concessions expeditiously as a part of the same process led Respondent to deny Claimant’s due process rights by failing to initiate a specific administrative procedure to revoke the extension of the two Concessions, thus violating the FET standard also in that regard.”¹³⁸

2. Delay

Foreign investors may argue that a delay in the host state’s environmental decision-making process constitutes a violation of the FET standard. The tribunals examining this argument have adopted different approaches.

In *Gold Reserve*, the tribunal held that the host state’s delay in granting the investor the required environmental permits was contrary to the FET standard. In this case, the investor’s mining concessions were terminated according to Venezuelan Mining Law because the investor failed to commence exploitation within seven years. The tribunal succinctly held that the delay by the Venezuelan environmental authorities to grant environmental permits “made it difficult for Claimant to comply with the time periods prescribed by the corresponding Mining Law and the Mining Title,” and such failure was “contrary to the BIT standard.”¹³⁹

tribunal concluded that the absence of an independent regulator did not breach the FET provision. *Id.* ¶¶ 616–21.

134. *Bilcon*, *supra* note 8, ¶¶ 370, 491. The claimant also argued that the Chair of the Panel, Dr. Fournier, had also chaired the panel in a previous case in which Dr. Fournier had a negative attitude towards the “community value” argument. An expert retained by the investor testified that he had “heard it said” that the Ecology Action Centre’s criticism to Dr. Fournier’s approach in that previous case might have influenced Dr. Fournier to adopt a different approach in the *Bilcon* case. However, the tribunal denied this argument for lack of evidence proving a link between the criticism of the previous case and Dr. Fournier’s approach concerning *Bilcon*. *Id.* ¶ 495.

135. *Id.* ¶ 496.

136. *Id.*

137. *Gold Reserve, Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 614 (Sept. 22, 2014).

138. *Id.*

139. *Id.* ¶ 608.

In contrast to *Gold Reserve*, the tribunals in *Glamis Gold* and *Bilcon* took into account the complexity of administration in determining whether the delay in environmental regulatory process amounted to a violation of the FET standard.¹⁴⁰

In *Glamis Gold*, the foreign investor asserted that the United States violated the FET standard partly because of the delay in the review process of the investor's mining project.¹⁴¹ Although admitting that the review process took longer time than usual,¹⁴² the tribunal held that this protracted process could be justified by the particular circumstances it concerned: "this was a particularly complicated, contested issue in which numerous parties took an interest and the federal government was quite aware of the likelihood, if not imminence, of litigation and therefore its need to be extraordinarily careful in its review and decision-making processes."¹⁴³

The tribunal also expressed sympathy for the U.S. federal government's suspension of the review process after the investor filed its Notice of Intent in the arbitration. It held that "the Tribunal does not find that such a failure of a governmental body to diligently pursue administrative review while also defending an arbitration with respect to that same review is manifestly arbitrary, completely lacking in due process, exhibiting evident discrimination, or manifestly lacking in reasons."¹⁴⁴

The *Bilcon* tribunal also accorded deference to the domestic agencies dealing with complex regulation. In *Bilcon*, the investor argued that the Bilcon project had experienced a delay in the environmental regulatory process compared with other similar projects.¹⁴⁵ The tribunal concluded that delays as "imprudent exercise of discretion or even outright mistakes" do not amount to a breach of the international minimum standard.¹⁴⁶

140. This approach is not surprising since both tribunals adopted a high threshold for violating the FET standard, while the *Gold Reserve* tribunal adopted a low one. The *Glamis Gold* tribunal considered the *Neer* standard still applies today, although notions have changed with respect to the definition of "outrageous." *Glamis Gold, Ltd. v. United States*, Award, ¶ 22 (NAFTA Arb. Trib. June 8, 2009). Although the *Bilcon* tribunal acknowledged that the international minimum standard has evolved towards an increased investor protection, it still held that there is a high threshold for the FET standard to apply and that "[a]cts or omissions constituting a breach must be of a serious nature." *Bilcon*, *supra* note 8, ¶¶ 438–44. On the other hand, in *Gold Reserve*, the tribunal refused to apply the *Neer* standard, stating that "public international law principles have evolved since the *Neer* case and that the standard today is broader than that defined in the *Neer* case on which Respondent relies." *Gold Reserve, Inc.*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 567.

141. *Glamis Gold, Ltd.*, Award, ¶ 773.

142. The review process had lasted for nine years before suspended by the U.S. federal government in 2003 (at which time the investor filed its Notice of Intent for arbitration). The investor pointed out that this process was more protracted compared with the two to three-year average time for such review. *Id.* ¶¶ 773–74. Nonetheless, the tribunal noted that "the process was proceeding diligently, albeit perhaps a little slowly." *Id.* ¶ 774.

143. *Id.* ¶ 774.

144. *Id.* ¶ 776.

145. *Bilcon*, *supra* note 8, ¶ 391.

146. As the tribunal stated "[m]odern regulatory and social welfare states tackle complex problems. Not all situations can be addressed in advance by the laws that are enacted. Room must be left for judgment to be used to interpret legal standards and apply them to the facts. Even when state officials are acting in good faith there will sometimes be not only controversial judgments, but clear-cut mistakes in following procedures, gathering and stating facts and identifying the applicable substantive rules.

However, neither the *Glamis Gold* tribunal nor the *Bilcon* tribunal specified to what extent deference should be accorded to the host state. Too much deference accorded to the host state might result in a failure to protect the investor's interests under the investment treaties. For example, in *Glamis Gold*, the investor was subject to a nine-year environmental review which was normally two or three years on average. The tribunal summarily held that the review, which was conducted "perhaps a little slowly," could be justified by the complicated situation faced by the host state. The tribunal neither made a careful examination of the impact of the delay nor did it examine whether the situation was so complicated that the environmental authorities had to spend nine years to solve it. Such a simple justification based on the complexity of environmental administration might provide a disguise for a host state that has violated its obligations under international investment law.

Compared with the tribunals in *Glamis Gold* and *Bilcon*, the *Chemtura* tribunal took more criteria into consideration when deciding whether the delay by the environmental authority in the process of the registration of the foreign investor's products breached the FET standard. The *Chemtura* tribunal first noted that the delayed registration process was conducted in good faith, which "is the general context in which the delays identified by the Claimant must be assessed."¹⁴⁷ The tribunal also found that the responsibility for the delays was attributed to both parties: on the one hand, the investor's initial application was incomplete, and on the other hand, the host state's queuing period was excessively long.¹⁴⁸ Moreover, the tribunal compared the evaluation time in the host state and that in the investor's home state. After a comparison between the evaluation procedure between the United States and Canada, the tribunal found that "the time used by the PMRA [Pest Management Regulatory Agency (of Canada)] for the evaluation . . . was not fundamentally different from that used by the EPA."¹⁴⁹ Finally, the tribunal examined the actual impact of the delay on the foreign investment. The tribunal held that "[o]ne might further think of measuring the materiality of the delays by looking at their economic impact."¹⁵⁰ However, "[t]his avenue leads nowhere," because "[t]he Claimant claims no independent damages on this account."¹⁵¹

Thus, the *Chemtura* tribunal examined the issue of "delay" by taking into account various criteria, including not only the impact of the delay on the investment (as in *Gold Reserve*) and the complexity of the host state's administration (as in *Glamis Gold* and *Bilcon*), but also the intent of the host state, the responsibility of the investor for the delay, and a comparison between the review processes in the host state and that in the investor's home state. Compared

State authorities are faced with competing demands on their administrative resources and there can be delays or limited time, attention and expertise brought to bear in dealing with issues. The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard." *Id.* ¶ 437.

147. *Chemtura Corp. v. Gov't of Can.* UNCITRAL, Award, ¶ 216 (Aug. 2, 2010).

148. *Id.* ¶ 218.

149. *Id.* ¶ 220.

150. *Id.* ¶ 223.

151. *Id.*

to other cases, the comprehensive analysis adopted in *Chemtura* is a better approach because it cannot achieve justice either by absolutely prohibiting delay in the environmental decision-making process or by according unlimited deference to the host state's environmental administration.

3. Right to be Heard

The protection of the foreign investor's right to be heard, as a due process issue, is closely related to the transparency requirement and the host state's obligation to inform. In *Metalclad v. Mexico*, *Tecmed*, and *Gold Reserve*, the environmental authorities' denial of the investor's application for a permit without previously consulting the investor was held by the tribunals as a violation of the investor's right to be heard.

Metalclad concerned the denial of a municipal permit for the construction of a hazardous waste landfill operated by the foreign investor Metalclad. In the assessment of the FET standard, the tribunal noted that "the permit was denied at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear."¹⁵²

Similarly, in *Tecmed*, the tribunal held that the National Ecology Institute of Mexico ("INE") failed to inform Tecmed of its defaults and irregularities prior to denying the renewal of its permit, which prevented Tecmed from "being able to express its position and to agree with INE about the measures required to cure the defaults."¹⁵³

In *Gold Reserve*, the tribunal considered the deprivation of the investor's right to be heard as proof of the host state's bad faith. The *Gold Reserve* tribunal found that Venezuela issued the Revocation Order, which declared the "absolute nullity" of the Construction Permit for environmental reasons, without allowing the investor an opportunity to be heard.¹⁵⁴ From this conduct, the tribunal inferred that the only reasonable explanation would be that the Revocation Order was determined by political objectives.¹⁵⁵

4. Transparency

Another important element in the FET standard related to due process is the transparency requirement. In relatively early cases, such as *Metalclad* and *Tecmed*, the tribunals adopted an absolute transparency standard. For instance, the *Metalclad* tribunal requires that "all relevant legal requirements" must be "readily known to all affected investors" with "no room for doubt or uncertainty."¹⁵⁶ Similarly, the *Tecmed* tribunal held that the host state should act in a manner "free from ambiguity and totally transparently in its relations with the foreign investor,"

152. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 91 (Aug. 30, 2000).

153. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 162 (May 29, 2003).

154. *Gold Reserve, Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 600 (Sept. 22, 2014).

155. *Id.*

156. *Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 76.

so that the foreign investor “may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives.”¹⁵⁷ Subsequent to *Metalclad* and *Tecmed*, most tribunals abandoned the absolute transparency standard. In *Plama v. Bulgaria*, *Chemtura*, and *Al Tamimi*, the tribunals, taking into account the good faith of the host state,¹⁵⁸ held that mere uncertainty in environmental law,¹⁵⁹ the government’s unspecific notice of relevant information during environmental regulatory process,¹⁶⁰ or inconsistent representations by the governmental officials,¹⁶¹ did not constitute a violation of the transparency standard. The tribunals in *Plama* and *Chemtura* also took into account the due diligence of the foreign investor in the assessment of transparency.¹⁶² Accordingly, there is a general trend in the investment jurisprudence towards a less strict transparency requirement, which contributes to the reconciliation between the foreign investor’s legitimate interests and the host state’s environmental regulation.

IV. INTERNATIONAL ENVIRONMENTAL OBLIGATIONS IN THE FET ASSESSMENT

Today, states increasingly bear stringent international environmental commitments, and accordingly, are required to update their domestic environmental law to ensure the enforcement of new environmental standards. However, the change of law by host states to fulfill international environmental commitments might frustrate the foreign investors’ expectations at the time of their investments, which could result in a potential violation of the FET clause. The question is whether and to what extent a tribunal should take into account the host state’s international environmental commitments during the assessment of the FET standard.

A. Conflict Clauses Concerning International Environmental Law in Investment Treaties

A small number of investment treaties provide a conflict clause to solve a potential inconsistency between the treaty provisions and the requirements under international environmental law.

In *S.D. Myers v. Canada*, the tribunal applied Article 104¹⁶³ and Annex 104.1¹⁶⁴ of NAFTA to reconcile a potential inconsistency between NAFTA and

157. Técnicas Medioambientales Tecmed S.A., ICSID Case No. ARB (AF)/00/2, Award, ¶¶ 154, 167.

158. *Plama Consortium, Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Award, ¶ 218 (Aug. 27, 2008); *Chemtura Corp. v. Gov’t of Can.*, UNCITRAL, Award, ¶ 147 (Aug. 2, 2010); *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, ¶ 399 (Nov. 3, 2015).

159. *Plama Consortium, Ltd.*, ICSID Case No. ARB/03/24, Award, ¶ 220.

160. *Chemtura Corp.*, Award, ¶ 147.

161. *Adel A Hamadi Al Tamimi*, ICSID Case No. ARB/11/33, Award, ¶¶ 397, 399.

162. *Plama Consortium, Ltd.*, ICSID Case No. ARB/03/24, Award, ¶ 221; *Chemtura Corp.*, Award, ¶¶ 149–50.

163. Article 104 of the NAFTA provides:

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

several environmental treaties. The case concerned a U.S. investor's claim that Canada's ban on the export of the polychlorinated biphenyl ("PCB"), a highly toxic substance, had violated the FET clause in NAFTA. The tribunal analyzed two environmental treaties prescribed in Article 104 and Annex 104.1: (1) The 1986 Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste (the "Transboundary Agreement"); and (2) the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the "Basel Convention").

The Transboundary Agreement was a bilateral agreement concluded by Canada and the United States governing the transboundary movement of hazardous waste. It has been added into Annex 104.1 of NAFTA, and thus has supremacy over the NAFTA provisions in case of any inconsistency between them, provided that the host state has chosen an implementation measure that is least inconsistent with NAFTA. However, after an analysis of the text of the Transboundary Agreement, the tribunal concluded that the agreement "does not give a party . . . absolute freedom to exclude the import or export of hazardous waste simply by enacting whatever national laws it chooses."¹⁶⁵ Accordingly, the tribunal held that Canada's export ban was inconsistent with the Transboundary Agreement.

The tribunal then turned to the Basel Convention. Canada argued that its export ban was enacted to comply with the obligations in the Basel Convention. However, since the Basel Convention had not been ratified by the United States at the time of the case, it did not fall within the scope of Article 104, which recognizes the supremacy of the Basel Convention in the case of its inconsistency with NAFTA on the condition that the Basel Convention has been ratified by Canada, Mexico, and the United States.¹⁶⁶ Moreover, the tribunal found that Canada did not choose an alternative that was least inconsistent with the NAFTA provisions, and thus could not be justified under Article 104 of NAFTA.

a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979, b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990, c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or d) the agreements set out in Annex 104.1, such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.

164. Two bilateral environmental agreements are set out in Annex 104.1:

1. The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, signed at Ottawa, October 28, 1986.

2. The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, signed at La Paz, Baja California Sur, August 14, 1983.

165. S.D. Myers, Inc. v. Gov't of Can., UNCITRAL, Partial Award, ¶ 208 (Nov. 13, 2000).

166. *Id.* ¶ 214.

The importance of a conflict clause should not be overestimated. Only a small number of investment treaties have conflict clauses addressing the parties' international environmental obligations, and many of these conflict clauses, unlike Article 104 of NAFTA, do not provide a specific methodology for solving a potential inconsistency between international investment and environmental obligations.¹⁶⁷ In such circumstances, the tribunal may need to refer to the rules in general international law to reconcile the tension between the obligations under International Investment Law and International Environmental Law which will be addressed in the next two sections.

B. Reference to International Environmental Law through Systematic Interpretation of Investment Treaties

The investment tribunal may adopt a systematic interpretation of an investment treaty if the International Environmental Law ("IEL") in question is applicable to both the host state and the foreign investor's home state. According to Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"), a treaty shall be interpreted with "any relevant rules of international law applicable in the relations between the parties," taken into account.¹⁶⁸ This provision provides an opportunity for the tribunal to interpret the FET standard with a consideration of the host state's obligations under international environmental law, including conventional international law, such as environmental treaties ratified by both parties, and customary international law, such as the obligations of preventing transboundary pollution¹⁶⁹ and of conducting an EIA when an activity may cause a significant adverse transboundary impact.¹⁷⁰

In *S.D. Myers*, the tribunal interpreted the NAFTA provisions with reference to the North American Agreement on Environmental Cooperation ("NAAEC"), which is a side agreement with NAFTA addressing NAFTA parties' environmental obligations. Based on the objectives and the requirements of NAAEC, the tribunal concluded that NAFTA provisions should be interpreted according to three general principles: first, "[p]arties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states;" second, "[p]arties should avoid creating distortions to trade;" and third, "environmental protection and economic development can and should be mutually

167. VIÑUALES, at 138-140.

168. Article 31(3)(c) is part of Article 31 of the VCLT, which together with Article 32, form a customary international law rules of interpretation of treaties. Article 31(1) provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." After a definition of the term "context" in Article 31(2), Article 31(3) states that: "There shall be taken into account, together with the context . . . [a]ny relevant rules of international law applicable in the relations between the parties." Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

169. Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 193 (Apr. 20) (citing Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241-42, ¶ 29 (July 8).

170. *Id.* ¶ 204.

supportive.”¹⁷¹ Accordingly, the tribunal struck a balance between the host state’s investment and environmental obligations, holding that:

In the Tribunal’s view, these principles are consistent with the express provisions of the Transboundary Agreement and the Basel Convention. A logical corollary of them is that where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade. This corollary also is consistent with the language and the case law arising out of the WTO family of agreements.¹⁷²

On the other hand, in *Glamis Gold*, the tribunal failed to take into account a relevant environmental treaty concluded by both disputing parties in the interpretation of the FET provision of NAFTA. The *Glamis Gold* case concerned a Canadian mining project located in a culturally sensitive area in the United States where there existed designated Native American sites. The investor argued that the U.S. federal government’s denial of the project’s Plan of Operation (“POO”) based on the strict “undue impairment” standard, which was newly enacted in a solicitor’s M-Opinion, frustrated its legitimate expectations based on the pre-existing mining law that adopts the relatively less strict “unnecessary or undue degradation” standard. Recognizing that the shift of standards was a significant change that surprised the claimant,¹⁷³ the tribunal pointed out that the issue before it was “whether a lengthy, reasoned legal opinion violates customary international law because it changes, in an arguably dramatic way, a previous law or prior legal interpretation upon which an investor has based its reasonable, investment-backed expectations.”¹⁷⁴ The tribunal held:

[I]t is not for an international tribunal to delve into the details of and justifications for domestic law. If Claimant, or any other party, believed that [Department of the Interior] Solicitor Leshy’s interpretation of the undue impairment standard was indeed incorrect, the proper venue for its challenge was domestic court. In the context of this claim, this Tribunal may consider only whether the M-Opinion occasioned ‘a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.’¹⁷⁵

Based on this deference to the host state’s domestic legislation and by adopting a high bar for the violation of the FET standard, the tribunal concluded that the United States’s change of its environmental standard did not violate the FET clause.

In the “factual summary” part of the award, under the subtitle of “domestic regulatory landscape,” the tribunal addressed the United States’s obligations under the 1972 Convention concerning the Protection of the World Cultural Property and Natural Heritage (“World Heritage Convention”), as well as the United Nations Educational, Scientific and Cultural Organization’s

171. S.D. Myers, Inc., UNCITRAL, Partial Award, ¶ 220.

172. *Id.* ¶ 221.

173. *Glamis Gold, Ltd. v. United States*, Award, ¶ 759 (NAFTA Arb. Trib. June 8, 2009).

174. *Id.* ¶ 761.

175. *Id.* ¶ 762.

(“UNESCO”) 1968 *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works*.¹⁷⁶ UNESCO’s Recommendations may not constitute “rules of international law” under Article 31(3)(c). However, the World Heritage Convention, to which both Canada and the United States are parties, should have been taken into account by the tribunal in its interpretation of the NAFTA FET provision. Unfortunately, the tribunal did not include any further discussion of these instruments during its analysis of the case.

Article 31(3)(c) of the VCLT is applicable only if the relevant rules of international law in question is applicable to both parties to the treaty. As a result, Article 31(3)(c) of the VCLT is not applicable to the dispute where the host state changes its environmental law to fulfill an obligation under an environmental treaty, to which the foreign investor’s home state is not a party. For example, as mentioned above, in *Unglaube*, Costa Rica expropriated the German investors’ properties to build a national park to protect sea turtles, which is in compliance with its obligations under the Inter-American Convention for the Protection and Conservation of Sea Turtles. However, since Germany is not a Party to this convention, the tribunal is not obliged to take into account this convention in the interpretation of the Costa Rica-Germany BIT. Neither can Article 31(3)(c) be applied when the host state follows an environmental standard in an environmental treaty to which the host state itself is not a party. An illustrative example is *Chemtura*, in which Canada adopted a Special Review of the U.S. investor’s lindane products, a hazardous insecticide. Although Canada’s conduct was in line with the requirement of a restrictive use of lindane under the Convention for the Protection of the Marine Environment of the North-East Atlantic (“OSPAR Convention”), a systematic interpretation could not be applied since Canada was not a party to the OSPAR Convention. Nonetheless, in these circumstances, IEL may still play a role in investment arbitration by proving the existence of international consensus on a particular environmental issue, and accordingly, the tribunals may determine the good faith and scientific rationality of the challenged environmental measure.

C. International Environmental Law as a Proof of International Consensus on an Environmental Issue

The *Chemtura* case is a typical example in which the tribunal considered the development of international environmental law as evidence of the host state’s good faith. The case concerned Canada’s Special Review of a U.S. investor’s products that contained lindane. The investor argued that Canada violated the FET standard because its Special Review was conducted for a trade irritant rather than for health and environmental considerations.¹⁷⁷ Canada contended that the Special Review of lindane products was undertaken based on legitimate considerations in accordance with Canada’s international obligations under the Aarhus Protocol, which restricts the use of lindane.¹⁷⁸ In order to examine the real intent of Canada in launching the review, the tribunal noted that it “cannot ignore the fact that

176. *Id.* ¶¶ 83–84.

177. *Chemtura Corp. v. Gov’t of Can.* UNCITRAL, Award, ¶ 133 (Aug. 2, 2010).

178. *Id.* ¶ 131.

lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s.”¹⁷⁹ The tribunal listed the international conventions, including the Aarhus Protocol to the Convention on Long-range Transboundary Air Pollution (“LRTAP Convention”), the OSPAR Convention and the Stockholm Convention on Persistent Organic Pollutants, all of which require a restriction of the use of lindane.¹⁸⁰ The tribunal thus held that “this broader factual context is relevant in assessing” the claimant’s argument that Canada launched the review process in bad faith.¹⁸¹

The tribunal particularly analyzed Canada’s obligation of restricting uses of lindane and reassessing lindane under the Aarhus Protocol. The tribunal noted that “Annex II of the Aarhus Protocol expressly provides that ‘[a]ll restricted uses of lindane shall be reassessed under the Protocol no later than two years after the date of entry in force.’”¹⁸² The tribunal then relied on the several Canadian environmental officials’ testimonies indicating that Canada conducted the Special Review to meet its commitments during the negotiation of the Aarhus Protocol.¹⁸³ These testimonies also showed that Canada’s international commitments were limited to a review of lindane and that Canada did not commit to banning lindane prior to such a review.¹⁸⁴ As a result, the tribunal denied the claimant’s argument that the Special Review was conducted to reach the foregone conclusion that lindane should be banned.¹⁸⁵ Based on this evidence, the tribunal concluded that Canada did not launch the Special Review of lindane in bad faith.¹⁸⁶ It held that “the evidence on the record does not show bad faith or disingenuous conduct on the part of Canada. Quite the contrary, it shows that the Special Review was undertaken by the PMRA [Canada’s Pest Management Regulatory Agency] in pursuance of its mandate and as a result of Canada’s international obligations.”¹⁸⁷

However, the *Chemtura* approach of considering the host state’s international environmental obligations in the FET assessment has not been adopted by some other tribunals. As one example, the tribunal in the *S.D. Myers* case did not take into account Canada’s international environmental commitments in the analysis of Canada’s intent. In this case, Canada’s ban on the export of the Polychlorinated biphenyl (“PCB”), a highly toxic substance, was challenged by the U.S. investor as a violation of the FET standard. Canada argued that the purpose of the export ban of the PCBs was to comply with Canada’s obligation under the Basel Convention (to which Canada was a party, while the United States was not) requiring the restriction of the transboundary movement of hazardous wastes. However, the tribunal denied this argument, holding that Canada’s policy was shaped “to a very great extent” by the intent to protect its domestic PCB disposal

179. *Id.* ¶ 135.

180. *Id.* ¶¶ 135–36.

181. *Id.* ¶ 137.

182. *Id.* ¶ 139.

183. *Id.* ¶¶ 139–42.

184. *See id.*

185. *See id.* ¶ 143.

186. *Id.*

187. *Id.* ¶ 138.

companies.¹⁸⁸ The tribunal made this decision mainly based on the statements of several Canadian environmental officials saying that the export ban would not contribute to environmental protection but would benefit domestic economics.¹⁸⁹ This evidence, the tribunal held, indicated that Canada's export ban of the PCBs was "intended primarily to protect the Canadian PCB disposal industry from U.S. competition."¹⁹⁰ Thus, the tribunal found "no legitimate environmental reason for introducing the ban,"¹⁹¹ without any further analysis of Canada's obligations under the Basel Convention.

For another example, the *Unglaube* tribunal hardly considered Costa Rica's international environmental obligations during the FET assessment. The investors argued that the change in the boundaries of the park and the construction of a "buffer zone" outside such boundaries had frustrated its reasonable expectations protected by the FET provision. Costa Rica maintained that all of its actions were to protect the natural environment for its citizens as well as the endangered leatherback turtles, which was in compliance with its obligation under the Inter-American Convention for the Protection and Conservation of Sea Turtles.¹⁹² The *Unglaube* tribunal dismissed the investors' claim by according deference to the host state's domestic regulation and by setting up a high bar for violating the FET clause. The tribunal held:

[T]o prove a breach of the standard, a claimant must show more than mere legal error. Instead, as stated by the *Saluka* Tribunal, the evidence must establish actions or decisions which are 'manifestly inconsistent, non-transparent, [or] unreasonable (*i.e.*, unrelated to some rational policy) . . . Where, however, a valid public policy does exist, and especially where the action or decision was taken relates to the State's responsibility 'for the protection of public health, safety, morals or welfare, as well as other functions related to taxation and police powers of states,' such measures are accorded a considerable measure of deference in recognition of the right of domestic authorities to regulate matters with their borders.¹⁹³

However, the tribunal did not discuss the Inter-American Convention for the Protection and Conservation of Sea Turtles, which Costa Rica considered as a basis for all of its actions.¹⁹⁴

188. S.D. Myers, Inc. v. Gov't of Can., UNCITRAL, Partial Award, ¶ 162 (Nov. 13, 2000).

189. See *id.* ¶¶ 164–92. The tribunal also considered a Minister's speech as an evidence of discriminatory intent, which stated that "[t]he handling of PCBs should be done in Canada by Canadians. We have to take care of our problems." *Id.* ¶ 185.

190. *Id.* ¶ 194.

191. *Id.* ¶ 195.

192. Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award, ¶ 103 (May 16, 2012).

193. *Id.* ¶ 246 (emphasis and internal citations for quoted material omitted).

194. This is surprising since the tribunal agreed with the *Duke Energy* decision, which stated that the assessment of the legitimacy of the investor's expectations "must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State." *Id.* ¶ 249. Costa Rica's international environmental commitment is of course one important factor among the should-be-considered "all circumstances."

D. Conclusion

It has been widely recognized that the FET provision is not designed to prohibit the host state from changing its domestic law. For the same reason, the FET provision should not prohibit the host state's change of law to fulfill its international environmental commitments. Despite this apparent conclusion, it is not easy to find a balance point between the protection of the foreign investor's legitimate expectations and the host state's right, and also obligation, to comply with its IEL obligations. The tribunals' approaches in this regard can be divided into three categories: (1) When the investment treaty in question has a conflict clause dealing with such tension (such as Article 104 of NAFTA), the tribunal has resorted to the conflict clause to see whether it is applicable to the current case, as with the *S.D. Myers* tribunal; (2) When there is no conflict clause in the investment treaty or the conflict clause is inapplicable, and the IEL in question obliges both parties to the investment treaty, the tribunals have adopted inconsistent opinions on whether to take into account IEL in the interpretation of the investment treaty. The *S.D. Myers* tribunal took into account a relevant environmental treaty in the interpretation of NAFTA while the *Glamis Gold* tribunal did not; and (3) When there is no conflict clause in the investment treaty or the conflict clause is inapplicable, and the IEL in question obliges only the host state, the tribunals have adopted different approaches regarding the application of the IEL: although the *Chemtura* tribunal considered the host state's obligations under the IEL as a proof of a good faith underlying the challenged measure, the tribunals in *S.D. Myers* and the *Ungeba* did not do so.

V. TOWARDS AN INTEGRATED METHODOLOGY FOR ASSESSING ENVIRONMENTAL REGULATION UNDER THE FET STANDARD

The aforementioned investment jurisprudence has exhibited a status of chaos concerning the assessment of the host states' environmental measures under the FET standard. The tribunals have adopted four different models of the general threshold of the FET standard in environment-related investment arbitration. Within each model, the tribunals have adopted diverse interpretations of the subcomponents of the FET standard. Adding to the complexity of the picture, the tribunals have adopted various approaches with respect to whether and how to account for the host states' international environmental obligations in determining the legitimacy of the states' activities under the FET standard. Such chaotic jurisprudence sends out disordered and confusing signals to host states, who, before enacting domestic environmental legislation or signing environmental treaties, need to ensure that their environmental regulation will not lead to a violation of their commitments under investment treaties that may result in substantive amounts of compensation. This calls for a clarification of the current blurred line between a non-compensable legitimate environmental regulation and a compensable illegal infringement of foreign investment.

In this part, the author proposes an integrated methodology to draw this line, with due consideration of both the foreign investor's economic interests and the host state's environmental interests. The methodology is, without a specific commitment made by a host state to a foreign investor, the host state's

environmental regulation does not violate the FET standard, as long as such regulation is reasonable to achieve a genuine environmental objective and is applied non-discriminatorily and with due process. It consists of five elements: good faith, reasonableness, procedural propriety, non-discrimination, and no specific commitments.

A. Good Faith: The Challenged Measure Must Be for a Real Environmental Objective

The first element is that the challenged measure must be conducted in good faith for the purpose of environmental protection. The tribunal should make an objective assessment of the real intent underlying the measure, in order to distinguish between an environmental protection measure that has an incidental adverse impact on foreign investments and an infringement targeting foreign investment disguised by an environmental name.

The regulatory intent of the host state has been an important element considered by the tribunals in the FET assessment, although bad faith per se is not required for a violation of the FET principle.¹⁹⁵ Some tribunals held that good faith is a component of the FET standard. In *Tecmed*, the tribunal held that FET “is an expression and part of the bona fide principle recognized in international law.”¹⁹⁶ Similarly, in *Biwater*, the tribunal considered good faith as one component of the FET standard, together with other components such as protection of legitimate expectations, transparency, consistency, and non-discrimination.¹⁹⁷ The *Saluka* tribunal and the *Gold Reserve* tribunal also recognized “bona fide” as one requirement of the FET standard.¹⁹⁸ Other tribunals held that the good faith of the host state can justify a violation of the FET principle. As stated by the *GAMI* tribunal, “Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements.”¹⁹⁹ The tribunal in *Yuri Bogdanov v. Moldova* also held that “protecting the environment in a legitimate aim and legislation to that effect has an objective and reasonable justification. This also means that the imposition of charges of this kind in itself can in no way violate the fair and equitable standard.”²⁰⁰ Some other tribunals considered the host state’s intent as a context in which the FET standard should be assessed. In *Chemtura*, for example, the tribunal repeatedly stated that the “good faith” of the Canadian government to protect

195. Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 153 (May 29, 2003); *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 116 (Oct. 11, 2002); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 602 (July 24, 2008).

196. Técnicas Medioambientales Tecmed S.A., ICSID Case No. ARB (AF)/00/2, Award, ¶ 153.

197. *Biwater Gauff (Tanzania) Ltd.*, ICSID Case No. ARB/05/22, Award, ¶ 602 (July 24, 2008).

198. *Saluka Invs. B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶¶ 307–08 (Mar. 17, 2006); *Gold Reserve, Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 569 (Sept. 22, 2014).

199. *Gami Invs., Inc. v. Gov’t of the United Mexican States*, UNCITRAL, Final Award, ¶ 215 (Nov. 15, 2004).

200. *Yuri Bogdanov & Yulia Bogdanova v. Republic of Mold.*, SCC Case No. V091/2012, Final Award, ¶ 193 (Apr. 16, 2013).

human health and the environment was a “general context” in which the tribunal decided the legitimacy of the government’s specific actions.²⁰¹ The methodology suggested in this article is similar to the second approach: it considers the “good faith” of the host state’s regulation as one of the criteria for justifying a violation of FET.

Despite its importance, detecting the real intent of domestic decision-makers is by no means easy, since a single governmental policy is often framed by many different people with differing perspectives, policy considerations, partisan political factors and career concerns.²⁰² Given these difficulties, the tribunal should determine the intent underlying an ostensibly environmental measure through an objective assessment of that measure.

First, the tribunal should determine the motivation underlying a challenged measure based on “the record of the evidence as a whole,”²⁰³ rather than simply relying on subjective representations of individual officials. The tribunal in *Gold Reserve* instead examined “a stream of statements and public announcements” made by “the highest levels of authority”²⁰⁴ of Venezuela, including President Chávez,²⁰⁵ and concluded that these statements and announcements indicated that Venezuela’s termination of the investor’s mining concessions was not for an environmental purpose, but for implementing a new national policy of recovering the country’s mining resources by putting them under the control of socialism for national development.²⁰⁶ By contrast, the *Glamis Gold* tribunal was cautious not to rely on individual representations to determine the intent of legislation.²⁰⁷ In order to determine whether the challenged California legislature had a discriminatory intent to “target” the investor’s mining project, the tribunal relied on the language and drafting history of the legislation as well as the realities of the mining industry in California.²⁰⁸

Second, the tribunal should determine the primary, rather than incidental, intent of the host state.²⁰⁹ States usually adopt one measure to achieve multiple objectives. For instance, in *Yuri Bogdanov*, Moldova’s challenged environmental charges on the import of environmentally harmful goods served both as an environmental regulation and as a trade restriction. The tribunal held that those charges constituted an environmental regulation which could be justified under the

201. *Chemtura Corp. v. Gov’t of Can.* UNCITRAL, Award, ¶¶ 184, 215–16 (Aug. 2, 2010).

202. *S.D. Myers, Inc. v. Gov’t of Can.*, UNCITRAL, Partial Award, ¶ 161 (Nov. 13, 2000).

203. *Id.*

204. *Gold Reserve, Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 581 (Sept. 22, 2014).

205. *Id.* ¶ 580.

206. *Id.* ¶ 581.

207. *Glamis Gold, Ltd. v. United States*, Award, ¶ 792 (NAFTA Arb. Trib. June 8, 2009).

208. *Id.* ¶¶ 792–93.

209. As held by the ICJ in the *Whaling* case, “a State often seeks to accomplish more than one goal when it pursues a particular policy. Moreover, an objective test of whether a programme is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives.” *Whaling in the Antarctic* (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. 225, ¶ 97 (Mar. 31).

FET provision since its “primary intention” is environmental protection rather than trade regulation.²¹⁰

B. Reasonableness: The Challenged Measure Must Be Reasonable to Achieve the Environmental Objective

The second element is that the challenged measure must be reasonable to achieve its environmental objective. A “reasonable” environmental measure should not be made arbitrarily; rather, it should be made based on scientific evidence.

First, the tribunal should examine the scientific bases underlying the challenged environmental measures. A controversial issue here is whether and to what extent the tribunal should accord deference to the host state in making decisions related to scientific determinations. For instance, the tribunals in *Glamis Gold* and *Chemtura* refused to delve into the scientific bases of the environmental measures. In *Glamis Gold*, the tribunal agreed with the United States that “[i]t is simply not this Tribunal’s task to become archaeologists and ethnographers and to draw a definitive conclusion as to the location of the Trail of Dreams.”²¹¹ In particular, the tribunal noted the following:

It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency. Indeed, our only task is to decide whether Claimant has adequately proven that the agency’s review and conclusions exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons so as to rise to the level of a breach of the customary international law standard embedded in Article 1105.²¹²

The *Chemtura* tribunal accorded deference to the host state in certain “highly specialized domain involving scientific and public policy determinations.”²¹³ The *Chemtura* tribunal noted that the assessment of “whether the protection granted under [Article 1105] is lessened by a margin of appreciation granted to domestic regulatory agencies and, if so, to what extent” should be conducted “*in concreto*”; it should not be “an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies.”²¹⁴ In assessment of whether the Special Review of lindane conducted by Canada had violated the FET clause, the tribunal “notes at the outset that it is not its task to determine whether certain uses of lindane are dangerous, whether in general or in the Canadian context” and that “the rule of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies.”²¹⁵

210. Yuri Bogdanov & Yulia Bogdanova v. Republic of Mold., SCC Case No. V091/2012, Final Award, ¶¶ 192–93 (Apr. 16, 2013).

211. *Glamis Gold, Ltd. v. United States*, Award, ¶ 779 (NAFTA Arb. Trib. June 8, 2009).

212. *Id.*

213. *Chemtura Corp. v. Gov’t of Can.* UNCITRAL, Award, ¶ 123 (Aug. 2, 2010).

214. *Id.*

215. *Id.* ¶ 134.

In regard to the claimant's argument that "the scientific basis for the outcome of the Special Review was insufficient,"²¹⁶ the tribunal pointed out again that "it is not for the Tribunal to judge the correctness or adequacy of the scientific results of the Special Review, not even those questioned by the Board of Review."²¹⁷ The tribunal also agreed with the testimony of the expert witness presented by Canada, who confirmed that "the PMRA conclusions were within acceptable scientific parameters,"²¹⁸ and that PMRA has reasonable discretion to adopt a relatively high safety standard in its risk assessment of the use of lindane.²¹⁹ In the tribunal's view, the scientific divergence between the foreign investor and Canada "cannot in and of itself serve as a basis for a finding of breach of Article 1105 of NAFTA."²²⁰

This "no-second-guessing" approach adopted in *Glamis Gold* and *Chemtura* is questionable. Granted, the host state should be accorded deference to exercise its sovereign rights to decide domestic matters, and in this sense, the investment tribunal should not be granted "an open-ended mandate to second-guess government decision-making."²²¹ However, the state's exercise of sovereignty should be in conformity with its obligations under international investment agreements. It is one thing that the investment tribunal acts as a court of appeal adjudicating domestic measures, while it is another that the tribunal assesses the reasonableness of a measure to conclude whether it is "fair and equitable" under international law. The former should be prohibited, and the latter is within the scope of authority of investment tribunals.

Two recent cases have provided illustrative examples of how international adjudicators have assessed the scientific bases of governmental measures in a way that falls within the authority of international tribunals rather than of "a court of appeal."

The first one is *Philip Morris v. Uruguay*, which concerns investors registered in Switzerland investing in the tobacco industry in Uruguay.²²² The investors' core claim was that Uruguay's tobacco-control measures, including a single representation requirement, prohibiting more than one variant of cigarette within a single cigarette brand (the "SPR") and a requirement increasing the size of graphic health warnings on cigarette packages (the "80/80 Regulation"), violated the BIT for their harmful impact on the trademarks of the investors' cigarette products.²²³ In the assessment of the FET clause, the tribunal held that substantial deference should be accorded to the government and that the tribunal should not be a court of appeal:

[T]he present case concerns a legislative policy decision taken against the background of a strong scientific consensus as to the lethal effects of tobacco.

216. *Id.* ¶ 153.

217. *Id.*

218. *Id.* ¶ 154.

219. *Id.*

220. *Id.*

221. *S.D. Myers, Inc. v. Gov't of Can., UNCITRAL, Partial Award*, ¶ 261 (Nov. 13, 2000).

222. *Philip Morris Brands Sàrl v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7, Award (July 8, 2016).

223. *Id.* ¶ 9.

Substantial deference is due in that regard to national authorities' decisions as to the measures which should be taken to address an acknowledged and major public health problem. *The fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal.* Article 3(2) does not dictate, for example, that a 50% health warning requirement is fair whereas an 80% requirement is not. In one sense an 80% requirement is arbitrary in that it could have been 60% or 75% or for that matter 85% or 90%. *Some limit had to be set, and the balance to be struck between conflicting considerations was very largely a matter for the government.*²²⁴

But according deference to Uruguay's public health regulation does not deprive the tribunal's rights of assessing the scientific basis of the regulation. To determine the investors' claim that the challenged measures were arbitrary due to an absence of scientific evidence of their effectiveness,²²⁵ the tribunal broadly considered scientific evidence "at the international level," including the tobacco industry's record, a judgment by the United States court, submissions by a Canadian NGO, a World Health Organization ("WHO") report on "labeling and packaging in Brazil," as well as published international journals.²²⁶ Particularly, the tribunal adopted the Amicus Briefs submitted by the WHO and the Pan American Health Organization, which recognized the reasonableness and effectiveness of the challenged measures.²²⁷ The tribunal also pointed out that, since Uruguay's measures had been adopted to implement the obligations under the 2003 WHO Framework Convention on Tobacco Control ("FCTC"), "there was no requirement for Uruguay to perform additional studies or to gather further evidence in support of the Challenged Measures."²²⁸

The ICJ in the case *Whaling in the Antarctic (Australia v. Japan)*, also delved into the scientific basis of the challenged Japanese program. In this case, the issue before the ICJ is whether the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA II") is conducted "for the purpose of scientific research," which forms an exemption from the obligations under the International Convention for the Regulation of Whaling. Japan argued that "matters of scientific policy cannot be properly appraised by the Court" and that "the role of the Court therefore is 'to secure the integrity of the process by which the decision is made, [but] not to review the decision itself.'"²²⁹ However, the court adopted an "objective" standard of review in determining whether Japan's whaling program fell within "a special permit authorizing the killing, taking and treating of whales" under the Convention.²³⁰ This objective standard of review includes the following two parts:

[F]irst, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking

224. *Id.* ¶ 418 (emphasis added).

225. *Id.* ¶ 389.

226. *Id.* ¶ 392.

227. *Id.* ¶ 391.

228. *Id.* ¶¶ 394–96.

229. *Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening)*, Judgment, 2014 I.C.J. 225, ¶ 65 (Mar. 31). However, Japan refined this position "near the close of the oral proceedings." *Id.* ¶ 66.

230. *Id.* ¶ 67.

and treating of whales is ‘for purposes of’ scientific research by examining whether, in the use of lethal methods, the programme’s design and implementation are reasonable in relation to achieving its stated objectives.²³¹

In particular, the court stressed that its task is not to resolve whaling policy with respect to which the international community has divergent views, but to examine whether the special permits granted in Japan’s whaling program fell within the scope of the scientific research exemption clause in the Convention.²³²

The *Philip Morris* case and the *Whaling* case have provided illustrative examples in which the international adjudicators made an objective assessment of the reasonableness of states’ domestic measures, in a way that the international adjudicators did not act as a “court of appeal” or illegitimately interfered with domestic police powers.

It is noteworthy that the tribunal need not examine the actual effects of the challenged measure to determine its reasonableness. This is because, as noted by the WTO Appeal Body, whether a measure is effective in achieving its environmental aims may only be seen years or even decades after the adoption of the measure.²³³ The tribunal in *Philip Morris* also held that it was unnecessary to take an “actual effect” test when determining the reasonableness of the challenged measure:

[w]hether or not the SPR was effective in addressing public perceptions about tobacco safety and whether or not the companies were seeking, or had in the past sought, to mislead the public on the point, it is sufficient in light of the applicable standard to hold that the SPR was an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith.²³⁴

C. Procedural Propriety: The Challenged Measure Must Be Implemented in Due Process

The third condition is that the environmental measure must be implemented in a fair procedure. A reasonable environmental measure may constitute a violation of the FET standard if the measure is not implemented in due process or is applied in a discriminatory manner. Due process is a vital element of the FET standard, and in a number of cases, procedural shortcomings have contributed to a violation of the FET.²³⁵ As discussed in Part IV, The host state

231. *Id.*

232. *Id.* ¶ 69.

233. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* 21, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996). In this case, the WTO Appeal Body has refused to apply “effects test” to determine whether a Party’s environmental regulation could be justified under the Article XX (g) (general exceptions for trade-restricting measures aimed to preserve exhaustible natural resources), because “[i]n the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable.”

234. *Philip Morris Brands Sàrl v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7, Award, ¶ 409 (July 8, 2016).

235. DOLZER & SCHREUER, *supra* note 10, at 154.

should exercise its legitimate right of environmental protection with due process, including ensuring the impartiality of decision-making, protecting the foreign investor's right to be heard, and refraining from serious delay in regulatory processes.

First, the partiality of an environmental decision-making agency may amount to a violation of due process. For example, in *Bilcon*, the foreign investor claimed that Canada's selection of the members of an environmental review panel was biased. However, in this case, the tribunal found that the evidence provided by the foreign investor did not prove any partiality of the panel members.²³⁶ In *Merrill & Ring v. Canada*, the foreign investors claimed that an environmental advisory committee, whose recommendations had no binding effects on the government's decision but were usually adopted by the government, was partial. In this case, the members of the tribunal were in disagreement as to whether the partiality of an "advisory committee" amounted to a violation of the FET standard: some stressed that the advisory committee's recommendations had a predominant influence on governmental decisions,²³⁷ while others insisted that the advisory committee's impact on the government was limited because the government did not have "a closed mind."²³⁸ Another example is *Gold Reserve*, in which the tribunal held that a procedural defect of terminating two different concessions in the same process violated the FET standard.²³⁹

Second, an undue delay in the environmental decision-making process may violate the due process requirement. The tribunal has adopted different approaches with respect to the standard of review of a delay: the *Gold Reserve* tribunal adopted a pro-investor approach, holding that a delay in granting an environmental permit, which had a harmful impact on the foreign investor, was "contrary to the BIT standard."²⁴⁰ However, the tribunal failed to consider other criteria such as the complexity of administration, the host state's intent or the investor's due diligence. The *Glamis Gold* tribunal and the *Bilcon* tribunal, on the other hand, adopted a pro-host state approach. They held that the delay in the host state's environmental regulation did not amount to a breach of FET, mainly considering that the host states were dealing with complicated issues.²⁴¹ This approach is also questionable since it will easily lead to an unlimited deference to a host state tackling with complex administrative problems. For example, in *Glamis Gold*, the tribunal simply justified a more than nine-year delay of environmental review for the reason that "this was a particularly complicated, contested issue in which numerous parties took an interest and the federal government was quite

236. *Bilcon*, *supra* note 8, ¶ 496.

237. *Merrill & Ring Forestry, L.P. v. Gov't of Can.*, ICSID Case No. UNCT/07/1, Award, ¶ 228 (Mar. 31, 2010).

238. *Id.* ¶ 240.

239. *Gold Reserve, Inc. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 614 (Sept. 22, 2014).

240. *Id.* ¶ 608.

241. *Glamis Gold, Ltd. v. United States*, Award, ¶ 774 (NAFTA Arb. Trib. June 8, 2009); *Bilcon*, *supra* note 8, ¶ 437.

aware of the likelihood, if not imminence, of litigation and therefore its need to be extraordinarily careful in its review and decision-making processes.”²⁴²

A better approach would be to take account of multiple factors, including the complexity of administration, the intent of the host state, and the due diligence of the foreign investor. A typical example was the *Chemtura* case. In this case, the tribunal not only carefully examined the causal link between the delay in question and the damages suffered by the foreign investor, but also took into account the host state’s good faith, the investor’s contribution to the delay, and a comparison between the host state and the investor’s home state with respect to the amount of time they normally spend for regulating such issue.²⁴³

Third, a failure to ensure the host state’s right to be heard in environmental decision-making may violate the due process requirement. For example, the tribunals in *Metalclad* and *Tecmed* in their assessment of the FET standard took into account the fact that the host states failed to inform the foreign investor before denying the investor’s application for a permit. In *Gold Reserve*, the tribunal held that the fact that the host state revoked a permit previously granted to the investor, without allowing the investor an opportunity to be heard, proved that such revocation was not for environmental reasons but for political reasons.²⁴⁴

D. Non-discrimination: The Challenged Measure Must Be Implemented in a Non-discriminatory Manner

In addition to the due process requirement, the challenged measure should also be applied generally, rather than discriminatorily, against the foreign investor. The *Glamis Gold* tribunal illustrated how to determine the general applicability of an environmental measure. In *Glamis Gold*, the California government enacted Senate Bill 22 (“SB 22”) to enable the previously passed Senate Bill 483 to become law, prohibiting the lead agency’s approval of a reclamation plan for operating hard rock surface mining if the operation was “located on, or within one mile of, any Native American sacred site and [was] located in an area of special concern.”²⁴⁵ This bill permanently prevented the approval of the investor’s project located in sacred Native American areas.²⁴⁶ The investor argued that SB 22 targeted the investor’s project and was designed to make the project infeasible, which was discriminatory and arbitrary.²⁴⁷ The tribunal noted that it was clear that the investor’s project was on the minds of the California legislators drafting SB 22.²⁴⁸ However, the tribunal found this implies two possibilities: one is that SB 22 indeed targeted the investor’s project; the other is that SB 22 was a bill of general application, addressing a larger class of projects with a general problem.²⁴⁹ The tribunal decided that SB 22 was in the latter category because SB 22 on its face

242. *Glamis Gold, Ltd.*, Award, ¶ 774.

243. *See Chemtura Corp. v. Gov’t of Can.* UNCITRAL, Award, ¶¶ 155–58 (Aug. 2, 2010).

244. *Gold Reserve, Inc.*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 600.

245. *Glamis Gold, Ltd.*, Award, ¶ 175.

246. *Id.* ¶ 177.

247. *Id.* ¶¶ 788–89.

248. *Id.* ¶ 791.

249. *Id.* ¶ 792.

appeared to apply to not only present but also future mines that harm sacred sites.²⁵⁰ It is noteworthy that the tribunal set a threshold for a bill of general application:

[W]hat are the requirements to be a bill of general application? Although not delving into the intricacies of domestic law and lawmaking, the Tribunal determines that likely characteristics of a law of general application would be that it is not strictly limited in time or geographic scope, and it is not crafted so as to exclude from its regulation all, or most, other similarly situated actors.²⁵¹

E. No Specific Commitments: The Host State Has Not Made Specific Commitments to the Foreign Investor

Although the host state's regulatory change is reasonable to achieve a genuine environmental purpose and is implemented with due process and in a non-discriminatory manner, the host state may still violate the FET standard if it has made a specific commitment to the foreign investor stating that such change will not be made. This final condition of "no specific commitments" aims to protect the foreign investor's legitimate expectations based on specific stabilization promises made by the host state. Many recent tribunals have held that the host state's change of law does not constitute a violation of the FET standard unless the host state has made a specific stabilization assurance to the foreign investor.²⁵² For example, the tribunal in *Parkerings v. Lithuania* held that "[s]ave for the existence of an agreement, in the form of a *stabilisation* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment."²⁵³ Adopting the same approach, the tribunal in *Yuri Bogdanov v. Moldova* decided that the new legislation enacted by Moldova, which imposed an environmental charge on the foreign investor, did not breach the FET clause because the new legislation did not fall within the scope of the stabilization clause.²⁵⁴ However, it should be clarified that the host state's promises made to the foreign investors with respect to not changing environmental law does not mean that the environmental legislative process will be frozen. The state can still change the law despite such promises, but it needs to compensate the foreign investor for the latter's losses due to such change.

CONCLUSION

Investment jurisprudence has been inconsistent with respect to the assessment of the host state's environmental regulation under the FET clause in investment treaties. On the one hand, the tribunals have crafted four different models of general threshold of the FET standard in environment-related investment

250. *Id.* ¶ 794.

251. *Id.* ¶ 793.

252. See Patrick Dumberry, *The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105*, 31 J. INT'L ARB. 47 (2014).

253. *Parkerings-Compagniet AS v. Republic of Lith.*, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sept. 11, 2007).

254. *Yuri Bogdanov & Yulia Bogdanova v. Republic of Mold.*, SCC Case No. V091/2012, Final Award, ¶¶ 186–93 (Apr. 16, 2013).

arbitration. On the other hand, the tribunals have established different standards of review for each specific subelement of FET. Moreover, in the cases where the host state's challenged measure is enacted for implementing international environmental obligations, the tribunals have adopted diverse approaches regarding the role of international environmental law in investment arbitration. To cure this legal uncertainty, this article proposes an integrated methodology to assess the host state's environmental regulation under the FET standard, that is, unless there exist specific commitments made by the host state to the foreign investor in a contrary manner, the host state's environmental regulation does not violate the FET standard, as long as such regulation is reasonable to achieve genuine environmental objectives and is applied non-discriminatorily and with due process.