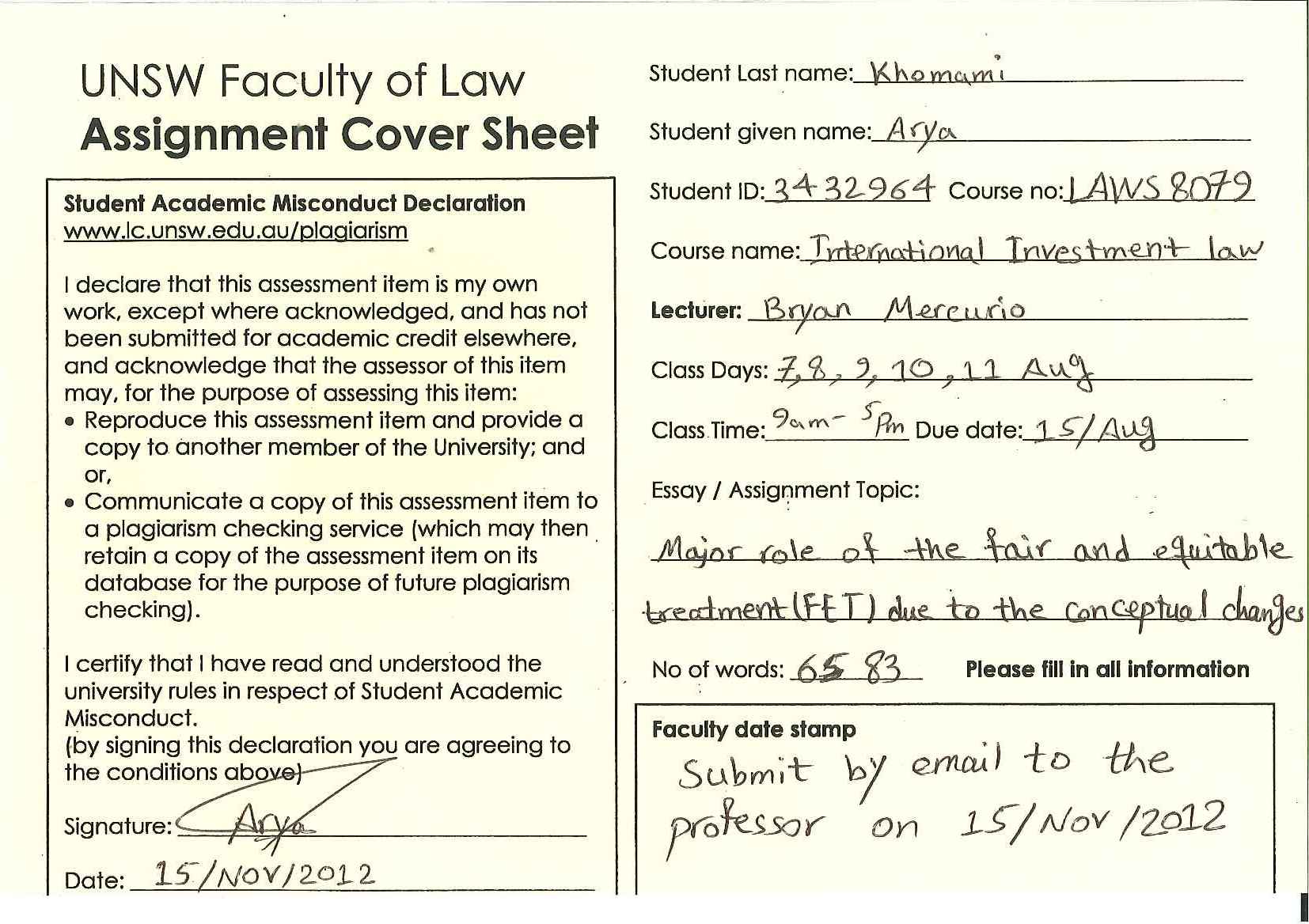
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# Arya Khomami,International investment law Essay

**Major role of the fair and equitable treatment (FET) due to the conceptual changes**

Contents

[Arya Khomami,International investment law Essay 1](#_Toc338260477)

[I. Features of the FET concept 3](#_Toc338260478)

[A. Introduction 3](#_Toc338260479)

[B. Features of the FET as a customary norm 3](#_Toc338260480)

[C. Features of the FET as an independent norm 4](#_Toc338260481)

[II.Approaches for clarification of the FET concept 5](#_Toc338260482)

[A. Reference to the origin of the standard 5](#_Toc338260483)

[1. ADF group v The united states of America 6](#_Toc338260484)

[2.Mondev vs US 7](#_Toc338260485)

[3.Vivendi v Argentina: 8](#_Toc338260486)

[B.The level of development of the countries 8](#_Toc338260487)

[1. WASTE management: 9](#_Toc338260488)

[2.Parkerings vs Lithuania 10](#_Toc338260489)

[3.Glamis Gold Ltd. v. United States of America 11](#_Toc338260490)

[C. Health and enviromental regulation 13](#_Toc338260491)

[1.Saluka vs Czech republic: 13](#_Toc338260492)

[2.Tecmed vs Mexico 14](#_Toc338260493)

[III. Conclusion: 15](#_Toc338260494)

[Bibliography: 16](#_Toc338260495)

# I. Features of the FET concept

## A. Introduction

The FET first used in Havana Charter for an International Trade Organization (1948).[[1]](#footnote-1)This innovation continued by OECD Draft Convention on the Protection of Foreign Property.[[2]](#footnote-2)It is true to say that this standard appeared in investment treaties due to the requirement to the absolute standard. It is clear that all standards except fair and equitable treatment are not absolute and they are comparative.FET is the only absolute standard that assess the conduct of governments through the investment .This feature is very important, because it gives flexibility to the standard. But because of some reasons, this standard becomes vague.

There is a trend in the international investment law to broaden the concept of FET to better support investors. In addition there are different international investment treaties, each treaty chooses special way of drafting of FET.Therefore as FET is absolute standard, and because of different approaches of interpretation, it becomes vaguer. It is true to say that there are 2 fundamental approaches to interpret FET in treaties.

In the first approaches FET is restricted by minimum standard of international customary law or even international law. These terms will use to interpret FET and therefore can help to decrease its vagueness in some extent. Second, in some treaties FET is stated as an unqualified standard. Therefore FET is not restricted by any exclusion. In these treaties FET is interpreted very broadly as an independent standard.

FET is an absolute standard that develops in both customary concept and independent one. It is one of the most important concepts, because it can make restriction for unfair and unreasonable conducts of governments. Therefore it is beneficial to serve the legitimate expectations of the investors. But it can not be denied that the conceptual evolution can not be best works, except there is a legal framework for such an evoltion.Unless this conceptual evolution can make some problems including vaguness,unclearness and unpredictibility.It is clear that these problems can decrease the efficiency of this concept. Because while the governments can not predict that which conducts are not fair and predictable, they can not adopt proper measures. It is obvious that the main aim of the international investment law is to illustrate clear framework for invetment.It can be best reached, if there is a clear framework that the FET can evolutes in such a framework. It is the aim of this article to try seeking fundamental criterias which can better conceptualize FET.

## B. Features of the FET as a customary norm

FET as a customary international norm has some elements :”denial of justice, lack of due process, lack of due diligence, and instances of arbitrariness and discrimination”[[3]](#footnote-3)

However these elements are similar with elements of FET as an independent norm, but FET as an independent standard interpreted these norms by Vienna convention and they are not restricted to the minimum standards of the international law. It is perceived that the unfair act under minimum standard must be grossly unfair or complete lack of transparency as mentioned in waste management award. But the conduct can be deemed as unfair and unequitable under the independent interpretation of FET,because it can not be served the legitimate expectation of the investor ,although it is not grossly unfair and unequitable.

It is true to say that the concept of the FET as a customary international law standard evolutes. There are several awards that mention to the evolutionary concept of the FET.Although this approach can be better serve the current investment trends, but it can not be denied that such an evolution has adverse effect on the vagueness of the FET concept too. As tribunal states that:

“[…] what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.”[[4]](#footnote-4)

## C. Features of the FET as an independent norm

FET as an independent norm has some components that as mentioned before they are interpreted by Vienna convention:

“(a) Defeating investors’ legitimate expectations (in balance

with the host State’s right to regulate in public interest);

(b) Denial of justice and due process;

(c) Manifest arbitrariness in decision-making;

(d) Discrimination;

(e) Outright abusive treatment.”[[5]](#footnote-5)

Legitimate expectation is one of the important components of the FET . Legitimate expectation has some features that are best described in LG&E tribunal :”It can be said that the investors fair expectations have the following characteristics: they are based on the conditions offered by the host state at the time of the investment; they may not be established unilaterally by one of the parties; they must be exist and be enforceable by law; in the event of infringement by the host state, a duty to compensate the investor for damages arises except for those caused in the event of stated of necessity;however;the investors fair expectations cannot fail to consider parameters such as business risk or industries regular patterns.”[[6]](#footnote-6)

Denial of justice is “traditionally defined as any gross misadministration of justice by domestic courts resulting from the ill-functioning of the states judicial system”[[7]](#footnote-7) Manifest arbitrariness is “ a measure that inflicts damage on the investor without serving any legitimate purpose and without rational explanation, but that instead rest on the prejudice or bias ,would be considered arbitrary”[[8]](#footnote-8)

Discrimination is different with the MFN and NT norms. And it means the discrimination based on the gender, race and religion.[[9]](#footnote-9)

Abusive treatment means coercion ,duress and harassment.[[10]](#footnote-10)

# II.Approaches for clarification of the FET concept

## A. Reference to the origin of the standard

It is one of the approaches to give framework to the FET and decrease its vagueness. Although it seems at first that it worket, but gradually it appeared its more vagueness itself. This approach mainly used in the NAFTA awards. It describes the FET as a customary international law standard. It mainly refers to the FTC interpretation. This approach have 2 problems:First,The customary international law can not response to the increasing needs of investors for stability and predictibility.There is not legal background in the international customary law to response to the requirement of stable investment enviroment.Second as it is mentioned before ,even in the NAFTA awards, FET in customary international law describes as a dynamic concept. It means that international customary law that was used by tribunals to give more transparency to FET,in fact it does not have itself enough transparency ,and it is the phenomenon that it is in development.

### 1. ADF group v The united states of America

This is the award that clearly illustrate the features of FET as a customary international law standard. It is restricted the FET to the interpretation of FTC and by this way could give the framework to the FET. “The ADF tribunal required the claimant to prove that an autonomous FET requirement has become a customary norm which, in that case, the claimant has failed to do so”[[11]](#footnote-11)

ADF group was a company registered under Canada law. This company did some projects in the US. The law in the U.S changed and interpreted in a way that only domestic material must be used.ADF group as a claimant argued that the interpretation of the rule is inconsistent with the “obligations of the Respondent set out in NAFTA Articles 1102(1) and (2) and 1105(1) to accord “National Treatment” and “fair and equitable treatment“[[12]](#footnote-12).Article 1105.1 NAFTA is about fair and equitable treatment as it reads:” 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. …”.It is true to say that FTC interpretation has a major role in most tribunal awards. This interpretation states that:” 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investors of another Party. 2. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in

addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. 3. A determination that there has been a breach of

Another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”It is clear that in FTC interpretation ,the most concentration is on the customary international law. This interpretation was the base of the tribunal award:” The Tribunal does not find that the U.S. measures in question are inconsistent with the requirements of NAFTA Article 1105(1) as construed in the FTC Interpretation of 31 July 2001, which Interpretation is binding upon the Tribunal.”[[13]](#footnote-13)

It is clear that this approach does not have enough legal background to support the stability as one of the important expectations of the invetors.In this approach there is a framework for FET.But the problem is ,this framework is not expand enough to completely cover all requirements under the the FET as an absolute standard. Therefore in other awards NAFTA tribunals tried to evolutes the FET standard. Although this evolution helped to FET as a customary international norm to response to more requirements. But in addition it decrease clarity of the approach. It can not be denied that that tribunals connected the FET to the customary international law for more clearness.

### 2.Mondev vs US

A Massachusetts limited partnership owned by Mondev International Ltd., a company incorporated under the laws of Canada, in the commercial real estate development contract. In conflict with the vote of jury, the Massachusetts sentenced the BRA(Boston Redevelopment Authority) immune from liability.Mondev brought its case to the ICSID.One of the claims was fair and equitable treatment. The tribunal interpreted the FET according to the FTC guide.

As to the meaning of Article 1105(1), the principal issues debated between the parties

concerned the effect of the FTC’s interpretations, and in particular, the content of the notion

of denial of justice, which is central to Mondev’s remaining NAFTA claims.[[14]](#footnote-14)

There was a debate in the tribunal that whether the interpretation was bounded by FTC or not. It is important subject, because the conclusion can be considerable. If any further interpretation was not bound, then it is possible to not restrict the FET to the minimum standard.[[15]](#footnote-15)

“Both ADF and Mendev”affirmed, however, that the modern minimum standard of treatment is not confined to the Neer standard, although neither of them have offered a new legal test.”[[16]](#footnote-16)

The problem that I mentioned about the FET as an independent norm arises about the FET as an international customary norm too. Because the FET as a customary norm shows it’s evaluating concept. It cause more vaguness.In waste management v Mexico the tribunal adds some other parts to the customary features of FET as described the minimum standard of treatment “arbitrary ,grossly unfair,unjust or idiosyncratic is discriminatory and exposes the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome which offends judicial propriety”[[17]](#footnote-17) Even in the Glami case the tribunal accepted that the government right for regulation should be restricted, while is grossly unfair by customary international law norm. It is clear that the tribunal accepted that the the investor can expect that law should not be necessarily grossly unfair, to be deemed under minimum standard of international customary.”…illegality at the domestic level is insufficient and something more is required. Claimants must satisfy a rather high evidential burden to show that the state conduct I notably arbitrary or grossly unfair and that the measure in question relates to an area effectively regulated by customary international law”[[18]](#footnote-18)

### 3.Vivendi v Argentina:

The tribunal rejected that the FET is restricted to the minimum standard of treatment.[[19]](#footnote-19)FET was mentioned in the article 3 of the treaty:” Article 3 provides: *“Each of the Contracting Parties undertakes to grant, within its territory and its maritime area, fair and equitable treatment according to the principles of international law to investments made by investors of the other Party, and to do it in such a way that the exercise of the right thus recognized is not obstructed de jure or de facto.”.As FET was drafted by referencing to international law, it was possible to the tribunal to interpret it broadly.Therfore the tribunal stated that the minimum standards of the customary international law is the floor of the FET in the treaty. Although it implies from the award that the evolution of the FET as an international law standard has been approved, but there is not any clear criteria for such an evolution. The tribunal accepted the change of the law. This change happened after changing the government in Argentina.”However, the tribunal suggested that this change should be accompanied by a transparent and non-coercive renegotiation of the* contract at issue and not through threats of recession based on colorable allegations of impropriety.”[[20]](#footnote-20)

It is clear that the tribunal applied broader concept respect to the minimum standard of the international law. It is not described that the action that must be grossly unfair to be considered. But this interpretation is not broad enough to include the stability too. It is clear that the tribunal did not discuss about the law change at all. It was assumed that the government could change the law. The only debate is on the way of implementing the change.

As it is clear, the FET as a customary international norm is in evolution and it can not be restricted to the minimum standard as there was in Neer case anymore.Therefore it is obvious that the internatonal customary law can not be the proper framework for the FET anymore, because it itself is in evolution and does not have a clear concept.

## B.The level of development of the countries

As I mentioned before the FET has a vague concept because of broad interpretation and evolution. It is true to say that the FET in both of its dimensions (as a customary norm or independent one) is in progress. This progress is because of the evolution of components of FET.Because the concept of these components evolutes. Therefore the whole concept develops too.

Although such an evolution is natural and derives from the current situation of the investment, but is can not be denied that there is not proper framework for this evolution. One of the approaches for making a path for such a development, is considering to the level of development of countries. Because one of the important components of FET is legitimate expectation. And as I mentioned before legitimate expectation will assess through all expectation that the reasonable investor could have at the time of the investment. It is neither legitimate nor reasonable for the investor to have the same expectation from different countries. It is the criteria that completely consider in the decision about the investment. It is true to say that “it has not generally been accepted by tribunals that the content of the standard should be adapted to the level of expectation on the part of the investor.”[[21]](#footnote-21)

### 1. WASTE management:

Claimant point out that the fair and equitable treatment standard is a contingent , Claimant t consider to the new approach in assessing the FET that the meaning of the standard is to be determined by reference to specific circumstances of application. [[22]](#footnote-22)The specific circumstances is the level of the development of the countries As OECD Working Papers explains this concept:

“It is an ‘absolute’, ‘non-contingent’ standard of treatment, i.e., a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, *by reference to specific circumstances of application,* as opposed to the ‘relative’ standards embodied in ‘national treatment’ and ‘most favored nation’ principles which define the required treatment by reference to the treatment accorded to other investment.” [[23]](#footnote-23)

The tribunal did not accept the influence of the level of the development on the evolution of the Fettle tribunal express that there are 2 kinds of evolution:1.The evolution of the concept of outrageous changes over the time,2.The evolution of the concept of the minimum standard of the treatment from which it was in the Neer case. [[24]](#footnote-24)

The tribunal consider to the 2 elements of evolution in the FET under the international customary norm. Evolution in the interpretation of these 2 components can influence on the FET concept as whole. Because if the outrageous or minimum concepts change, the FET under customary international will be included the more independent attributes of the FET.

The tribunal consider to the first kind of evolution and emphasize on the evolution of the shocking and outrageous concept. Then it referred to the *Mondev* tribunal:

*“Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In 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.”[[25]](#footnote-25)

It is clear that the level of the development of countries is real criteria that has been considered by investor before investing. Therefore it can not be denied that the level of the development is a part of the legitimate expectation of the investor. In this case the claimant consider to this concept by referring to the OECD report. The tribunal did not accept the level of development by this reason that the evolution of the customary international law is in the concept of outrageous not in the minimum standard. Therefore it is not possible to add a new element to the concept.

### 2.Parkerings vs Lithuania

Parkerings concluded a contract to build multi-story car parks and to enforce the city’s parking laws.

At first it was deemed that the parking fees must go to the private section including parkering, but the Ministry of Justice rejected it. The conflictions and interferences of government continued, eventually, the municipality terminated the contract.

The claimant claim was based on the legitimate expectation.

“In parkenings v Lithunia ,the tribunal noted that the Lithuania was a country in political transition ,therefore, the investor should have regarded changes in legislative regime as likely. In such a situation ,no exception that laws would remain unchanged could be legitimate.”[[26]](#footnote-26)

The tribunal consider to the FET as an independent standard. Therefore it tries to interpret the norm according to the Vienna convention[[27]](#footnote-27) particularly pursuant to Article 31, “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

In paragraph 278 of the award, the tribunal referred to the CMS Gas Transmission Company v. The

Argentine Republic:” any measure that might involve arbitrariness or discrimination is in itself contrary to fair

and equitable treatment. The standard is next related to impairment: the management,

operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the

investment must be impaired by the measures adopted.”

Although the tribunal adopted the independent FET approach and in addition accepted that the there was a grossly unfair conduct. But distinguishing between two matters:” ***a)*** the

obligations of the Republic of Lithuania not to modify the law, and ***b)*** the obligations of

the Municipality of Vilnius to inform and protect the Claimant against the potential

economic impact of such modification on the Agreement.”[[28]](#footnote-28)

The tribunal accepted the legitimate expectation of the investors but it did not accept the broad interpretation through it. It is important to consider to the reason that the tribunal used for justify its vote. Tribunal justify its vote by considering to the situation of the country. The tribunal did not accept the broad interpretation of the FET,because the situation of the country was predicatble.It can not be deemed as a legitimate expectation to expect not any changes from the countries that they are in transition. I think this reasoning is considerable, because the tribunal consider to the situation of the country as one of the factors of the legitimate expectation. The tribunal could illustrate that it is a real factor that should be considered and can not be a legitimate expectation. I think this justification can justify the level of the development of countries as one of the factors of legitimate expectation. It is clear that like the same justification in this vote, it is neither legitimate nor reasonable to have the same expectation from the countries with different level of development. It is a real issue that must be considered as one of the factors of the legitimate expectation.

### 3.Glamis Gold Ltd. v. United States of America

Federal and state agencies in the united states had some concerns about environmental and cultural influences of mining project of Glamis.The project was placed in the land that it was sacred in the opinion of some tribes in there. The state of California in 2003 blocked the project without any pre-inform.Glamis deemed this manner as arbitrary and discriminatory.

Claimant believed that the fair and equitable treatment under the minimum standard of treatment is dynamic one. Although the claimant accepted that the the standard is under customary international law, but it justified by referring to some votes, that because it has dynamic feature, it must be interpreted by Vienna convention.[[29]](#footnote-29)

In this case, the claimant consider to the levels of developments of countries and states that it must be considered .because it is the part of the legitimate expectation. The claimant simply argued that it considered to the level of the development of the U.S before investment and U.S was frustrated the legitimate expectation of the investor.

“Claimant contends that the resources and levels of development particular to a host State play an integral role in the application of the minimum standard of treatment to it.”[[30]](#footnote-30)

The claimant states that the expectation of the investor from U.S is higher than other countries.

“[f]or a highly developed legal system with relatively extensive resources and institutional stability, such as the United States, the international minimum standard thus requires better conduct than what may be required for a less-developed country.”[[31]](#footnote-31)

It is important that the claimant based its argument on the level of the development of the U.S. “This is not because the fair and equitable treatment standard is a contingent standard, Claimant explains, that varies based on a host State’s treatment of foreigners or its own nationals, but because the exact meaning of the standard is to be determined by reference to specific circumstances of application.The specific circumstances of application, Claimant continues, “necessarily involve[] a consideration of the host state’s level of development.”[[32]](#footnote-32)

The tribunal stated that because Glamis could not show the customary international law under the minimum standard is in the evolution therefore the threshold for glamis is high. Therefore it is clear that the tribunal did not accept the the claimant reasoning based on the level of the development. At least it is true to say that the tribunal did not accept that the level of the development could give the lower threshold to the claimant. Maybe it is because there is not any clear reasoning that included level of development as the component of legitimate expectation under international customary law.

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## C. Health and enviromental regulation

It is clear that the governments can pass laws in different areas and sometimes these laws can negatively influence on the investors legitimate expectation particularly when there is commitment from the government for the investor in advance of the investment that the stability of the laws was guaranteed. While there is an unqualified FET in treaties which interpreted broadly, it deemed that the government can not change the laws which influence the investment. It is true to say that in some tribunals, it is accepted that the countries can pass laws in public interests, although they influence on the investment. In order to justify this approach, it can be said that it is neither reasonable nor legitimate for the investor to expect that the government would not pass any law in environment and health issues that are two important components of public interest.

It is true to say that the right of the government for passing the laws specially while they negatively influenced on the investment ,naturally restricted by unqualified FET and investors legitimate expectation. However “Where a government undertakes a regulatory measure in furtherance of its commitment to the health,enviroment or etc and negatively affects investment ,it is uncertain whether the tribunal will accept”[[33]](#footnote-33).But this evolution of the FET concept can be find more clear framework by accepting that the government can regulate in health and environment issues. Such an approach will restrict the vagueness of FET concept.

### 1.Saluka vs Czech republic:

Saluka had 46.16% of the shares of IPB bank in the Czech Republic. The Czech Republic forced IPB to transfer its business to Ceskoslovenska Obchodni banka (CSOB) for one Czech crown.

The investor interpreted the FET as an independent standard and it claimed that it did not restrict to the egregiously unfair The tribunal accepted and interpreted FET by the Vienna convention.[[34]](#footnote-34)

It is important that the tribunal consider to the legitimate expectation as one of the important component of the FET” The standard of fair and equitable treatment is therefore closely tied to the notion of

legitimate expectations34 which is the dominant element of that standard.”[[35]](#footnote-35)

In this award, the tribunal for the first time mentioned to the new concept:”Host states legitimate right”. As mentioned before, through the evolution of the FET concept, it is not legitimate to change the law which influence on the investment. But it is true to say that clear granting the right to change the law in public interest affairs can be give more predictability to the FET concept. As the tribunal in saluka case states that “the host states legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well”[[36]](#footnote-36).The tribunal accepted that it could be reasonable that the law would change in public interest affairs. It is clear that such a reasoning can have considerable influences. Because at least there is a more predictable and clear framework for FET and can decrease the vagueness of FET as was noted that” No investor may reasonably expect that the circumstances prevailing at the time the

investment is made remain totally unchanged.”[[37]](#footnote-37)

### 2.Tecmed vs Mexico

The claimant(Tecmed) invested in the land that was purchased by the municipality.The land had a renewable license for five years issued by the Ministry of Urban Development and Ecology (SEDUE).Ownership of the land transferred to the decentralized agency of the Municipality. Upon the liquidation of the agency, the land was transferred to promotora.Tecmed requested from INE (Waste and Activities Division of the National Ecology Institute of Mexico) for renewal of the license to promotora.The INE rejected the permission. The Respondent claims that denial of the permit is a control measure in a highly regulated sector and which is very closely linked to public interests.

Referring to the fair and equitable treatment under international law guaranteed by Article 4(1) of the Agreement, the Claimant claims that “it encompasses the duty to act transparently and respecting the legitimate trust generated in the investor”.[[38]](#footnote-38)

The Respondent acclaimed that Promotora only sold a personal and real property to the Claimant relating to the Industrial Park of the city of Hermosillo, which did not include permits or licenses to operate the landfill.[[39]](#footnote-39)

The Arbitral Tribunal interprets that fair and equitable standard as an independent one.[[40]](#footnote-40)

INE frustrated the legitimate expectation of Tecmed.[[41]](#footnote-41) INE did not inform the Tecmed about its position and in addition they did not inform the claimant about the effect of the infringements on the renewal of the Permit.

“The Arbitral Tribunal considers that INE’s treatment had a material adverse effect on Tecmed’s ability to get to know clearly the real circumstances on which the maintenance or validity of the Permit depended”[[42]](#footnote-42)

It is clear that the environmental and health regulations are common in all countries. It is deemed that the government can pass laws in these public affairs. Therefore it can not be the legitimate expectation for the investor to expect the laws will not change. But as it was clear in Tecmed vs Mexico ,the way of applying environmental concerns are important.First,it must be clear that whether there is a new law or not. Maybe the law did not change and only the way of interpretation changes. In this cases, the manner is inconsistent with the fair and equitable treatment. Because the investor simply can not predict the government manner. Therefore it is violation of transparent and predictable manner.Second,if there is a new law, it is acceptable for the government to pass a new law in health and environmental subjects. It can be deemed as a framework for evolution of the FET.It is obvious that the evolution of the FET concept can not restrict the government to pass laws in these subjects. Because they are public affairs that related to the national interest and as I mentioned before it is common among countries to consider to them and try to pass regulations about them. In these cases the investor has to illustrate that there is a special guarantee that the government granted to its investment and the investor invested upon considering to such guarantee.

# III. Conclusion:

It is true to say that the FET has been changed considerably from its earlier concept under minimum standard of international customary law. This evolution has not been finished yet, and it seems that it will coutinue.But because such an evolution does not have a clear framework. It can not be denied that some problems have been arised.AS UNCTAD report states that : ”If the states and its subnational entities do not know in advance what type of conduct may be considered a breach of treaty, then it can not organize its regulatory and administrative decision-making processes and delegation in a way that ensure that its conduct will not incur liability under the FET”[[43]](#footnote-43)

It is clear that such an evolution as I declared before is natural and derives from current situation of the investment. But it can not be denied that FET can serves its aim, if there is a clear framework for it. It is obvious that for such a framework ,first it should be some criteria’s that I tried to declare them :First, Some tribunals particularly NAFTA tribunals, try to interpreted the FET in the framework of the minimum standards of the international customary law. However at first it could give a predictability to this concept, but gradually it has been appeared that the minimum standard does not have enough background to satisfy the legitimate expectation of the investors. Therefore as it mentioned in waste management case ,the evolution happened in the minimum standard concept and the meaning of outrageus.Therefore all hopes faded very soon, because the minimum standard is not clear framework for FET evolotion.The second approach was the level of the development that has been approved by UNCTAD report 2012 and requested by claimants in several cases. However this approach was not accepted by the tribunals as a criteria to influence on the threshold that has been deemed for minimum standard, but as I discussed, it is clear that the level of the development is real factor that usually has been considered by investor before the investment. Therefore it is clear that it can be the component of the legitimate expectation of the investor. It can not be assumed that the expectation of the investors from different countries are same. Therefore considering the level of the development of countries case by case could be the good approach in order to design the evolutionary framework for the FET.

It is obvoius that there is not a clear framework for the legitimate expectation of the investors as one of the important component of the FET.It is not clear that the whether regulation changes can influence on the legitimate expectation of investors or not. As I mentioned in this essay, it is neither legitimate nor reasonable to expect that the regulations would not change in the public interest affairs like environment and health except in situations that there are special commitments. Therefore clear granting such a right as an exclusion to the principle of stability could give a clear framework to the FET concept.

Inconclusion, considering to the level of the developments of countries and granting the right for changing the health and environmental regulation can be good criteria’s to cause clarification for FET concept.

# Bibliography:

**1. Books**

Dolze ,R and Schreuer ,C. (2008). Standards of protection. *Principles of international investment law*. Oxford university press. 119-148

Grierson, T and Laird I. (2008). Standards of treatment. In: Muchlinski, P and Ortino, F and Schreuer, C *The oxford handbook of international investment law*.Oxford university press. 260-290

Mclachlan, C and Shore, L and Weiniger, M. (2010). Non-contingent standard.*International investment arbitration*. 2nd ed. Oxford university press. 7.176-7.194

Newcomber ,A and Pradell ,L. (2009). Minimum standards of treatment.*Law and practice of investment treaties, standards of treatment*.Kluwer law international. 233-296

Tudor I (2008). *The fair and equitable treatment standard in the international law of foreign investment*. Oxford university press. 145-132

**2.Articles**

Christoph scheruer and Ursuala kriebaum. (2006). *at what time must legitimate expectations exist?.* Available: http://www.univie.ac.at/intlaw/pdf/97\_atwhattime.pdf. Last accessed 15 Nov 2012.

Dolzer, R. (2005). Fair and equitable treatment : A key standard in investment treaties. *Heinoline*. 87 (39), 87-95

Marcela Klein Bronfman. (2005). *Fair and equitable treatment:an evolving standard.* Available: http://www.mpil.de/shared/data/pdf/pdfmpunyb/15\_marcela\_iii.pdf. Last accessed 15 Nov 2012.

Olatokunbo Lad-Ojomo. (2010). *WHAT IS THE DISTINCTION BETWEEN.* Available: http://www.teiajuridica.com/fair.pdf. Last accessed 14 Nov 2012.

Price, D. (2000). Some observations on the chapter eleven of NAFTA. *Heinoline*. 23 , 421-435

Rahim Moloo and Justin Jacinto. (2011). *Environmental and Health Regulation:Assessing liability under investmen treaty.* Available: http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1397&context=bjil. Last accessed 14 Aug 2012.

Reinisch, A. Fair and equitable treatment & full protection and security. Available: http://ils.univie.ac.at/fileadmin/user\_upload/legal\_studies/Downloads/FET\_and\_FPS.pdf. Last accessed 14 Nov 2012.

UNCTAD series of issue in international investment Agreements. (2012). Fair and Equitable Treatment. Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012

1. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012, p.5,pa.3 [↑](#footnote-ref-1)
2. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012, p.5,pa.5 [↑](#footnote-ref-2)
3. Newcomber ,A and Pradell ,L. (2009). Minimum standards of treatment.*Law and practice of investment treaties, standards of treatment*.Kluwer law international P.238,pa.4 [↑](#footnote-ref-3)
4. *ADF Group Inc. v United States*, ICSID Case No.ARB (AF)/00/1, Final Award, 9 January 2003, para.

   179. [↑](#footnote-ref-4)
5. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012, P.62,pa.4 [↑](#footnote-ref-5)
6. Peter Muchlinski,Federico ortino and Christoph schreuer (2008). *The oxford handbook of international investment law*. New York: Oxford. p.276,pa.4. [↑](#footnote-ref-6)
7. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012,p.80 [↑](#footnote-ref-7)
8. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012, P.78,pa.3 [↑](#footnote-ref-8)
9. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012,p.82,pa.1 [↑](#footnote-ref-9)
10. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012,p.82,pa.4 [↑](#footnote-ref-10)
11. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012,p.50.pa.5 [↑](#footnote-ref-11)
12. ADF Group Inc.v.United States of America, ICSID Case No. ARB(AF)/00/1), Award, October 4, 2001

    ,pa.59 [↑](#footnote-ref-12)
13. ADF Group Inc.v.United States of America, ICSID Case No. ARB(AF)/00/1), Award, October 4, 2001, Pa.199,sec.6 [↑](#footnote-ref-13)
14. *Mondev v. United States*, Award, 11 October 2002,pa.99. [↑](#footnote-ref-14)
15. *Mondev v. United States*, Award, 11 October 2002,pa.105. [↑](#footnote-ref-15)
16. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012,P.50,pa.6 [↑](#footnote-ref-16)
17. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012,P.51,pa.2 [↑](#footnote-ref-17)
18. *Mondev v. United States*, Award, 11 October 2002, para. 119; [↑](#footnote-ref-18)
19. *Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August

    2007, para.6.6.2 [↑](#footnote-ref-19)
20. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012, P.75,pa.2 [↑](#footnote-ref-20)
21. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012, p.14,pa.4 [↑](#footnote-ref-21)
22. *Waste Management v. Mexico*, ICSID Case No ARB(AF)/00/3, Award,

    30 April 2004, 43 ILM 967 (2004),pa.565 [↑](#footnote-ref-22)
23. *Waste Management v. Mexico*, ICSID Case No ARB(AF)/00/3, Award,

    30 April 2004, 43 ILM 967 (2004),pa.566 [↑](#footnote-ref-23)
24. *Waste Management v. Mexico*, ICSID Case No ARB(AF)/00/3, Award,

    30 April 2004, 43 ILM 967 (2004),pa.612 [↑](#footnote-ref-24)
25. *Waste Management v. Mexico*, ICSID Case No ARB(AF)/00/3, Award,

    30 April 2004, 43 ILM 967 (2004),pa.613 [↑](#footnote-ref-25)
26. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012,pa.72,pa.4 [↑](#footnote-ref-26)
27. *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8,

    Award, 11 September 2007,pa. 275 [↑](#footnote-ref-27)
28. *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8,

    Award, 11 September 2007,pa.333 [↑](#footnote-ref-28)
29. *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award, 8

    June 2009.pa.548 [↑](#footnote-ref-29)
30. *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award, 8

    June 2009,pa.564 [↑](#footnote-ref-30)
31. *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award, 8

    June 2009,pa.564 [↑](#footnote-ref-31)
32. *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award, 8

    June 2009,pa.565 [↑](#footnote-ref-32)
33. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012,p.14,pa.1 [↑](#footnote-ref-33)
34. *Saluka v. Czech Republic*, Partial Award, 17 March 2006,pa.101 [↑](#footnote-ref-34)
35. *Saluka v. Czech Republic*, Partial Award, 17 March 2006,pa.302 [↑](#footnote-ref-35)
36. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012,p.73,pa.3 [↑](#footnote-ref-36)
37. *Saluka v. Czech Republic*, Partial Award, 17 March 2006,pa.305 [↑](#footnote-ref-37)
38. TECMED S.A. v. THE UNITED MEXICAN STATES CASE No. ARB (AF)/00/2 AWARD,May,23,2003,p.17,pa.8 [↑](#footnote-ref-38)
39. TECMED S.A. v. THE UNITED MEXICAN STATES CASE No. ARB (AF)/00/2 AWARD,May,23,2003,pa.76 [↑](#footnote-ref-39)
40. TECMED S.A. v. THE UNITED MEXICAN STATES CASE No. ARB (AF)/00/2 AWARD,May,23,2003,p.17,pa.155 [↑](#footnote-ref-40)
41. TECMED S.A. v. THE UNITED MEXICAN STATES CASE No. ARB (AF)/00/2 AWARD,May,23,2003,p.17,pa.162 [↑](#footnote-ref-41)
42. TECMED S.A. v. THE UNITED MEXICAN STATES CASE No. ARB (AF)/00/2 AWARD,May,23,2003,p.17,pa.165 [↑](#footnote-ref-42)
43. UNCTAD series of issue in international investment Agreements. (2012). *Fair and Equitable Treatment.* Available: http://unctad.org/en/docs/unctaddiaeia2011d5\_en.pdf. Last accessed 14 nov 2012,p.12,pa.3 [↑](#footnote-ref-43)