Pakistan's International investment Policy: Towards a New Generation of Fair and Equitable Treatment Provisions

by

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Statement of Originality

I hereby declare that this thesis is my own work. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person.

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Abstract

Fair and equitable treatment is the most invoked substantive protective standard which exists in the majority of Pakistan's international investment agreements. The standard has gained prominence as a controversial provision available to foreign investors due to being regularly being invoked in investor state disputes.

The international investment agreements do not provide adequate protection for Pakistan. The main argument put forward by this thesis is that the present interpretation and application of fair and equitable treatment creates an imbalance in rights of foreign investors and the regulatory space of Pakistan as a host state.

This thesis therefore analyses the contemporary nature of fair and equitable treatment provisions in Pakistan's International Investment Agreements prior to drawing a conclusion as to why they do not adequately protect the interests of Pakistan as a host state. This is undertaken by conducting doctrinal research of the fair and equitable treatment provisions and by using case studies of the mining and construction industries.

Given the lack of adequate protection provided by the international investment agreements for Pakistan, my thesis examines different jurisdictions to identify whether these jurisdictions can assist Pakistan in protecting the interests of Pakistan. Lastly, my thesis argues that a reform of fair and equitable treatment can protect Pakistan and accommodate the interests of foreign investors.

Fair and equitable treatment is an obligation on a host state to act fairly and equitably towards the investments of foreign investors. Fair and equitable treatment has gained popularity over the years as it is the most invoked substantive protective standard by foreign investors in investor-State dispute settlement (ISDS) cases. This is due to the lack of a definition of fair and equitable treatment in international investment agreements. Attempts to clarify the meaning and interpretation of fair and equitable treatment have exacerbated the application of the standard resulting in implications for host states. This has resulted in a rise of investor state dispute settlement cases against host states, in particular, developing countries have been affected the most. As a result, tribunals, arbitrators and organisations have established an ongoing reform of fair and equitable treatment in international investment law.

Therefore, the aim of my thesis is to contribute to the existing discourse on International Investment Law reform. To achieve this aim the objectives of my thesis is to present the gap in the existing body of research and to articulate how my thesis purports to fill in this gap. My thesis employs a combination of methodologies to meet the aims and objectives of my thesis. The methodologies that have been deployed are case studies, and comparative analysis to critically examine fair and equitable treatment provisions in Pakistan's IIAs.

My thesis is the first to examine the fair and equitable treatment provision in international investment agreements concluded by Pakistan. There is a need to reform fair and equitable treatment in international investment agreements to strike a balance between the interests of foreign investors and host states. Thus, my thesis is part of the ongoing reform of FET initiated by scholars, arbitrators, tribunals, and the international investment community.

Contents

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Dedication

I dedicate my PhD to God; the most kind and the most merciful.

Table of Abbreviations

AMT	American Manufacturing & Trading
AfCFTA	African Continental Free Trade Agreement
BITs	Bilateral Investment Treaties
CETA	Comprehensive Economic Trade Agreement
CHEJVA	Chagai Hills Exploration Joint Venture Agreement
CPEC	China Pakistan Economic Corridor
CPI	Corruption Perception Index
CFIA	Cooperation and Facilitation Investment Agreement
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIPA	Foreign Investment Protection and Promotion Agreement
FPCCI	Federation of Pakistan Chambers of Commerce and Industry
FCNs	Friendship, Commerce, and Navigation
GATT	General Agreement on Tariffs and Trade
HS	Host State
II	International Investment
IIAs	International Investment Agreements
IIL	International Investment Law
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Treaties of Investor-State Dispute Settlement

IQAir	World Air Quality Report
MFN	Most Favoured Nation
MoCC	Ministry of Climate Change
NYC	New York Convention
NESPAK	National Engineering Services of Pakistan
NAFTA	North American Free Trade Agreement
NCHR	National Commission for Human Rights
NPHDA	Naya Pakistan Housing Development Authority
OECD	Organisation for Economic Co-operation and Development
OICCI	Overseas Investors Chamber of Commerce and Industry
SECMC	Sindh Engro Coal Mining Company
SDGs	Sustainable Development Goals
UNCTAD	United Nations Conference on Trade and Development
UK	United Kingdom
US	United States
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WAPDA	Water and Power Development Authority's

Chapter 1: Pakistan's International Investment Policy

1.1 Introduction

Pakistan has one of the fasted growing economies in the world, encouraged by an influx of Foreign Direct Investment (FDI) into the country.[1] This is reinforced by 53 Bilateral Investment Treaties (BITs), from which 35 BITs are currently in force.[2] Therefore, BITs are at the heart of Pakistan's international investment policy geared towards promoting economic development as well as encouraging unity and solidarity international relations particularly with capital exporting countries.[3]

These BITs and other International Investment Agreements (IIAs) have been formulated to encourage investment and protect foreign investors.[4] They have become the most popular instruments used to promote Pakistan as a hub for foreign investment through a range of protection standards including fair and equitable treatment (FET), most favoured nation and full protection and security.[5] These provisions are enforced through a system known as investor-state dispute settlement (ISDS) which permits investors to sue host-States for breach of treaty protection standards.[6] This study seeks to study and recommend reform of the FET standard within Pakistan's BITs. Prior to undertaking an examination of FET, it is important to define FET using the definition provide by UNCTAD. According the UNCTAD, FET is an obligation in an IIA on a host state to accord fair and equitable treatment to the investment of foreign investors.[7]

1 World Bank, 'Overview' (World Bank, 2021) < Pakistan Overview: Development News, Research, Data | World Bank > accessed 20 August 2021.
2 United Nations, 'Pakistan Population' (Worldometer, 13 August 2021) < https://www.worldometers.info/world-population/pakistan-population/ > accessed 13 August 2021.
3 --, 'Pakistan GDP' (Trading Economics, 2021) < Pakistan GDP - 2021 Data - 2022 Forecast - 1960-2020 Historical - Chart - News (tradingeconomics.com) > accessed 21 August 2021.
4 United Nations, 'Pakistan Population' (Worldometer, 13 August 2021) < https://www.worldometers.info/world-population/pakistan-population/ > accessed 13 August 2021.
5 --, 'Pakistan GDP' (Trading Economics, 2021) < Pakistan GDP - 2021 Data - 2022 Forecast - 1960-2020 Historical - Chart - News (tradingeconomics.com) > accessed 21 August 2021.
6 Manuel Rocha, 'Ousted Pakistani Leader as Challenging Investment Treaties That Give Corporations Excessive Power' (bilaterals.org, 2022) < Ousted Pakistani Leader as Challenging Investment Treaties That Give Corporations Excessive Power | bilaterals.org > accessed 20 April 2022.
7 --, 'Fair and Equitable Treatment' (UNCTAD, 2021) < Fair and Equitable Treatment | UNCTAD > accessed 19 April 2022.

For Pakistan, FET has become a problematic protection standard due to the different interpretations by arbitration tribunals in IIAs concluded by Pakistan with other host States.[8] Therefore, this thesis seeks to provide a critical assessment of the FET provision in Pakistan's IIAs by utilising literature, jurisprudence, and State practice to identify its impact on a number of critical economic sectors and thereby make recommendations for reform.

The objectives of chapter one are as follows: to demonstrate that there are key problems with the interpretation and application of FET; to identify the problems that have motivated the research; to identify the gap in research and how my thesis fills in the gap by making a significant contribution to the research area; to demonstrate that there is a need to reconceptualise the FET provision in international investment agreements to remedy the social, political, and economic implications of the provision; and to demonstrate that the challenges posed by FET in IIAs can be remedied by adopting the actions taken by other jurisdictions.

This chapter is divided into six parts with the aim of introducing the research rationale and the nature of FET in Pakistan's IIAs. Firstly, this chapter introduces the key issues with FET in Pakistan's IIAs through the provision of a rationale for choosing this as a topic for my thesis. Secondly, this chapter examines the role of FDI in Pakistan to determine whether the inclusion of FET standard plays a key role in driving FDI inflows into Pakistan. Thirdly, this chapter will examine some of the key cases brought against Pakistan where a foreign investor has accused Pakistan of breaching the FET to reveal the scope of the problem. Fourthly, this chapter examines the treaty-making practice through an analysis of the different types of IIAs containing a FET in Pakistan. Fifthly, this chapter provides a global perspective on FET, to identify whether FET is a global issue and, if so, how have countries facing similar problems addressed them. Finally, this chapter ends by setting out the aim, objectives, research questions and an outline of each subsequent chapter before reaching a circumspect conclusion. The next section presents the key problems FET has created for Pakistan as a substantive protective standard contained in most of the country's BITs. The section provides

[8] United Nations, 'International Investment Agreements Navigator' (Investment Policy Hub, 2022) < https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 January 2022.

evidence in the form of cases and IIAs responsible for encouraging foreign investors to pursue claims citing breach of FET.

This section presents the road map for this chapter:

The first section comprises of the research rationale which presents the reasons for conducting research on fair and equitable provisions in Pakistan's International Investment Agreements. This section identifies the problems with the interpretation and application of fair and equitable treatment from the perspective of Pakistan.

The second section comprises of the research aim. The aim elucidates the overarching purpose of conducting research on fair and equitable treatment in IIAs concluded by Pakistan. The purpose of this section is to contribute and extend the existing discourse on international Investment Law.

The third section comprises the research questions my thesis seeks to answer. The research questions focus on answering to what extent can the challenges to Pakistani IA's arising from differing interpretations of FET provisions in BIT's be remedied by comparatively adopting corrective actions taken by other jurisdictions which face similar challenges. Detailed answers to the research questions are merited in the conclusion (Chapter 8).

The contribution to knowledge section articulates how my research makes a significant and original contribution to the existing body of research in this area. This section examines the local and national sources to examine how my research contributes to the gaps in this research area.

The section on scope of study reveals the extent to which FET provisions have contributed to the rising number of cases against Pakistan by undertaking a detailed examination of Pakistan's IIAs.

The section on methodology introduces the methodologies selected to discuss and explain the research. Furthermore, this section explains how the methodologies relate to answering each research question. The purpose of the methodology section is to supplement the research questions and arguments made in this thesis.

The chapter outline presents an outline of each chapter as a continuous narrative to show what each chapter does and how each succeeding chapter develops on the chapter before.

1.2 Research rationale

The United Nations Centre on Trade and Development (UNCTAD) launched the International Investment Agreement (IIA) Reform Accelerator on 12 November 2020 to accelerate reform of eight IIA provisions including FET aimed towards protecting the host State's right to regulate.[9] A discussion on FET is important within the context of the IIA Reform Accelerator because FET has gained prominence for creating a disparity between the rights of the foreign investor and the autonomy of the host State.[10] This is significant from the point of view of a developing capital-importing country like Pakistan because of the impact on its regulatory space which has to be balanced out with a desire to attract foreign investment.[11] In comparison, a developed country such as the United Kingdom (UK) would not have a problem including FET provisions in its IIAs because of its strong legal environment and especially when entering a treaty with a developing country, there is limited scope for an investor from the developing country to pursue opportunities in the UK and pursue ISDS in the future.[12] Therefore, the impact and desire to regulate FET is unlikely to be the same for a capital importing developed and capital exporting developing country.

As a result, FET has sparked a debate, as echoed in the IIA Reform Accelerator, on how to strike a balance between the commercial interests of the foreign investor and the sovereignty of the host State.[13] My thesis aims to contribute to this ongoing debate by studying the FET standard in Pakistan's IIAs and proposing solutions from an international perspective on best practice. It is important for my thesis to assess the

9 --, 'International Investment Agreement (IIA) Reform Accelerator' (World Investment Forum, 2021) < https://worldinvestmentforum.unctad.org/high-level-international-investment-agreements-conference-2021 > accessed 11 August 2021.
10 --, 'International Investment Agreement (IIA) Reform Accelerator' (World Investment Forum, 2021) < https://worldinvestmentforum.unctad.org/high-level-international-investment-agreements-conference-2021 > accessed 11 August 2021.
11 Ahmed Reza and Sarjeel Mowahid, 'Snapshot: Foreign Investment Law and Policy in Pakistan' (ABS & Co, 2021) < https://www.lexology.com/library/detail.aspx?g=5c63e5ec-cb1a-4b9e-8a53-d4a14c08b9c8 > accessed 12 August 2021.
12 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session' (Vienna, 14–18 October 2019).
13 *Ibid*.

remedial options within the parameters of international investment law because the FET standard is a public international law construct applied mainly in the field of international investment law.[14] While consulting the domestic and regional laws is important, host States by and large do not have a distinct system for enforcing substantive protection standards rather they depend mainly on the international legal framework.

Therefore, this study concentrates on applying the international legal framework to my research and exploring solutions by taking examples from other jurisdictions.[15] This will involve a discussion on whether and how FET should be limited in IIAs to preserve the regulatory space of developing countries and in some cases, even excluded completely.[16] This is supported by the United Nations Commission on International Trade Law (UNCITRAL) ongoing reform initiatives including a proposed reform of FET by limiting the FET standard in IIAs to certain sectors.[17] However, the question whether such reform options are justified and necessary in the case of Pakistan? Thus, this thesis presents detailed case studies aimed at evidencing the problems or potential problems that may arise through the continued imposition of the FET standard.[18]

Furthermore, there are key problems that motivated the research. The lack of a definition of FET in Pakistan's IIAS has allowed tribunals to use their discretion in interpreting the standard in ISDS cases. The different interpretations of FET has exposed Pakistan to a number of ISDS cases posing risks to the political, economic, and social aspects of the country. The interpretation and application of FET is wide creating an imbalance between the interests of foreign investors and the rights of

[14] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Eighth Session' (Vienna, 14–18 October 2019).
[15] See Moraes, Choer Henrique and Hees, Felipe, 'Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements' (27 August 2018) AJIL Unbound (American Journal of International Law blog), Symposium on the BRICS Approach to the Investment Treaty System (2018) < https://ssrn.com/abstract=3394717 > or < http://dx.doi.org/10.2139/ssrn.3394717 > accessed 18 November 2021; Ranjan, Prabhash, 'India and Bilateral Investment Treaties—A Changing Landscape' (2014) ICSID Review-Foreign Investment Law Journal 419, 421*;* and Yalkin, Tolga, 'The International Minimum Standard and Investment Law: The Proof is in the Pudding' (2009) European Journal of International Law 3 August accessed 18 November 2021.
[16] Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 64.
[17] United Nations, 'World Investment Report 2021' (UNCTAD, 2021) < https://unctad.org/webflyer/world-investment-report-2021-investing-sustainable-recovery > accessed 13 April 2021.
18 See Chapter 5 for case studies on the mining industry and the construction industry evidencing the problems or potential problems.

Pakistan to regulate as a host state. Thus, these problems have influenced the research revealing the uncertainties attached with FET in IIAs concluded by Pakistan.

My thesis purports to resolve the key problems posed by FET in Pakistan's IIAS by investigating the different interpretations of FET. Based on this investigation, my thesis will examine the challenges these interpretations have on Pakistan. Thereafter, my thesis will examine whether the BITs are an effective framework in balancing the rights of foreign investors and Pakistan as a host state. In light of this, my thesis will make recommendations based on jurisdictions as a corrective to the key problems with FET by recommending different approaches to remedy the problems with FET in Pakistan's IIAs. These will provide options to govern the approach Pakistan requires to deal with litigation from foreign investors to balance the interest of foreign investors with the rights of Pakistan as a host state.

1.3 Research aim

The aim of this thesis is to contribute and extend the existing discourse on international Investment Law reform initiated by UNCTAD through the Reform Accelerator and further supported by the ISDS reform activities currently being undertaken at UNCITRAL level. My thesis will inform this reform by; 1) providing evidence of the impact of ISDS on Pakistan; 2) by examining and prosing a range of reform options. This research is original because 1) it is the first comprehensive study of the FET standard in Pakistan BITs as indicated in the Chapter 2 literature review and Chapter 4 review of the international legal framework; 2) it presents original evidence through the exploratory case studies presented in Chapter 5; and 3) it makes a number of original reform options taking into consideration the legal, economic and social environment in Pakistan, as presented in Chapters 6 and 7.

The aim of this study is achieved as follows:

1. Firstly, to give a rationale for proposing reform of FET in Pakistan's IIAs (Chapter 1 and 2).
2. Secondly, to critically analyse the international investment sources which offer FET to foreign investors (Chapter 4).
3. Thirdly, to critically examine the affect FET has on the mining and construction sector of Pakistan (Chapter 5).

4. Fourthly, to examine the solutions jurisdictions have adopted to regulate the FET standard in their IIAs (Chapter 6).
5. Finally, to make recommendations for reform of FET in Pakistan's IIAs (Chapter 7).

1.4 Research Questions

To achieve this, my thesis aims to answer five research questions and these are as follows:

1. What are the different interpretations of the FET standard in BITs?
2. What challenges do the various interpretations of FET have on a developing country like Pakistan?
3. To what extent do the BITs concluded by Pakistan act as an effective framework in balancing the rights of foreign investors and host states?
4. Have other jurisdictions revised the FET standard in their BITs? If so, what actions have these jurisdictions taken?
5. What lessons can Pakistan learn from the actions of other jurisdiction on how to remedy the key problems with FET?

1.5 Contribution to knowledge

This thesis uses Pakistan as a case study to investigate the FET standard accorded to foreign investors. Pakistan has an extensive bilateral investment treaty programme; 53 BITs have been signed and 35 are in force thus far.[19] This includes 7 multilateral agreements and all 7 are currently in force.[20] The financial services, oil, gas, and power sectors attract the highest inflows of FDI in Pakistan.[21] Furthermore, Pakistan was one of the first signatories to the New York Convention however did not ratify the NYC until Pakistan passed The Recognition and Enforcement (Arbitration Agreements

[19] United Nations, 'International Investment Agreements Navigator' (Investment Policy Hub, 2022) https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan accessed 19 January 2022.
[20] United Nations, 'International Investment Agreements Navigator' (Investment Policy Hub, 2022) https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan accessed 19 January 2022.
[21] United States, 'Energy Resource Guide' (International Trade Administration, 2021) https://www.trade.gov/energy-resource-guide-pakistan-oil-and-gas accessed 17 January 2022.

and Foreign Arbitral Awards) Act 2011.[22] Pakistan is also a member of the International Centre for Settlement of Investment Disputes (ICSID) which Pakistan ratified on 15th September 1966 and entered into force on 15th October 1966.[23] To support this investigation, this thesis examines the investor-state cases brought by foreign investors to illustrate the social-economic implications on a developing country like Pakistan.

At national level, the Pakistan Foreign Private Investment (Promotion and Protection) Act 1976 allows foreign investors to invest in any sector except for industries that are considered restricted for public policy reasons such as alcohol, ammunition and arms.[24] This Act provides assurances to foreign investors through the alleviation of tax concessions, including double tax arrangements,[25] providing treatment no less favourable than that accorded to the nationals of Pakistan, and permits remittances by foreign employees in the event a foreign investor requires maintenance.[26] To encourage investments from foreign investors, the Act, offers protection of agreements in the form of compensation in the currency of the home country of the foreign investor. This legal framework is important for Pakistan because it focuses on the actions taken by the host State to provide protection to foreign investors.

Furthermore, Pakistan was one of the first countries to take the initiative to sign BITs. Pakistan signed its first four BITs with Germany in 1959, Romania in 1978, Sweden in 1981 and Kuwait in 1983. The structure and contents of these BITs was taken from treaties of Friendship and Commerce made by developed countries at the time.[27] An example of this is the Pakistan – Sweden BIT (1981) which contains standard provisions, including FET without any reciprocal obligations on foreign investors. Similarly, the Pakistan – United Kingdom BIT (1994) states that the: “Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of

[22] The Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011.
[23] Lawrence Burger, ‘Pakistan Enacts a Statute to Implement the ICSID Convention’ (Kluwer Arbitration Blog, 2015) https://kluwerarbitrationblog.com/2015/03/19/pakistan-enacts-a-statute-to-implement-the-icsid-convention/ accessed 13 April 2022.
[24] Foreign Private Investment (Promotion & Protection) Act 1976.
[25] Foreign Private Investment (Promotion & Protection) Act 1976, art 8.
[26] *Ibid*.
[27] Gerald D Silver, ‘Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives “of Their Choice”’ (1989) 57 Fordham Law Review 765, 767.

the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."[28] It does not provide any safeguards for local communities, the environment or protect the state's right to regulate in national interest.

Given that Pakistan's BITs lack reciprocal protections for the host State, it is not surprising, therefore, that the country has acted as a respondent in ten investor state disputes since 2001.[29] These cases include *SGS v Pakistan*[30]*, Impregilo v Pakistan*[31]*, Bayindir v Pakistan*[32]*, Agility v Pakistan*[33]*, Tethyan Copper v Pakistan*[34]*, Progas Energy v Pakistan*[35]*, Allawi v Pakistan*[36]*, Karadeniz v Pakistan*[37]*, Al-Tuwairqi v Pakistan*[38] which is pending. The probability of facing ISDS cases today is much higher given that all Pakistan's BITs contain the FET provision and FET was invoked in all ten listed ISDS cases. These cases demonstrate that Pakistan needs to adopt stringent measures to deal with the implications foreign investors have on Pakistan by bringing a claim alleging a breach of FET. Therefore, Pakistan should aim to hold foreign investors accountable for failure to follow human rights or cause environmental damage as a result of activities from their investments in Pakistan in accordance with the United Nations Sustainable Development Goals, in particular, goal 1: "No one should be left behind…".[39]

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[28] Article 2 of the Pakistan–United Kingdom BIT (1994).
[29] United Nations, 'International Investment Agreements Navigator' (*Investment Policy Hub*, 2022) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 January 2022.
[30] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No ARB/01/13.
[31] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/3.
[32] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29.
[33] *Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan*, ICSID Case No ARB/11/8.
[34] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No ARB/12/1
[35] *Progas Energy Ltd v. Pakistan*, PCA Case No 2014-18.
[36] *Ali Allawi v. Islamic Republic of Pakistan*, PCA Case No 2012-23.
[37] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/13/1.
[38] *Dr Hilal Hussain Al Tuwairqi and Al-Ittefaq Steel Products Company Limited v. The Islamic Republic of Pakistan*, PCA Case No 2018-34.
[39] Antonio Guterres, 'Sustainable Development Goals' (*Sustainable Development Goals*, 2019) < https://www.un.org/sustainabledevelopment/development-agenda/ > accessed 12 December 2021.

The challenge is compounded by the lack of adequate safeguards or recourse to justice at domestic level as exemplified the Supreme Court of Pakistan decision in *Shehla Zia vs. WAPDA (1994)*[40]*.* This case provides an illustration of the type of environmental and human rights breaches the residents face in regions synonymous with foreign investment in Pakistan and the challenges to accessing justice. In this case, a group of residents challenged the Water and Power Development Authority's (WAPDA) decision to contract a company to build an electricity grid station in the "green belt"[41] region.

The problem for the residents was exacerbated by the fact that the Supreme Court of Pakistan had to address several issues, such as the meaning of right to life and environmental protection. Under Article 184 (3) of the Pakistan Constitution, the Supreme Court of Pakistan can hear any matter of public importance.[42] The Supreme Court of Pakistan had to decide whether the petition was a matter of public importance as the residents argued the project posed great health risk to the residents. The court had to decide whether the right to life covered the environment as Pakistan's Constitution did not include environmental protection. This case exemplified the procedural challenges in the legal system of Pakistan. Moreover, a large number of affected third parties were restricted from making representation in this case because of poverty and access to justice related challenges. The Supreme Court struggled to make a definitive ruling and had to invite a group of engineers from the National Engineering Services of Pakistan (NESPAK) to review the project. Even though, the court acknowledged that the scientific evidence at the time supported the notion that electronic magnetic fields can have an adverse impact on health, the Supreme Court ruled that the scientific evidence was inconclusive therefore a specialist team was required to deliberate on the matter. This demonstrates that the host state cannot be depended on to bring about an action as a result of the actions of investors thus supporting the impetus for reform in this area. Although the Supreme Court of Pakistan ruled in favour of the residents after finding that WAPDA violated the Constitution of Pakistan for failing to safeguard the health of the residents and the environment and extended the meaning of the right to life to incorporate environmental

[40] *Ms Shehla Zia v WAPDA* [1994] PLD SC 693.
[41] Ibid, 15.
[42] Article 184(3) of the Constitution of Pakistan.

pollution, third party groups were not adequately represented, and compensation remains uncertain almost 30 years later.[43]

In relation to IIAs, Pakistan has endeavoured to address these problems through plans for a new Model BIT. This is part of a growing trend by developing countries, such as India, Indonesia and South Africa to develop BITs which do not freely allow foreign investors to seek direct recourse to international tribunals.[44] Pakistan's Model BIT will be used as a template for negotiating existing and future BITs.[45] The purpose of this new template is to safeguard the interests of Pakistan and to put an end to the endless stream of cases ISDS lodged against Pakistan. The Pakistan Board of Investment has made it clear that it will offer contracting States the option to amend certain controversial provisions, including FET.[46] This will enable Pakistan to adopt measures that are in national interest to the country as opposed to being restricted by FET provisions. The template is yet to be finalised therefore leaving room to be informed by the findings and recommendations in this thesis.

The example of *Shehla Zia v WAPDA*[47] has provided an illustration of the negative impact investments on local communities, limits of access to justice at domestic level and the importance of enabling the state to regulate in the national interest. These investments have a profound effect on the economic, social and political determination of a country and in some cases, resulting in the abuse of the human rights of local people, cause devastation to the environment and exacerbate corruption in government.[48] The best scenario is to have a foreign investor and a host State work together to accommodate each other. The host State is a key stakeholder in this relationship because it provides incentives, facilitates commercial interests, and offer security in exchange for sustainable investment. And in the event, that a dispute occurs between the foreign investor and the host State, both should be allowed to take

[43] Article 184(3) of the Constitution of Pakistan.
[44] United Nations, 'World Investment Report 2021' (*UNCTAD*, 2021) < https://unctad.org/webflyer/world-investment-report-2021-investing-sustainable-recovery accessed > 13 April 2021.
[45] Ibid.
[46] Zafar Bhutta, 'Pakistan to Terminate 23 Bilateral Investment Treaties' (*Business & Human Rights Resource Centre*, 4 August 2021) https://www.business-humanrights.org/en/latest-news/pakistan-to-terminate-23-bilateral-investment-treaties/ accessed 5 August 2021.
[47] *Ms Shehla Zia v WAPDA* [1994] PLD SC 693.
[48] United Nations, 'World Investment Report 2021' (*UNCTAD*, 2021) < https://unctad.org/webflyer/world-investment-report-2021-investing-sustainable-recovery accessed > 13 April 2021.

action or have the interests of the third party groups affected by the activities of the investor taken into consideration through amicus curiae submissions.[49] Thus, this thesis calls for a Pakistan to drive its international investment policy towards this scenario by reforming the controversial FET provision and providing more safeguards to local communities affected by foreign investors through measures such as the introduction of obligations on foreign investors. Thus, this thesis questions both the substantive (FET provision) and procedural (ISDS) rights established under the IIAs.

It should added that the host State may not always want to bring to the attention of the international investment community the violations committed by foreign investors for fear of exposing its own complicity or violations. In such an event that host State may voice their problems in disputes or adequately represent the interests of the third party groups affected by the activities of the foreign investors. This goes against the aims set by the Sustainable Development goals, such as guaranteeing 'equal access to justice for all' (Goals 16.3),[50] developing 'effective, accountable and transparent institutions at all levels' (Goals 16.6)[51] while ensuring 'responsive, inclusive, participatory and representative decision making at all levels' (Goal 16.7).[52] Therefore, finding a mechanism for balancing the rights of the host state and the foreign investor has become a moot point within literature.[53] This thesis extends the literature in this area by providing evidence to show the impact of FET on national regulatory space in Pakistan and make recommendations for a review the substantive protection standards to ensure that national interests such as the environment are adequately protected from investor action. The literature review in Chapter 2 provides a comprehensive breakdown of the gaps in literature and my contribution.

1.6 Scope of study

[49] Zafar Bhutta, 'Pakistan to Terminate 23 Bilateral Investment Treaties' (*The Express Tribune*, 5 August 2021) <https://tribune.com.pk/story/2313937/pakistan-to-terminate-23-bilateral-investment-treaties> accessed 14 April 2021.
[50] Antonio Guterres, 'Sustainable Development Goals' (*Sustainable Development Goals*, 2019) https://www.un.org/sustainabledevelopment/development-agenda/ accessed 12 December 2021.
[51] *Ibid*.
[52] *Ibid*.
[53] *Ibid*.

My thesis examines the extent to which the FET provision has contributed to the rising number of cases against Pakistan. This includes a thorough examination of the IIAs concluded by Pakistan with countries to determinate the nature and potential reform of the FET clause. Given that the IIAs of Pakistan contain investment provisions, investors are eligible to bring a claim citing a breach of the FET standard. Thus, my thesis will examine the domestic and international policy to determine the affect FET and the fear of ISDS has had on the economic, social and political environment in Pakistan. Therefore, my thesis will consult both bilateral and multilateral investment agreements concluded by Pakistan.

My thesis has deliberately excluded other countries from the South Asian region. These countries are Afghanistan, Bangladesh, Bhutan, the Maldives, Nepal, Pakistan and Sri Lanka.[54] Even though all share similar demographics, these countries have not faced similar challenges to Pakistan in relation to the FET provision and ISDS or instigated any substantive reform. The only comparison my thesis can possibly make is by examining each IIA to ascertain which IIAs include and exclude FET in their texts which would be fruitless.[55] Equally, my thesis could compare the number of ISDS cases brought against these countries and which ones were brought on the basis of FET; which again would add limited influential content. For this reason, my thesis often refers to India from the South Asian region as it has faced similar challenges to Pakistan in regard to FET in its IIAs.[56] The only difference is that Pakistan is still in the negotiation phase while India has already embarked on a review and reform of its IIA programme.[57] Thus, the extent to which my thesis can compare Pakistan to Afghanistan, Bangladesh, Bhutan, the Maldives, Nepal, Pakistan and Sri Lanka is rather limited, that is why only India is utilised as an example (see methodology).

However, my thesis does refer to the legal systems of other countries such as India and Bangladesh.[58] This is to show the investment treaty practice of these countries, which acts as a guidance for Pakistan, which will shape the recommendations made

[54] United Nations, 'Bangladesh' (*Investment Policy Hub*, 2022) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh> accessed 8 December 2021.
[55] Antonio Guterres, 'Sustainable Development Goals' (*Sustainable Development Goals*, 2019) <https://www.un.org/sustainabledevelopment/development-agenda/> accessed 12 December 2021.
[56] United Nations, 'World Investment Report 2021' (*UNCTAD*, 2021) <https://unctad.org/webflyer/world-investment-report-2021-investing-sustainable-recovery> accessed 13 April 2021.
[57] *Ibid*.
[58] See Chapter 7 for treaty making practices of other jurisdictions.

in Chapter 7. Recognising the treaty practice of these countries can provide insight into the problems encountered, how the countries found solutions, and how they have been implemented to address the challenges. However, the recommendations have a wider application beyond Pakistan.

In terms of the protection available to foreign investors against political instability, Pakistan has made significant strides in providing protection for foreign investors in recent years. The country has implemented several legal and regulatory reforms to improve the investment climate and reduce the risk of exploitation for foreign investors. For example, Pakistan now offers a number of incentives, including tax breaks, to attract foreign investment. Additionally, the country has established bilateral investment treaties with over 53 countries, which provide a framework for the protection of foreign investors' rights. Furthermore, Pakistan's Arbitration Council and dispute resolution mechanisms offer a timely and efficient avenue for resolving disputes that may arise between foreign investors and the government. These measures, combined with Pakistan's growing economy and strategic location, make it an attractive destination for foreign investors looking to penetrate new markets and expand their reach.

1.7 Methodology

My thesis employed a combination of methodologies to address the research questions at hand. These methodologies included doctrinal research, comparative legal research, literature review, and case studies.[59] The primary objective of this section is to outline the methodologies utilised in order to guide the thesis.

In order to examine legal doctrines and principles related to the FET standard, my thesis utilised doctrinal research, comparative legal research, literature review, and case studies.[60] Through comparative legal research, my thesis aimed to identify variations in the FET standard across different jurisdictions.[61] Additionally, a literature

[59] Caroline Morris and Cian Murphy, *Getting a PhD in Law* (1st edn, Hart Publishing 2011) 29, 35.
[60] Michael Salter, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (1st edn, Longman 2007) 49, 58.
[61] Richard Posner, 'The Present Situation in Legal Scholarship' [1981] 90(5) *The Yale Law Journal* 1113, 1113-1130.

review was conducted to gather existing scholarly perspectives on FET. Case studies were employed to systematically categorise and analyse the identified interpretations.

The deployment of doctrinal research provided a theoretical foundation for understanding legal doctrines associated with FET.[62] Comparative legal research offered valuable insights into international variations and legal developments.[63] The literature review provided a comprehensive overview of existing academic viewpoints. The comparative analysis structured the examination of diverse interpretations. These methodologies were employed to address the different interpretations of the FET standard in BITs.

My thesis delved into case studies to explore the real-world challenges stemming from various interpretations of FET, engaged in case studies to gain insights into specific challenges encountered by Pakistan, and utilised comparative legal research to place these challenges in an international context. The purpose of the case studies was to offer a comprehensive examination of challenges in practical settings; they provided valuable perspectives from stakeholders, while comparative legal research situated Pakistan's challenges within a global perspective. This approach helped in tackling the different interpretations of FET affecting a developing nation like Pakistan.

My thesis scrutinised the legal provisions of BITs signed by Pakistan through an analysis of legal documents, conducted a comparative analysis to assess the balance of rights in these BITs, and employed doctrinal research to comprehend the legal principles underlying the BITs.[64] The rationale behind this analysis was to provide an in-depth exploration of the practical implications, enable benchmarking against international standards through comparative analysis, and establish a theoretical basis for interpreting legal principles through doctrinal research. This approach aided in determining the extent to which the BITs signed by Pakistan serve as an effective framework for balancing the rights of foreign investors and host states.

Furthermore, my thesis conducted a comparative legal analysis to identify revisions in the FET standard, reviewed legal documents such as amendments and official statements through document review, and applied doctrinal research to comprehend

[62] Esin Orucu, *The Enigma of Comparative Law* (1st edn, Brill Academic Publishers 2004) 34, 40.
[63] Konrad Zweigert and Heinz Kotz, *An Introduction to Comparative Law* (2nd edn, Oxford University Press 1992) 7, 18.
[64] Robert K Yin, *Case Study Research and Analysis* (6th edn, SAGE Publications 2014) 60, 60-67.

the legal implications of revisions.[65] The purpose of utilising these methods was to recognise trends and differences in FET revisions, offer insights into official actions taken by other jurisdictions, and contribute to a more profound understanding of the legal implications. This aided in determining whether other jurisdictions revised the FET standard in their BITs, and if so, what measures these jurisdictions have implemented. Furthermore, my thesis conducted case study analyses of jurisdictions successfully addressing key FET problems. My thesis conducted a comparative study to distil lessons and potential remedies for Pakistan, and integrated doctrinal research to comprehend theoretical foundations. The rationale for utilising these methods was to provide a thorough exploration of successful practices, extract actionable insights and strategies from various jurisdictions, and contribute to theoretical understanding in proposing effective remedies. This helped in determining what lessons Pakistan can learn from the actions of other jurisdictions on how to address the key problems with FET.

1.8 Chapter Outline

My thesis comprises eight chapters and the contents of each chapter is discussed below:

Chapter 2: This builds from the chapter one by identifying the literature available on the topic, finding the gap in the literature, and helping to formulate solutions. This chapter discusses the literature relevant to my research topic in order to give an account of the evolving scholarship on my topic. It aims to review literature in order to identify the gap(s) and highlight my contribution to literature. From this my thesis is able to demonstrate how the research fills the gaps and extends this literature.

Chapter 3: This builds on chapter 2 by advancing the critical examination of FET within the context of Pakistan. This chapter gives a historical background of FET and the evolution of international law in this field. Equally, the procedural channels to enforcing the FET standard need to be examined. This chapter also provides a theoretical

[65] Robert E. Stake, *The Art of Case Study Research* (first published 1995, SAGE Publications Inc.) 35, 35 - 46.

discussion on FET to demonstrate the different interpretations of the FET standard around the world.

Chapter 4: This chapter builds on the previous chapter by permitting the identification of the areas that are attracting the most ISDS cases. This identification will grant a critical examination of these two area and this will aid the formulation of solutions. This chapter is divided into two sections. Section one analyses the mining sector and section two analyses the construction sector of Pakistan. These case studies explore the problems FET has on policy development in these sectors. This chapter discusses the employment, environmental, and human rights policies specific to each sector. The purpose of this chapter is to highlight the various challenges Pakistan is facing due to having FET in its IIAs, which will shape the recommendations proposed in chapter 7 and the search for solutions in chapter 6.

Chapter 5: This chapter builds on chapter 4 by identifying the sectors that attract the most ISDS cases. This identification permits the critical examination of these two sectors. This chapter presents the different approaches countries have adopted in order to address the issues with FET in their IIAs. This chapter discusses the Comprehensive Economic Trade Agreement; the Morocco and Nigeria BIT and the Indian Model BIT which provide a modern interpretation of the FET standard. Based on these approaches, this chapter proposes a set of reforms to guide Pakistan on how to address the challenges with regards to the FET provision in its IIAs.

Chapter 6: This chapter builds upon the previous chapter by proposing reforms of FET for Pakistan based on the critical examination of FET in Pakistan's IIAs and ISDS cases. This chapter undertakes an evaluation of the reforms proposed in the previous chapter to understand whether they can strike a balance between the foreign investor and the sovereignty of Pakistan. In this chapter, the role of Shariah law in shaping the FET provision in Pakistan's IIAs is provided. This evaluation takes into account the social, political and environmental influences.

Chapter 7: This chapter builds on the previous chapters by concluding that the challenges to Pakistani IA's arising from differing interpretations of FET provisions in BIT's can be remedied by adopting corrective actions taken by other jurisdictions

which face similar challenges to Pakistan. This chapter concludes on how Pakistan can approach FET in its IIAs based on the research conducted in the preceding chapters.

1.9 Conclusion

This chapter has provided a rationale for conducting the research on the FET standard in Pakistan's IIAs so as to address the imbalance between the rights of the foreign investor and the host State. This chapter demonstrates why there is a pressing need to reform the FET provision as it is mostly geared towards the foreign investor overlooking the autonomy of the host state to regulate, as illustrated in the ISDS cases. My thesis aims to examine the rights afforded to foreign investors in these IIAs within the context of sustainable development initiatives, as this has become a highly important aspect of international law particularly due to emerging issues such as global warming. Achieving sustainable development alongside attracting FDI is at the heart of Pakistan's international investment policy. This will be discussed in Chapter 5 in relation to the two case studies. It is indeed counter intuitive to ignore the initiatives adopted to make investment transactions more sustainable as more countries are implementing measures targeting sustainable development. Therefore, my this examines FET within the context of Pakistan and its need to reconceptualise the provisions in its IIAs to avoid future litigation while simultaneously protecting the right to regulate in the interests of her people.

Chapter 2: The Nature of Fair and Equitable Treatment

2.1 Introduction

Since the dawn of the twenty-first century, sustainable development and international investment law reform have occupied the minds of arbitrators and international law researchers alike.[66] Therefore, this chapter aims to interrogate this new body of literature, building on the discourse primarily from the latter half of the twentieth century. This literature review provides a foundation for inspiring "substantial, useful"[67] research relating to fair and equitable treatment and related issues.[68] A literature review is an excellent starting point in identifying research that has made an important contribution to this area of study. Each review concludes with an explanation of the contribution each piece of literature has made to my research area. It also identifies any gaps, inconsistencies, and contradictions in each piece of work. By undertaking this task, this chapter purports to justify the choice of the research topic. The review is structured as follows: firstly, it commences by introducing the work of the author. Secondly, it provides an explanation of the contribution the work has made to the subject area. Finally, it reaches a conclusion by analysing the gap in the work. This chapter concludes with an explanation of the knowledge found in literature and how my thesis intends to fill it.

As explained in Chapter 1, the originality of my work stems from three key areas:

a) The absence of a comprehensive study on Pakistan's international investment policy, in particular, the much-invoked FET provision.
b) The absence of evidence to provide the impact of these policies on selected sectors. This thesis fills this gap also by providing case studies in Chapter 5.
c) The range of country-specific solutions provided to remedy the problem, is discussed in Chapters 6 and 7. These solutions are evaluated to fit within the Pakistan context.

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[66] Chrispas Nyombi, 'Lifting the Veil of Incorporation Under Common Law and Statute' (2014) *International Journal of Law & Management* 56(1) 66-81, 67.
[67] David N Boote and Penny Beile, 'Scholars before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation' (2005) 34(6) *Education for Information* 3-15, 4.
[68] Chrispas Nyombi, 'Protection of Foreign Investment Pre-1945 and the Impact of Subsequent Reforms' (2015) *International Business Law Journal* (5) 419-431, 425.

This literature review intends to show these gaps. Most of the literature sources are from the post-war period because many of the major developments in the field occurred around that period. The debates at the time concentrated on the extent to which foreign investors should be granted rights and be permitted to exercise these rights in host States.[69] As such, earlier scholarly work reveals that political groups denied rights to investors that came from outside of their country.[70] These investors were given the title of "aliens"[71] and considered to be opponents of the values, culture, and traditions of that community in question. The events of the Second World War overturned the discriminatory international legal framework pinpointing the necessity for a contemporary infrastructure, reflecting the social and economic needs of the wider investment community.[72] The literature review will now commence with a thematic review, in chronological order of development, of the origins of the FET standard. The themes are discussed below.

2.2 The historical origins of FET bias to foreign investors in customary international law

The concept of fair and equitable treatment bias is firmly entrenched in its historical origins. In this section, my thesis will examine the historical origins of FET bias toward foreign investors in customary international law. The purpose of this section is to present a review of the key literature that pertains to this theme in order to answer the research questions.

From a historical point of view, foreign investors were subject to mistreatment by host states as the view that prevailed historically was that foreign investors were subject to the law of the land. Evelyn Speyer Colbert opined that political groups denied foreign investors any rights that came from outside of their country due to the notion that aliens were subjected to the laws of the host state.[73] Furthermore, Patrick Dumberry states that during this period "Western States simply felt that there was no

[69] Evelyn Speyer Colbert, *Retaliation in International Law* (1st edn, Kings' Crown Press 1948) 189.
[70] Arnold Rainer, *Encyclopedia of Public International Law*, vol 1 (1992) 102; Alwyn V Freeman, *The International Responsibility of States for Denial of Justice* (1st edn, Krus Reprint Company 1910) 590.
[71] From the Latin word alius, meaning "other".
[72] Edwin Montefiore Borchard, *The Diplomatic Protection of Citizens Abroad, or, The Law of International Claims* (Banks Law Pub 1915) 33.
Evelyn Speyer Colbert, *Retaliation in International Law* (1st edn, Kings' Crown Press 1948) 210.

need for any international rules protecting their nationals abroad."[74] Therefore, the rights of foreign investors were contested for a period until notable authors during this period advocating for their rights.

The contribution of scholars to the field of international law in the 17th and 18th centuries revolutionised state responsibilities in international law. Emmerich Vattel declared that "whoever uses a citizen ill, indirectly offends the State, which is bound to protect this citizen".[75] Another scholar Hugo Grotius contributed significantly to the evolution of the rights of foreign investors by arguing that under international law, States had a duty to safeguard the travel and trade made by aliens.[76] These scholars opined that once a foreigner entered the territory of the host State, then the host country was under an obligation to protect the foreigner and his property with the utmost respect and dignity. Thus, foreign investors' rights did not always exist in international investment law and it was the contribution of scholars to the field of international law that revolutionised the rights of foreign investors in international law.

To further understand the origins of fair and equitable treatment bias it is necessary to understand host states strongly opposed any representation of foreign investors rights in the domain of the international investment community. For example, Carlos Calvo, an Argentinian scholar, invented a theory stating that foreign investors should not be treated more favourable than the treatment accorded to the nationals of the host state.[77] Simultaneously, Patrick Dumberry explained that strong opposition from host states, in particular, Latin America prevented the prevalence of foreign investors rights in international law.[78] This recognition was evident following WWII where the focus on academic and judicial voices shifted to human rights therefore the rights of all human beings became a pertinent subject for the international community.[79]

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[74] Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 13, 19.
[75] Emer de Vattel, *The Law of Nations: or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (1st edn, P.H. Nicklin & T. Johnson 1835) 161.
[76] H Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna 1648–1815* (1st edn, Sijthoff Leiden 1971) 47-55.
[77] Encyclopedia Britannica, 'Calvo Doctrine' (27 Aug 2007) <https://www.britannica.com/topic/Calvo-Doctrine> accessed 2 February 2023.
[78] Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 13, 28.
[79] Chrispas Nyombi, 'Protection of Foreign Investment Pre-1945 and the Impact of Subsequent Reforms' (2015) *International Business Law Journal* (5) 419-431, 425.

Notwithstanding the opposition, the world witnessed the emergence of the minimum standard of treatment. UNCTAD explains that the minimum standard of treatment is part of customary international law requiring host states to honour and respect this norm.[80] This stemmed from the work of Adam Smith who was able to highlight this problem through his analysis of large corporations and their potential impact on national sovereignty. The contribution Smith made to the literature in this area is immense.[81] Smith's work also influenced the role of arbitral tribunals in addressing disagreements in relation to a foreign investment requiring decisions to be rooted in fairness and equity. This is supported by Andrew Blandford who states that historical research demonstrates tribunals had to 'base their decisions on what were then called "the general principles of justice and equity" influenced by scholarly work at the time.[82] The leading commentator on this is Elihu Root who published an article in 1920 stressing that the minimum standard of treatment was warranted because aliens were mistreated due to the low level of protection offered by some countries. He explained that a host State should subject a foreign investor to the same laws as it gives to its citizens, in relation to administration, protection and reparation for injury as it does to its own citizens. This should not be more or less than the treatment given to its own citizens as long as the treatment does not fall below the threshold of civilisation.[83] Hence, these principles harnessed the minimum standards of treatment. The minimum standard of treatment shaped the complex and multifaceted nature of FET as it stands today as the introduction of the minimum standard of treatment became intertwined with FET. This emulated the historical bias of FET towards foreign investors in customary international law.

The literature is a scrupulous contribution to the contemporary position of FET in international investment law. However, the literature has evolved the position of foreign investors by placing considerable focus on natural sociability. This seems to have created an imbalance between the rights of the foreign investor and the rights of

[80] UNCTAD, *Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD 2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 3 February 2023.
[81] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1st edn, Clarendon Press 1976) 278.
[82] Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 13, 25.
[83] *Ibid*, 22.

the host state pertaining to the FET standard in international investment law. This focus has resulted in a paradigm shift evolving the ideas on the rights of foreign investors to the disadvantage of foreign investors. This has contributed to the modern view pertaining to the rights of foreign investors enabling foreign investors to acquire more rights than the host state. Hence, my thesis seeks to establish that there is an imbalance between the rights of the foreign investor and the host state. This is due to the primary focus on the rights of foreign investors. Due to this focus, the literature has greatly influenced the contemporary interpretation and application of FET. IIAs permit foreign investors to sue host states for failing to comply with any of the contents of the IIAs, particularly FET. This addresses one of the research questions which is to what extent do BITs act as an effective framework in balancing the rights of the foreign investor and host state. The answer is that BITs do not act as an effective framework due to the imbalance between the rights of foreign investor and host states. My thesis contributes to this literature by focusing on subsuming the rights of foreign with the rights of the host state to ensure a balance between the parties is created. Furthermore, my thesis adds to this literature by proposing that FET be reconceptualised by either removing FET; limit FET to customary international law; or restrict FET to substantive content. This will focus on limiting the rights of the foreign investor with the rights of the host state to self-regulate expanding the literature in this area. In the next section, my thesis will review the key literature pertaining to the second theme, namely, the problematic aspects of FET interpretation by arbitral tribunals.

2.3 Problematic aspects of FET interpretation by arbitral tribunals

From the previous section, it was made clear that FET was intended to protect foreign investors from discriminatory practices by a host state. However, in the modern era, fair and equitable treatment has become a favourable provision amongst foreign investors. Due to its growth and popularity amongst foreign investors, tribunals are now faced with the task of interpreting and applying FET in ISDS cases. However, there are several issues associated with the interpretation of FET, which has led to considerable problems when interpreting and applying FET. Thus, in this section, my

thesis will review the key literature that presents the problematic aspects of FET interpretation by arbitral tribunals.

The first problem that my thesis has identified is that the vagueness of the term fair and equitable can be open to multiple interpretations by tribunals. According to Islam the interpretation and application of FET prioritises foreign investors and neglects host states.[84] Simultaneously UNCTAD contends that "the vague and broad wording of the obligation carries a risk of an overreach in its application."[85] OECD has declared that host states are concerned that the vague nature gives tribunals more discretion to interpret and apply FET *ex aequo et bono*.[86] Hence, the vague nature of FET can create confusion, which can lead to disagreements over the application of the standard.

The second problem pertains to the disputes that arise over the meaning of fair and equitable and what actions a host state can or cannot take. Sarmiento and Nikièma explain that states have made attempts to clarify the measures susceptible to challenges however the interpretations granted by the tribunals vary making it difficult to clarify the host states position.[87] One of the main reason this has become a problem is due to the meaning arbitral tribunals have granted FET. Islam explains:

> "close examination of these arbitral awards covering the wide range of approaches that these tribunals have adopted will reveal that, in dealing with these political, socio-political and transitory issues, the current

[84] Rumana Islam, 'The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration' (2018) *Asian Journal of International Law* 10(2) 414, 428.
[85] UNCTAD, *Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD 2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 3 February 2023.
[86] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (OECD Working Papers on International Investment 2004/03) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf> accessed 4 February 2023.
[87] Florencia Sarmiento and Suzy Nikièma, 'Fair and Equitable Treatment: Why it Matters and What Can Be Done' (IISD, 2022) <https://www.iisd.org/system/files/2022-11/fair-equitable-treatment-en.pdf> accessed 24 February 2023.

investment tribunal has largely been inconsistent and inadequate in their approaches."[88]

This uncertainty can be a deterrent to foreign investment, as investors may be reluctant to invest in a country where the laws are unclear or ambiguous. Furthermore, the subjectivity of interpretation can lead to disagreements, take time and money to solve, and ultimately reduce foreign investment in the host state.

The third problem is that the interpretation of FET can vary depending on the investor. According to Levashovaa, determining fair and equitable treatment can sometimes be subjective.[89] Dulac and Hoe state that in some cases investors may perceive themselves to be unfairly treated, even though the host state may deem its actions to be reasonable.[90] Gallus explains this discrepancy can lead to costly, time-consuming disputes, and it can also damage the reputation of the host state, which would hurt its ability to attract foreign investment.[91] Hence, the problems with the interpretation of FET by arbitral tribunals are numerous and can significantly impact the relationship between host states and foreign investors.

The fourth problem suggests that the investment treaty arbitration system is significantly flawed and contradicts the fundamental principles of judicial accountability, openness, coherence, and independence. Harten carefully analysed the role of public judges which he perceives to be limited as they are barred from reviewing investment treaty awards for the purpose of identifying errors of law.[92] Support for this notion also comes from Muchlinski who argues that a "purely literal approach to the interpretation of legal terms is often very incomplete. The term(s) in question must be reviewed in the light of the context and policy behind their use."[93]

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[88] Rumana Islam, 'The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration' (2018) *Asian Journal of International Law* 10(2) 414, 428.
[89] Yulia Levashova, 'Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law' (2020) *Netherlands International Law Review* 67 233, 240.
[90] Elodie Dulac and Jia Lin Hoe, 'Substantive Protections: Fairness' (Global Arbitration Review, 2022) <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/second-edition/article/substantive-protections-fairness> accessed 25 February 2023.
[91] Nick Gallus, *The 'Fair and Equitable Treatment' Standard and the Circumstances of the Host State* (1st edn, Cambridge University Press 2011) 223, 245.
[92] Gus Van Harten, 'A Case for International Investment Court' (Inaugural Conference of the Society for International Economic Law, 2008) *Society of International Economic Law (SIEL) Inaugural Conference* 5, 7.
[93] Peter T Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press 2007) 636.

Therefore, arbitration is a private matter, the transparency of the proceedings is questionable due to limited public access. In addition to this proposal, Harten argues that the system is incoherent as a result of producing inconsistent decisions. Likewise, the work of Thomas Franck makes a significant contribution to this area, even though Thomas did not discuss FET per se, he examined the meaning of fairness.[94] Thomas comments on the presence of tensions in maintaining a stable investment regime commenting that 'the power of a court to do justice depends….on the persuasiveness of the judges' discourse, persuasive in the sense that it reflects not their own, but society's value preferences.'[95] Klager references this in his work stating that '[f]air and equitable treatment invites arbitrators '…to do justice', but thereby also discloses the tension that relates to the legitimacy of their decisions."[96] Furthermore, he argues that the inability to review arbitral rewards impacts universal jurisprudence.

This literature is important for my thesis because it examines the problems with FET interpretation and guides the analysis on whether the arbitration system has taken the perspectives of host states into account in interpreting FET in investor-state disputes. The approaches of the tribunals to FET dictate that the tribunal have included good faith, the obligation of full protection and security, freedom from coercion and harassment, denial of justice and due process, lack of arbitrariness and non-discrimination, transparency and stability and legitimate expectations. Even though, the tribunals have included these principles in interpreting FET, it seems that tribunals have made decisions supporting foreign investors as opposed to host States. Small argues that "[i]t is too early to say whether we are witnessing a sign of evolution of the international custom as it is also too early to establish a definitive list of elements for the interpretation of the 'fair and equitable treatment' standard since the jurisprudence is still constantly evolving."[97] As a result of this, my thesis brings to light some of the cases that require the FET standard to be reconceptualised, and this will shed light on the problems. As such, my thesis aims to make recommendations on how developing states like Pakistan should address the FET standard taking into account national interests. This would help to mitigate some of the concerns vetted out towards ISDS

[94] Thomas Franck, *Fairness in International Law and Institutions* (1st edn, Clarendon Press 1995) 328.
[95] *Ibid*, 212.
[96] *Ibid*, 195.
[97] Katia Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008) 111.

for being unjust, showing favouritism and being unfair for developing countries, such as Pakistan.[98]

2.4 Solutions to the problematic areas

In the previous section, my thesis examined the literature that presented the problematic aspects of FET interpretation by arbitral tribunals. In this section, my thesis will present the key literature pertaining to the solutions to the problematic areas.

2.4.1 Omit FET

The first solution is to omit FET from the text of an agreement. For example, India created a Model BIT and replaced FET in its BITs. According to Prabash Ranjan[99] this was a policy initiative undertaken by the Indian government to redefine the scope and structure of bilateral investment treaties. The aim of this solution is to provide a balanced framework for investment cooperation between India and other countries, while also protecting the interests of the Indian economy. Furthermore, it aims to promote sustainable development, enhance transparency, and provide a level playing field for investors.[100]

This solution can be beneficial as it seeks to redefine the nature of BITs as it aims to provide an equitable distribution of benefits between host and foreign investors. Prabash Ranjan explains that the model includes provisions for expropriation, compensation for loss, non-discrimination, and replaces fair and equitable treatment. Gordon Blanke the Model BIT "avoids inclusion of the broader fair and equitable (FET) standard, which is a common feature in international investment arrangements."[101] Hence, the model seeks to promote an environment that

[98] Gus Van Harten, Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law (1st edn, Oxford University Press 2010) 627-658.
[99] Prabhash Ranjan, Harsha Vardhana Singh, Kevin James and Ramandeep Singh, 'India's Model Bilateral Investment Treaty: Is India Too Risk Averse?' (Brookings India IMPACT Series No. 082018, August 2018) https://www.brookings.edu/wp-content/uploads/2018/08/India%E2%80%99s-Model-Bilateral-Investment-Treaty-2018.pdf accessed 10 April 2023.
[100] *Ibid*.
[101] Gordon Blanke, 'India's Revised Model BIT: Every Bit Worth It!' (Kluwer Arbitration Blog, 20 March 2016) <https://arbitrationblog.kluwerarbitration.com/2016/03/20/indias-revised-model-bit-every-bit-worth-it/> accessed 25 February 2023.

encourages investment while at the same time, protecting the development aspirations of the host country.

On the other hand, the solution may not necessarily work in the favour of the host state and foreign investors. Patnaik argues that the India model bilateral investment treaty is too restrictive and complicates foreign investment in the country.[102] Furthermore, Dhar argues:

> "FET can indeed be interpreted in a broad manner especially when the government has promised to protect the substantive investments of a foreign investor in the country. The new model treaty has adopted the 'enterprise-based' definition. This will protect all the investments made by the affiliates of a foreign company which has invested in India through a single enterprise".[103]

Hence, although the omitting of FET is substantiated in response to the growing number of disputes with foreign investors it may not necessarily protect the interests of the host state.

2.4.2 Restricting FET to Minimum Standard of Treatment

The second solution to the problems is to restrict FET to the Minimum Standard of Treatment. The reference to the minimum standard of treatment will certainly ensure any treatment that goes beyond this treatment will not be accepted. An example of this is Morocco and Nigeria.[104] Morocco and Nigeria have a long-standing relationship, and in 2016, they signed a Bilateral Investment Treaty (BIT) to strengthen their economic ties. The agreement aimed to promote and protect investments between the two countries by creating a favourable climate for investors and enterprises willing to invest in both countries.[105] The BIT provides for dispute resolution mechanisms

102 Priti Patnaik, 'Deconstructing India's Model Bilateral Investment Treaty' (The Wire, 16 September 2016) <https://thewire.in/economy/deconstructing-indias-model-bilateral-investment-treaty> accessed 26 February 2023.
103 *Ibid*.
104 Morocco–Nigeria BIT (2016) available at: <http://investmentpolicyhub.unctad.org/IIA/treaty/3711> accessed 20 January 2022.
105 *Ibid*.

that ensure that investors' rights are protected, which enhances the confidence that investors have in investing in sectors such as agriculture, mining, telecommunications, and financial services.[106]

The BIT between Morocco and Nigeria has led to a significant increase in trade and investment between the two nations. According to Klentiana Mahmutaj Nigeria is among the largest economies in Africa and holds a vast oil and gas reserve, while Morocco is a significant regional player with a diversified economy.[107] The bilateral agreement seeks to leverage the strengths of both countries to create a more robust economic partnership that would benefit investors and the population of both nations. Since the treaty was signed, there has been an increase in foreign direct investment inflows into Nigeria from Morocco, especially in the areas of tourism, housing, and infrastructure.[108]

The BIT between Morocco and Nigeria marks a significant step in promoting trade and investment between African states. The agreement is expected to lead to more significant economic cooperation between the two countries and create a much-needed spur in intra-African trade. According to Tarcisio Gazzini while there are several challenges to the bilateral agreement's implementation, such as maintaining a stable political and economic environment and addressing corruption, the potential benefits are enormous.[109] With commitments to improving the business environment on both sides, the bilateral investment treaty between Morocco and Nigeria is expected to provide an avenue for investors to grow and gain a foothold in Nigeria and Morocco, contributing to the economic development of both countries over time.

The Bilateral Investment Treaty (BIT) between Morocco and Nigeria was an important step towards promoting fair and equitable investment opportunities for both countries.

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[106] *Ibid*.
[107] Klentiana Mahmutaj, 'Will the Morocco-Nigeria Bilateral Investment Treaty Transform Sustainable Development into Hard Law?' (EJIL: Talk! 27 January 2022) <https://www.ejiltalk.org/will-the-morocco-nigeria-bilateral-investment-treaty-transform-sustainable-development-into-hard-law/> accessed 2 May 2023.
[108] *Ibid*.
[109] Tarcisio Gazzini, 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties' (IISD, 26 September 2017) <https://www.iisd.org/itn/en/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/> accessed 3 May 2023.

Nyombi, Mortimer, and Ramsundar argue this provides necessary benefits to investors in terms of legal protection and a platform to resolve disputes.[110] The treaty binds both countries to establish a stable platform for trade and investment by providing investors with any necessary information or facilities for doing business and ensuring that their investments receive equal treatment and protection under the law.[111] This agreement aims to instill confidence in investors and create a favourable climate for investment in both countries.

Additionally, the BIT serves to maintain sustained economic development in both countries. Okechukwu Ejims contends by forging forward-moving and stable trade and investment ties, the agreement translates to long-term economic benefits for both countries. [112] Furthermore, it provides a framework for investment in the promising sectors of both countries, such as renewable energy and infrastructural development.[113] Ultimately, the treaty will attract more foreign investments into Morocco and Nigeria, increase jobs, and contribute to the economic strength within both countries.

Additionally, the critics of this approach have highlighted the problems associated with linking FET to the minimum standard. UNCTAD claims “some tribunals view the MST as an evolving standard.”[114] Paparinskis contends the minimum standard of treatment has always been complicated.[115] In light of this, Kurtz argues the interpretation and application of FET is inconsistent because tribunals “simply choose and move between different interpretative schools without rational explanation and

[110] Chrispas Nyombi, Tom Mortimer Narissa Ramsundar, ‘The Morocco-Nigeria BIT: towards a new generation of intra-African BITs’ (2018) 29(1) International Company and Commercial Law Review < https://repository.canterbury.ac.uk/download/c81e0d60322b5b26db8a3917bd53791a14c09304ec564abdb276320f25ca345e/74016/The%20Morocco%20Nigeria%20BIT.pdf > accessed 23 January 2023.
[111] Ibid.
[112] Okechukwu Ejims, ‘Using Investment Treaties to Hold Companies Accountable: A Case Study of the Morocco-Nigeria Bilateral Investment Treaty’ (Business & Human Rights Resource Centre, 5 October 2022) <https://www.business-humanrights.org/en/blog/using-investment-treaties-to-hold-companies-accountable-a-case-study-of-the-morocco-nigeria-bilateral-investment-treaty/> accessed 23 January 2023.
[113] Ibid.
[114] UNCTAD, ‘Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II’ (UNCTAD Series on Issues in International Investment Agreements II, 2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 3 February 2023
[115] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford Monographs in International Law, 1st edn, Oxford University Press 2013) 181.

analysis."[116] Hence, there is still much work to be done and progress that has been made is a testament to the power and importance of the fair and equitable treatment of all people.

2.4.3 List of behaviours and Actions breach FET

Due to its growth and popularity amongst foreign investors, host states are now faced with the task of reconceptualising FET. One of the ways in which this has occurred is to provide a list of behaviours and actions deemed to be a breach of FET. An example of this is the Comprehensive Economic Trade Agreement, or CETA; a trade agreement between Canada and the European Union that aims to increase trade and investment between the two regions. One of the key principles of the agreement is that it must be fair and equitable for all parties involved. This means that the agreement is designed to benefit both Canada and the EU, and ensure that the trade relationship between the two is based on mutual benefit and respect.[117] By prioritising fairness and equity, CETA seeks to create a level playing field for businesses and individuals on both sides of the Atlantic, while promoting sustainable economic growth and development. However, there are several issues associated with this version of FET, which has led to considerable problems when interpreting and applying FET. Thus, in this section, my thesis will review the key literature that presents the problematic aspects of FET interpretation by arbitral tribunals.

While this solution is viable it can be criticised for its lack of clarity on the fair and equitable treatment (FET) clause. Meyer-Ohlendorf states that the FET clause is designed to protect foreign investors from discriminatory or arbitrary actions by the host government however the wording "the wording of paragraph 2 continues to use vague terminology, giving tribunals ample discretion in interpreting the clause".[118]

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[116] UNCTAD, 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II' (UNCTAD Series on Issues in International Investment Agreements II, 2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 3 February 2023.

[117] Flavien Jadeau and Fabien Gelinas, 'CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation' (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931503> accessed 2 February 2023.

[118] UNCTAD, *Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD Series on Issues in International Investment Agreements II, 2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 3 February 2023.

Furthermore, Wilhelmer argues that the clause may allow corporations to challenge legitimate government regulations, such as those established to protect public health or the environment.[119] Additionally, UNCTAD has concerns that the FET clause may be interpreted in a way that grants greater rights to foreign investors than to domestic corporations or individuals, undermining the sovereignty and the rule of law.[120] As such, further clarification and scrutiny of the FET clause is necessary to ensure that it does not undermine the role of the host state.

Hence, my thesis makes an original contribution to the existing literature by conducting a comprehensive study on Pakistan's international investment policy pertaining to FET. Another original contribution my thesis makes is to evidence the impact of the FET interpretation by arbitral tribunals on Pakistan. A final contribution my thesis makes is to extend the current solutions by providing a remedy to the problem and these solutions will be evaluated to fit within the Pakistan context. My thesis will build on this by proposing a clear and consistent interpretation of FET in Pakistan's BITs to minimise the challenges and foster a more positive investment environment for foreign investors.

2.5 Conclusion

This chapter has demonstrated that the development of FET in international investment law has been influenced by the desire to promote and protect foreign investment. These effects are not distinct from the problems that happen to shape the conversation in other continents with capital importing countries, such as those in Latin America. Thus, the negative impacts of foreign investment on the environment as well as the abuse of human rights triggered the development of measures to protect national sovereignty. The measures put forward are typically the result of the failure of

[119] Hanna Wilhelmer, 'The 'Right to Regulate' in CETA's Investment Chapter - Fair and Equitable Treatment, Expropriation and Interpretative Powers' (Seminar in International Law & European Law: Investment Law, 2014) <https://eur-int-comp-law.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/wilhelmer.pdf> accessed 25 February 2023.

[120] UNCTAD, *Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD Series on Issues in International Investment Agreements II, 2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 3 February 2023.

first generation IIAs to efficiently counteract the damaging consequences of the investments of foreign investors. Thus, Pakistan has to enjoin the global efforts at securing mechanism that to promote sustainable foreign investment.

Overall, this chapter provides evidence that the history of international investment law is marred by contemporary conversations on the fair and equitable treatment standard in IIAs. Thus, my proposition for a reconceptualization of FET in Pakistan IIAs is bolstered by the determination to revise and balance the regulatory space of the host state and the economic interests of the foreign investor. Furthermore, this is supported by the need to encourage more development in Pakistan via the creation of IIAs and organisations that complement the investment environment of Pakistan towards more sustainable development initiatives.

Chapter 3: Fair and Equitable Treatment in Pakistan's IIAs

3.1 Introduction

The previous chapters discussed the applicable laws to contextualise the issues of fair and equitable treatment (FET) in Pakistani Bilateral Investment Treaties (BIT). To further the objectives of this thesis, the purpose of this chapter is to undertake a detailed examination of the domestic, regional, and international legal position in relation to FET. This will entail a historical analysis of the standard to comprehend the evolvement of the provision as a means of resolving disputes. Subsequent parts of this chapter will focus on the interpretation of FET and the imbalance between the obligations of the host state and the rights of the foreign investor. This will be achieved through an examination of the FET under the equilibrium of the minimum standards of treatment within customary international law. In light of this, this chapter will investigate the roots of FET, examine the definition of FET, and explore the impact of this provision around the world. This examination involves an interrogation of jurisprudence, literature and State practice on FET.

3.2 History of the FET provision in Pakistan's International Investment Agreements

This chapter will commence with a discussion of the origins of FET in Pakistan's IIAs with the aim of informing the ongoing debate regarding the meaning of FET. FET is an old phenomenon which can be traced back to the eighteenth century.[121] Jurists invoked FET under the guise of general principles of justice and equity.[122] These principles were synonymously embedded in treaties to restrict the powers of sovereign states prohibiting the arbitrary seizure of property. In the words of Vascianne:

> "Together with other standards which have grown increasingly important in recent years, the fair and equitable treatment standard provides a useful

[121] Jeswald W. Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 105.
[122] Gerald D. Silver, 'Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "Of Their Choice"' (1989) 57 Fordham L Rev 765.

yardstick by which relations between foreign direct investors and governments of capital-importing countries may be assessed."[123]

An example of a treaty which has codified the principle of fair and equity was the Jay Treaty signed between the United Kingdom and the United States in 1794.[124] Thereafter, the principles of fairness and equity became a permanent fixture in investment treaties.

3.2.1 Treaties of Friendship, Commerce, and Navigation (FCNs)

The preoccupation with FET culminated in the creation of a series of Friendship Commerce and Navigation Treaties (FCNs) by the United States. FCNs assured countries of ''equitable treatment'' and ''most constant protection and security'' of the investments of foreign investors.[125] An example of this is the FCN concluded with Ethiopia:

> ''[E]ach Contracting Party shall at all times accord fair and equitable treatment to nationals…shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws''.[126]

The content of these treaties was construed to serve a commercial purpose adopting an economic and legal character.[127] Hence, FCNs encapsulated fair and equitable treatment in order to promote fair and equitable trade and investment.

3.2.2 The Havana Charter 1948

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[123] Stephen Vascianne, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' [1999] British Yearbook of International Law 99-164, 99.

[124] Britannica, "John Trumbull" (Encyclopedia Britannica, 12 November 2021) <https://www.britannica.com/event/Jay-Treaty> accessed 3 February 2022.

[125] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (OECD Working Papers on International Investment, 2004) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf> accessed 3 February 2022.

[126] Gerald D. Silver, 'Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "Of Their Choice"' (1989) 57 Fordham L Rev 765.

[127] Gerald D. Silver, 'Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "Of Their Choice"' (1989) 57 Fordham L Rev 770.

Fair and equitable treatment as the obligation first appeared in The Charter for an International Trade Organization, hereinafter the Havana Charter, of 1948[128]. Although, the Havana Charter did not come into effect it galvanised the creation of the General Agreement on Tariffs and Trade (GATT) which entered into force on 1st January 1948.[129] Governments feared the Havana Charter offered little protection to investments as it gave capital-importing countries power to control investment flows. As one expert, Andreas Lowenfeld, notably observed governments feared that ''investment provisions negotiated at a multilateral conference might express the lowest common denominator of protection to which any of the participants would be willing to agree''.[130] In relation to FET, the Havana Charter assured governments of the following:

> "The Organization may, in such collaboration with other inter-governmental organizations as may be appropriate:
>
> (a) make recommendations for and promote bilateral or multilateral agreements on measures designed.
>
> (i) to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another; (ii) to avoid international double taxation in order to stimulate foreign private investments;
>
> (iii) to enlarge to the greatest possible extent the benefits to Members from the fulfilment of the obligations under this Article;".[131]

Moreover, unsuccessful negotiations amongst developed and developing countries contributed to the demise of the Havana Charter prompting the creation of the Abs-Shaw cross Draft Convention on Investment Abroad in 1959,[132] hereinafter the Abs-Shawcross Draft Convention.

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[128] --, 'The Charter for an International Trade Organization' (World Trade Organisation, 21 November 2021) <https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm> accessed 25 August 2021.
[129] Henrik Horn, Petros Mavroidis, Hakan Nordström, 'Is the Use of the WTO Dispute Settlement System Biased?' (1999) <https://www.researchgate.net/publication/4838424_Is_the_Use_of_the_WTO_Dispute_Settlement_System_Biased> accessed 27 August 2021.
[130] Andreas F Lowenfeld, *International Economic Law* (2nd edn, OUP 2008) 482.
[131] --, 'The Charter for an International Trade Organization' (World Trade Organisation, 21 November 2021) < https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm)> accessed 25 August 2021.
[132] Abs Hermann and Hartley Shawcross, 'Draft Convention on Investments Abroad' in *The Proposed Convention to Protect Private Foreign Investment: A Roundtable* (1960) 9 Journal of Public Law 119, 124.

3.2.3 The Bogota Agreement 1948

Following the failure of the Havana Charter, the same countries commenced renegotiations. The American States adopted the Economic Agreement of Bogota. Article 22 of the Economic Agreement of Bogota states:

> "Foreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied".[133]

The term now appeared in the Economic Agreement of Bogota which took the initiative to propose a series of safeguards referring to fair and equitable treatment as "equitable treatment" in the agreement. Article 23 1948 Economic Agreement of Bogota reads:

> "They further declare that, with respect to employment and the conditions thereof, just and equitable treatment should be accorded to all personnel, national and foreign, and that the development of the technical and administrative training of national personnel should be encouraged."[134]

Despite the efforts of this agreement, the initiative was unsuccessful owing to a lack of support. However, it is worth noting that although Pakistan was not a signatory state to the agreement, the Bogota agreement started a practice which would later be adopted by Pakistan and other countries around the world.

3.2.4 US FCN Treaties Post-Havana Charter

Subsequently, in the 1930s, there was a paradigm shift in the fair and equitable terminology adopted by investment treaties. Charles Fenwick notes that "[t]he international standard of justice" referred to what "the civilized world has come to accept as just and equitable".[135] In other words, there is historical support for the notion that fair and equitable treatment frequented early treaty making practices. Thus, fair

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[133] John E. Lockwood, 'The Economic Agreement of Bogota' (1948) 42(3) *The American Journal of International Law* <https://www.jstor.org/journal/amerjintelaw> accessed 25 August 2022.
[134] Ibid.
[135] Andrew C. Blandford, 'The History of Fair and Equitable Treatment before the Second World War' (2017) 32(2) *ICSID Review - Foreign Investment Law Journal* 287, 290.

and equitable treatment bore prominence in investment relations between states and investors prior to World War II.

3.2.5 Abs Shawcross Draft Convention 1959

The Abs-Shawcross Draft Convention was a key development in this area. The Convention proposed protection of the investments of foreign investors. Article 1 explicitly placed the onus on each party stating that:

> "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the management, use and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures".[136]

Furthermore, the articles in the Abs-Shawcross Draft Convention placed considerable stress on the protection of foreign investments portraying favour towards capital importing countries.[137] The OECD states that "[t]he Draft Convention, although never opened for signature, represented the collective view and dominant trend of OECD countries on investment issues and influenced the pattern of deliberations on foreign investment in that period."[138] As a result, the Abs-Shawcross Draft Convention was regrettably unpopular amongst developing countries.

3.2.6 Draft Convention on the Protection of Foreign Property 1967

Nevertheless, this gave birth to a new convention, namely, the OECD Draft Convention on the Protection of Foreign Property of 1967.[139] The Draft Convention on the Protection of Foreign Property 1967 was produced by the Organisation for Economic Cooperation and Development. Article 1 makes a clear reference to fair and

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[136] Hermann Abs and Lord Shawcross, 'Abs Shawcross Convention' (International Investment Instruments: A Compendium) <https://www.international-arbitration-attorney.com> accessed 19 January 2022.
[137] Gerald D. Silver, 'Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "Of Their Choice"' (1989) 57 Fordham L Rev 767.
[138] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (OECD Working Papers on International Investment, 2004) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf> accessed 3 February 2022.
[139] *Ibid*.

equitable treatment as follows: “the standard required conforms to the ‘minimum standard’ which forms part of customary international law”.[140] This was used by most of the countries who had joined the OECD as a basis for IIA negotiations. Hence, counties using this definition are also following the definition supplied by the Draft Convention of 1967.

The sequence of events which gave birth to fair and equitable treatment demonstrates that treaties are responsible for the emergence of the standard and are primarily occupied with fair and equitable treatment. Multilateral agreements have made efforts to reference fair and equitable treatment in their text however BITs have continued to establish the standard in international investment law, becoming the main source for fair and equitable treatment. Thus, the next section analyses the emergence of the BIT system with reference to fair and equitable treatment.

3.3 The BIT programme and FET

On a regional level, multilateral agreements offer fair and equitable treatment to foreign investors. The earliest example of fair and equitable treatment in a multilateral context is in the Havana Charter of 1948 stipulating that the International Trade Organisation:

1. “Make recommendations for and promote bilateral or multilateral agreements on measures designed…
2. To assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another.”[141]

The purpose of this agreement was to promote the arrangements which would facilitate “an equitable distribution”.[142] However, due to issues that remained unresolved, some of the countries did not ratify the agreement bringing one of the first post war efforts on trade to an unsuccessful end. Nevertheless, post war efforts on

[140] OECD, *Organisation for Economic Co-operation and Development Draft Convention of the Protection of Foreign* Property (OECD 1963) < https://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf > accessed 3 February 2022.
[141] Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021) 71.
[142] Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (First published 2016, Cambridge University Press 2016) 62.

international trade and investment did not end there.[143] The Energy Charter 1994 contained a provision on fair and equitable treatment as follows:

> "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."[144]

Further initiative on a multilateral level produced the Draft OECD Multilateral Agreement on Investment (1998)[145] made a reference to "fair, transparent and predictable investment regimes complement and benefit the world trading system". The "General Treatment" Article stipulates:

> "Each contracting Party shall accord fair and equitable treatment and full and constant protection and security to foreign investments in their territories. In no case shall a contracting Party accord treatment less favourable than that required by international law".[146]

From the perspective of Pakistan, the number of multilateral agreements is relatively low compared to the number of BITs signed and in force.

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[143] OECD, *Organisation for Economic Co-operation and Development Draft Convention of the Protection of Foreign Property* (OECD 1963) < https://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf > accessed 3 February 2022.

[144] *Energy Charter Treaty* (16 April 1998) <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC_en.pdf> accessed 3 February 2022.

[145] *General Treatment Draft OECD Multilateral Agreement on Investment* (OECD 1998) <https://www.oecd.org/daf/inv/internationalinvestmentagreements/1947271.pdf> accessed 3 February 2022.

[146] *Ibid*.

3.3.1 Pakistan's Bilateral Investment Treaties

The main reason for choosing to study the FET standard in Pakistan is due to the fact that Pakistan attracts FDI from both developed and developing countries. Since the IIAs of Pakistan contain investment provisions, there is nothing stopping a foreign investor from a developed country or a developing country to bring a claim citing a breach of FET.

Pakistan made history in 1959 when it signed its first BIT with the Federal Republic of Germany namely the Pakistan Germany BIT 1959.[147] BITs become a leading regulatory system for Pakistan governing the relationship between foreign investors and Pakistan as a host state.[148] This is because BITs are important legal instruments governing the investments of foreign investors. This section analyses the evolution of Pakistan's BITs under three headings: BITS 1959 to 1980s, 1980s to 2000s, and 2000s to present. Each section has a distinct purpose to explore the emergence of the fair and equitable treatment standard in Pakistan. This section will describe the events that shaped the formation of the modern BIT system which bore the most substantive treaty standards in existence, including, the fair and equitable treatment provision. The next section commences with a discussion of fair and equitable treatment as a key instrument in the protection of foreign investment in Pakistan covering 1959 to 1980.

3.3.2 BITs 1959 – 1980s

The first BIT was signed on 25th November 1959 between Germany and Pakistan to "to intensify economic co-operation between the two States".[149] The second treaty signed during this era was the 1978 Pakistan-Romania BIT.[150] However, both countries did not mention fair and equitable treatment or make any reference to fairness or equity in the BIT. Once again, the fair and equitable treatment provision was absent from the text of the treaty. Pakistan signed these treaties with the aim of

[147] Germany – Pakistan BIT (1959).
[148] Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375600 > accessed 22 June 2022.
[149] Germany – Pakistan BIT (1959).
[150] Pakistan – Romania BIT (1978).

attracting investment into the country through the offer of protection of investments. However, the country undertook the initiative cautiously as the signing of BITs was a new phenomenon and the country was sceptical of foreign investors and their expectations. Thus, despite the popularity of fair and equitable treatment today, Pakistan did not explicitly mention fair and equitable treatment in bilateral investment treaties signed between 1959 and 1980.

No	Title	Signed	Date of entry
1	Germany – Pakistan BIT[151]	25/11/1959	28/04/1962
2	Pakistan – Romania BIT[152]	21/01/1978	31/10/1978

List of Bilateral Investment Treaties concluded by Pakistan between 1959 and 1980[153]

3.3.3 BITs 1980s to 2000s

The impetus for signing BITs continued into the 1980s and 1990s. Pakistan had a strong drive to facilitate and protect investments of foreign investors as it served the economic ambitions of the country during this period. However, the conventional approach Pakistan had to BIT making changed in the 1980s. Pakistan made the decision to include a provision on fair and equitable treatment in the Pakistan – Sweden BIT (1981)[154]. The decision to incorporate fair and equitable treatment into this BIT reflected the growing trend amongst capital importing countries towards protection of foreign investors.

Subsequently, Pakistan continued to sign further treaties with other developing countries becoming an industry leader in the region. During this period, Pakistan

[151] United Nations, 'Pakistan' (Investment Policy Hub, 2022) < International Investment Agreements Navigator UNCTAD Investment Policy Hub> accessed 19 January 2022.
[152] Ibid.
[153] Ibid.
[154] Pakistan – Sweden BIT (1981).

signed 38 BITs with developing and developed countries. The following countries signed BITs with Pakistan between the 1980s and 2000s: Sweden, Kuwait, France, Republic of Korea, Netherlands, China, Uzbekistan, Tajikistan, Spain, Turkmenistan, United Kingdom, Singapore, Turkey, Portugal, Romania, Switzerland, Malaysia, Kyrgyzstan, Azerbaijan, Bangladesh, United Arab Emirates, Iran, Islamic Republic of, Indonesia, Tunisia, Syrian Arab Republic, Denmark, Belarus, Mauritius, Italy, Oman, Sri Lanka, Australia, Japan, Belgium-Luxembourg Economic Union, Qatar, Philippines, Czechia, and Yemen.[155]

No	Treaty	Signed	Date of entry
1	Pakistan – Sweden BIT	12/03/1981	14/06/1981
2	Kuwait – Pakistan BIT	17/03/1983	Terminated
3	France – Pakistan BIT	01/06/1983	14/12/1984
4	Republic of Korea – Pakistan BIT	25/05/1988	15/04/1990
5	Netherlands – Pakistan BIT	04/10/1988	01/10/1989
6	China – Pakistan BIT	12/02/1989	30/09/1990
7	Pakistan – Uzbekistan BIT	13/08/1992	15/02/2006
8	Pakistan – Tajikistan BIT	31/03/1994	
9	Pakistan – Spain BIT	15/09/1994	26/04/1996
10	Pakistan – Turkmenistan BIT	26/10/1994	
11	Pakistan – United Kingdom BIT	30/11/1994	30/11/1994
12	Pakistan – Singapore BIT	08/03/1995	04/05/1995
13	Pakistan – Turkey BIT	16/03/1995	03/09/1997
14	Pakistan – Portugal BIT	17/04/1995	14/12/1996
15	Pakistan – Romania BIT	10/07/1995	08/08/1996
16	Pakistan – Switzerland BIT	11/07/1995	06/05/1996
17	Malaysia – Pakistan BIT	17/07/1995	30/11/1995
18	Kyrgystan – Pakistan BIT	26/08/1995	
20	Azerbaijan – Pakistan BIT	09/10/1995	
21	Bangladesh – Pakistan BIT	24/10/1995	

[155] United Nations 'Pakistan' (Investment Policy Hub, (26 August 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 26 August 2021.

22	Pakistan – United Arab Emirates BIT	05/11/1995	02/12/1997
23	Islamic Republic of Iran – Pakistan BIT	08/11/1995	27/06/1998
24	Indonesia – Pakistan BIT (1996)	08/03/1996	03/12/1996
25	Pakistan – Tunisia BIT (1996)	18/04/1996	
26	Pakistan - Syrian Arab Republic BIT (1996)	25/04/1996	04/11/1997
27	Denmark – Pakistan BIT (1996)	18/07/1996	25/09/1996
28	Belarus – Pakistan BIT (1997)	22/01/1997	
29	Mauritius – Pakistan BIT (1997)	03/04/1997	03/04/1997
30	Italy – Pakistan BIT (1997)	19/07/1997	22/06/2001
31	Oman – Pakistan BIT (1997)	09/11/1997	14/05/1998
32	Pakistan – Sri Lanka BIT (1997)	20/12/1997	05/01/2000
33	Australia - Pakistan BIT (1998)	07/02/1998	14/10/1998
34	Japan - Pakistan BIT (1998)	10/03/1998	29/05/2002
35	BLEU (Belgium-Luxembourg Economic Union) - Pakistan BIT (1998)	23/04/1998	07/08/2015
36	Pakistan - Qatar BIT (1999)	06/04/1999	

37	Pakistan - Philippines BIT (1999)	23/04/1999	07/05/1999
38	Czech Republic - Pakistan BIT (1999)	07/05/1999	

Figure 4: List of Bilateral Investment Treaties concluded by Pakistan between 1980s and 2000s[156]

3.3.4 BITs 2000s to Present

Up until the 2000s Pakistan viewed BITs as an investment mechanism due to the success Pakistan had with its BIT programme. In order to continue attracting investments, Pakistan signed BITs with the following countries: Egypt, Lebanon, Morocco, Bosnia and Herzegovina, Bulgaria, Kazakhstan, Lao People's Democratic Republic, Cambodia, Tajikistan, Germany, Kuwait, Turkey, and Bahrain.

No	**Treaty**	**Date of Signature**	**Date of Entry into Force**
29	Pakistan - Yemen BIT (1999)	11/05/1999	
30	Egypt - Pakistan BIT (2000)	16/04/2000	
31	Lebanon - Pakistan BIT (2001)	09/01/2001	28/03/2003
32	Morocco - Pakistan BIT (2001)	16/04/2001	
33	Bosnia and Herzegovina - Pakistan BIT (2001)	04/09/2001	14/05/2010
34	Bulgaria - Pakistan BIT (2002)	12/02/2002	
35	Kazakhstan - Pakistan BIT (2003)	08/12/2003	07/12/2009
36	Lao People's Democratic Republic - Pakistan BIT (2004)	23/04/2004	19/03/2007
37	Cambodia - Pakistan BIT (2004)	27/04/2004	
38	Pakistan - Tajikistan BIT (2004)	13/05/2004	29/07/2009
39	Germany - Pakistan BIT (2009)	01/12/2009	

Full text of each bilateral investment treaty available at: United Nations, 'Pakistan' (*Investment Policy Hub*, 2022) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 January 2022.

40	Kuwait - Pakistan BIT (2011)	14/02/2011	10/11/2013
41	Pakistan - Turkey BIT (2012)	22/05/2012	
42	Bahrain - Pakistan BIT (2014)	18/03/2014	07/10/2015

Figure 5: List of Bilateral Investment Treaties concluded by Pakistan from 2000s onwards[157]

While BITs were a plausible solution to growing the economy, Pakistan witnessed a decline in BITs during this period. It is important to stress that the last BIT Pakistan signed was in 2014.[158] This is because Pakistan faced its first investor-state case in 2001 causing the Government of Pakistan to halt the signing of all IIAs until further notice.[159]

3.4 Different Interpretations of Fair and Equitable Treatment in Pakistan

This section examines IIAs by categorising them into 3 types: IIAs that make no reference to FET, IIAs that refer to FET as an autonomous standard, and IIAs that refer to FET within the context of international law, in order to demonstrate that wording of fair and equitable treatment within these agreements is vague. Also, this section reveals that that the interpretation of FET has changed considerably in Pakistan treaty practice. This is important as the meaning given to fair and equitable treatment, as this chapter will demonstrate, has an impact on the outcome of a case.

3.4.1 No FET standard

Some IIAs make no reference to fair and equitable treatment. Recent examples of IIAs which make no reference to FET in their agreements include the New Zealand-Singapore FTA of 2001, the New Zealand-Thailand Closer Economic Partnership

[157] Full text of each bilateral investment treaty available at: United Nations, 'Pakistan' (*Investment Policy Hub,* 2022) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 January 2022.
[158] United Nations, 'Pakistan' (Investment Policy Hub, 2022) < International Investment Agreements Navigator | UNCTAD Investment Policy Hub> accessed 19 January 2022.
[159] The first case to be brought against Pakistan was *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13.

Agreement (EPA) (2005)[160], the Albania-Croatia BIT (1993),[161] and the Croatia-Ukraine BIT (1997)[162]. Even though these treaties do not refer to FET, the minimum standard under customary international law still exists therefore there is an expectation to provide equity and fairness.

IIAs with no reference to fair and equitable treatment in Pakistan are a small minority. The following table presents Pakistan IIAs where FET is absent from the agreements:

Country	Date of Signature	Date of Entry into Force
Philippines	23/04/1999	Not in force
Japan	10/03/1998	29/05/2002
Islamic Republic of Iran	08/11/1995	27/06/1998
Romania	10/07/1995	08/08/1996
Germany	25/11/1959	28/04/1962

Table 6: No FET standard in Pakistan BITs[163]

However, the decision to exclude FET in these agreements raises problems in investor-state relations. This absenteeism may cause uncertainty in its application as it is not clear whether these treaties guarantee FET as a component of customary international law. The purpose behind this decision seems to suggest that host States are reluctant to subject their regulatory measures to review. The notion is supported by UNCTAD who proposes that "[s]ilence on fair and equitable treatment may well indicate that the States parties to the agreement are unwilling to subject their regulatory measures to review under this standard."[164] Hence, it seems Pakistan

[160] New Zealand-Singapore Free Trade Agreement 2001.
[161] Albania-Croatia BIT (1993).
[162] Croatia-Ukraine BIT (1997).
[163] Full text of each bilateral investment treaty available at: United Nations, 'Pakistan' (*Investment Policy Hub,* 2022) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 January 2022.
[164] United Nations, 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II' (*UNCTAD*, 2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 26 August 2021.

removed FET from these agreements intentionally in order to reduce vulnerability to the risks attached to FET.

Even though the FET standard is absent from these treaties the minimum standard under customary international law still applies. However, the issue arises within the context of whether an investor can invoke the international minimum standard through Investor-State Dispute Settlement. [165] For example, in the India Singapore Comprehensive Economic Cooperation Agreement, ISDS is limited to situations "concerning an alleged breach of an obligation of the former under this Chapter".[166] The absence of this clause eliminates protection against unfair and unequitable treatment by the host state of the investor. On the other hand the New Zealand-Thailand Closer Economic Partnership Agreement's arbitration provision extends to disputes "with respect to a covered investment".[167] Nevertheless, Haeri states "in interpreting and applying the fair and equitable treatment standard autonomously, tribunals are not restricted by the methodology (and authoritative sources) for the identification of customary international law." [168] From Haeri's statement, it comes as a surprise that that the fair and equitable treatment standard is interpreted in an autonomous and broad manner which goes beyond the international minimum standard of treatment. There is a chance that fair and equitable treatment can be subjected to an expansive application. This provision has been construed broadly enough to encompass disputes claiming a breach of the minimum standard of treatment as well other claims. Thus, removing an FET obligation in their agreements widens the meaning of the FET standard in IIAs adding to the already problematic nature of the standard.

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[165] United Nations, 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II' (*UNCTAD*, 2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 26 August 2021.

[166] United Nations, 'https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdfIndia Singapore Comprehensive Economic Cooperation Agreement' (*UNCTAD*, 29 August 2005) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2707/download> accessed 26 August 2021.

[167] -- 'New Zealand-Thailand Closer Economic Partnership Agreement' (Asia Regional Integration Center, 7 July 2005) <https://aric.adb.org/fta/thailand-new-zealand-closer-economic-partnership-agreement> accessed 26 August 2021.

[168] Hussein Haeri, 'A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law' (2011) 27(1) Arbitration International 27.

Another reason as to why Pakistan may have made the decision to remove FET is to prevent FET from being invoked via other substantive protective standards. This variation poses another problem in that the absence of FET allows investors to invoke clauses from other agreements. For example, the Most Favoured Nation clause was invoked by the claimants in the case of *Bayindir v Pakistan*[169] as the tribunal accepted the argument put forward by the investors which allowed the investors to import the FET clause from one BIT to another BIT. The tribunal deliberated on this matter in their judgment stating that "it is true that the reference to FET in the preamble together with the absence of a FET clause in the Treaty might suggest that Turkey and Pakistan intended not to include an FET obligation in the Treaty."[170] Although this is the case, the Tribunal did not leave the matter there because the tribunal was not convinced by this argument stating that it does not rule "out the possibility of importing an FET obligation through the MFN clause expressly included in the Treaty."[171] The tribunal was of the opinion that the parties were aware of the importance of fair and equitable treatment which went against the suggestion that the parties did not intend to offer fair and equitable treatment to the foreign investor in this case. The tribunal said that the "fact that the States parties to the Treaty clearly contemplated the importance of the FET rather suggests the contrary."[172] The tribunal made it clear that the parties did not make the standard an "operative obligation", however, the preamble of the treaty permitted the tribunal to infer the MFN clause. The tribunal made this ruling "in the light of the Treaty's object and purpose pursuant to Article 31(1) of the VCLT [Vienna Convention on the Law of Treaties]."[173]

The approach adopted by the tribunal suggests that Pakistan's decision to exclude FET from the text of an agreement is deliberate. The purpose is to avoid succumbing to a level of protection offered by the standard to foreign investors which would expose the host states to the obligation. As a result of this, IIAs with no reference to FET permit foreign investors to invoke FET via the MFN clause. This means that tribunals have

[169] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, (ICSID Case No. ARB/03/29).
[170] *Ibid.*
[171] *Ibid.*
[172] *Ibid*.
[173] United Nations, 'Vienna Convention on the Law of Treaties' (*Treaty Series*, 27 January 1980) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> accessed 5 February 2022.

expanded the meaning of FET in IIAs through the creation of a loophole for foreign investors who are already accustomed to the nature of FET in IIAs. Thus, host states need to be cautious with BITs with no reference to FET as it can be invoke via another substantive protective standard.

Fair and equal treatment is a crucial component of IIAs. According to this standard, the host state must treat foreign investors equally and without bias. The premise that investors should anticipate a steady and predictable investment environment in which to operate forms the foundation of the concept of fair and equitable treatment. This includes safeguards against capricious or unfair acts by the host state and the assurance of an investment-friendly environment. Therefore, the absence of FET can have an effect on balancing the rights of foreign investors.

Moreover, numerous international investment treaties and agreements of Pakistan recognise the essential value of fair and equal treatment. Foreign investors are safeguarded by these agreements from the negative impacts of expropriation, unjust treatment, and discrimination. This actually implies that investors have a right to a fair trial, equal legal protection, and a level playing field with local investors. Hence, foreign investors have the right to have realistic expectations of the host state, and the actions or policies of the host state cannot violate such expectations with the inclusion of FET.

Furthermore, a crucial element of investment legislation is fair and equal treatment since it ensures that foreign investment is shielded against capricious or discriminatory measures. It establishes a benchmark for host nations' conduct and provides a mechanism for resolving disagreements between investors and states. In general, the idea of fair and equal treatment is crucial to luring in foreign investment and safeguarding investor rights. Investment law acknowledges the significance of this idea and incorporates it into the worldwide regulatory framework for investment operations. Therefore, this will affect the investments of foreign investors creating an imbalance.

Currently, there are no precedents in the domestic law of Pakistan in terms of the correctives to be adopted. However, for foreign investors in Pakistan, prior cases in domestic law are an essential component to setting the standards of fairness and equity. For court cases with identical facts, these precedents act as legal interpretations and guides. Foreign investors should be aware of the precedents

before making an investment in Pakistan because of its extensive legal system. The Abdul Razzaq case from 2006 is a superb illustration of a precedent that foreign investors should be aware of.[174] A person who questioned the government's right to lease property to a foreign oil firm prompted the lawsuit. The Supreme Court of Pakistan established a precedent stating that only land directly acquired from residents should be leased by the government and not land obtained from another state body.

3.4.2 Fair and equitable treatment as a Standalone Provision

An unqualified version of FET is another interpretation commonly found in IIAs. An unqualified version of FET does no more than state the obligation of a host State to accord fair and equitable treatment to protected investments. For example, some IIAs refer to FET by linking the standard to full protection and security. For example, Article 4 of the China-Switzerland BIT (2009) states:

> "Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."[175]

These provisions simply offer both standards of protection to foreign investors and do not modify the meaning of FET in IIAs. Pakistan has adopted this approach towards FET in its own BITs stipulating that the standard is an independent and autonomous standard. Those in favour of this interpretation argue fair and equitable treatment should be given its plain meaning. An example of this is in Article 3 of the Sweden – Pakistan (1981) which states "[e]ach Contracting State shall at all times ensure fair and equitable treatment to the investments made in that Contracting State by the investors of the other Contracting State."[176] The following Pakistan BITs contain a standalone FET provision:

Country	**Date of Signature**	**Date of Entry into Force**	**FET Provision**

[174] Naila Sarwar and Mohammad Shujaat Mubarik, Foreign Direct Investment (FDI) and Employment: A Case of Province of Punjab, Pakistan (2014) TEFL 1(4) TEFL <https://doi.org/10.18488/journal.29/2014.1.4/29.4.59.65> accessed 15 February 2022.
[175] Article 4 of the China-Switzerland BIT (2009).
[176] Article 3 of the Pakistan – Sweden BIT (1981).

Lao People's Democratic Republic	23/04/2004	19/03/2007	Investment or returns of investors of a Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment in accordance with the provisions of this agreement.
Belgium Luxembourg Economic Union	23/04/1998	07/08/2015	Each Contracting Party shall guarantee in its territory fair and equitable treatment for the investments made by investors of the other Contracting Party.
Australia	07/02/1998	14/10/1998	Each Party shall ensure fair and equitable treatment in its own territory to investments.
Oman	09/11/1997	14/05/1998	Either Contracting Party shall extend fair and equitable treatment to Investments made by nationals or companies of the other Contracting Party in its territory or maritime areas.
Azerbaijan	09/10/1995	Not in force	Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilisation of economic resources...
Turkmenistan	26/10/1994	Not in Force	Each Party shall ensure a fair and equitable regime in their territories in the respect of investments of investors of other Party and its activities concerning these investments.

Korea	25/05/1988	15/04/1990	Investments of nationals or companies of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall receive treatment which is fair and equitable and not less favourable than that accorded in respect of the investments and returns of the nationals and companies of the latter Contracting Party or of any third State.
Kuwait	17/03/1983	Not in Force	Each Contracting State shall at all times ensure fair and equitable treatment to the investments made in that Contracting State by the investors of the other Contracting State.

Table 7: No FET standard in Pakistan BITs[177]

According to these agreement, tribunals must assess whether the treatment received by the investor is fair and equitable. Treatment is fair when it is free from bias, fraud or injustice; equitable, legitimate … not taking undue advantage; disposed to concede every reasonable claim" and equitable when treatment is "characterised by equity or fairness … fair, just, reasonable."[178] Support for the plain meaning approach is expressed in the words of Mann at a time when the standard was commonly equated with the minimum standard. According to Mann nothing is acquired by bringing in the concept of the minimum standard and more than that it is misleading to bring in the minimum standard. Furthermore, he believes the terms "fair and equitable treatment" encompass conduct that goes further than the minimum standard of treatment offered

[177] Full text of each bilateral investment treaty available at: United Nations, 'Pakistan' (*Investment Policy Hub,* 2022) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 January 2022.

[178] Marcela Klein Bronfman, 'Fair and Equitable Treatment: An Evolving Standard' (March 2005) < Microsoft Word - 15_Marcela III.doc (mpil.de)> accessed 28 August 2021.

to protect foreign investors to a much greater extent which is more than the objective standard than any previously employed form of words. In his view, a tribunal is not concerned with a "minimum, maximum or average standard."[179] The tribunal is more concerned with the circumstances that gave rise to conduct considered to be fair and equitable or unfair and inequitable. Therefore, the definition of the fair and equitable standard is acknowledged materialistically, and the terms have to be examined and applied in an independent and autonomous manner.[180]

According to Mann, fair and equitable treatment constitutes an overriding obligation which incorporates other standards, including Most Favoured Nation, and the purpose of these standards is to ensure fair and equitable treatment is not impeded. Therefore, the view of Mann points to an independent fair and equitable treatment standard. This approach suggests that the plain meaning approach is "no doubt entirely consistent with canons of interpretation in international law."[181] The leading case advancing this theory is *Pope & Talbot Inc. v. Government of Canada*[182]. In this case, the tribunal suggested that "that those elements [of fair and equitable treatment and full protection and security] are included within the requirements of international law…"[183] The ruling in this case establishes fairness as an addition to the requirements of international law based on a review of BITs before and after NAFTA which granted a standard beyond the minimum standard of treatment. Thus, the decision of the tribunal reaffirms the position of fair and equitable treatment as a self-contained standard.

However, Tribunals are faced with the difficult task of ascertaining how to interpret this version of FET. There appears to be two views this matter. The view is that FET should be equated to the minimum standard under customary international law while the second school believes it should be interpreted on a case-by-case basis in accordance with the principles of fairness and equity. Evidence suggests that this formulation of FET has been equated with the minimum standard of treatment.

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[179] Marcela Klein Bronfman, 'Fair and Equitable Treatment: An Evolving Standard' (March 2005) < Microsoft Word - 15_Marcela III.doc (mpil.de)> accessed 28 August 2021.
[180] *Ibid*.
[181] Stephen Vasciannie, 'Fair and Equitable Treatment in International Investment Law and Practice' (1999) 70 BYIL 99, 103.
[182] *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL Arbitration (Award on the Merits, 26 April 2001).
[183] *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL Arbitration (Award on the Merits, 26 April 2001), para 111.

Accordingly, the fact that the foreign investor and the host state have made it necessary to specify that the fair and equitable treatment standard is an obligation rather than relying on a reference to international law, invoking a vague concept such as the minimum standard of treatment is "probably evidence of a self-contained standard."[184] From these reports, it is clear that the FET standard should be aligned with the minimum standard of treatment under customary international law. However, it is important to note that these agreements had no legal effect which suggests tribunals may have opted for an interpretation of FET with reference to the notions of fairness and equity delinking any reference to customary international law.

There appears to be two schools of thought in relation to this issue. The first school proposes that the standard should be equated to the minimum standard under customary international law. This notion was commented on in 1984 when the OECD Committee on International Investment and Multinational Enterprises stated, "[a]ccording to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated."[185] Although, this report may have influenced the decisions of tribunals to link fair and equitable treatment to the minimum standard it should be noted that this report has no legal effect.

On the other hand, the second school of thought interprets fair and equitable treatment on a case-by-case basis in light of the elements of fairness and equity. This assessment made by Dolzer who argues fair and equitable treatment is calculated according to whether the treatment received by the foreign investor is fair and equitable.[186] In this regard, the standard should be interpreted in accordance with the object and purpose of a treaty. This matter was discussed by the tribunal in *Saluka Investments v Czech Republic*[187]. The tribunal explained that the difference that exists between customary international law and fair and equitable treatment is limited to the

[184] OECD, Draft Convention on the Protection of Foreign Property (OECD, 1967) <https://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf> accessed 28 August 2021.
[185] Peter Costello, 'The OECD Guidelines for Multinational Enterprises' (OECD 2000) <https://www.giaccentre.org/Untitled_Document.pdf> accessed 28 August 2021.
[186] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2008) 124. See also UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements* (Vol. III UNCTAD/ITE/IIT/II, UN Pub Sales No. E.99.II.D.15, 2009) 40.
[187] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006.

standard contained in Article 3.1 of the Treaty. This article removes any reference to customary international law which means that this article does not have the same problems experienced under treaties which link fair and equitable treatment to the customary international law. The fact that the issues that arise under the treaties point to a desire to avoid the difficulties posed by tying fair and equitable treatment to customary international law is the reason it was not included in the treaty. Therefore, the treaty points to the autonomous nature of "fair and equitable treatment" standard and this has been included in Article 3.1 of the Treaty.[188] However, this approach is problematic because the terms fairness and equity are subjective in nature which are evolving concepts. This means the meaning changes to reflect modern times. Thus, the meaning of fair and equitable as an independent standard is difficult to comprehend as the definition evolves over the time to circumvent existing legal precedents.

3.4.3 FET and public international law

The third interpretation of FET in IIAs is a reference to public international law. For example, Article 3(2) of the Croatia – Oman BIT (2004) states that the "[i]nvestments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment in accordance with international law and provisions of this Agreement."[189] UNCTAD proposes that this interpretation "prevents the use of a purely semantic approach to the interpretation of the FET standard and is meant to ensure that the interpreter uses principles of international law, including, but not limited to, customary international law."[190] Another example of this type of formulation is illustrated in Article 2(3)(a) of the Bahrain-United States BIT (1999) which stipulates that "[e]ach Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international

[188] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006.
[189] Article 3(2) of the Croatia – Oman BIT (2004).
[190] UNCTAD, Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements (Vol. III UNCTAD/ITE/IIT/II, UN Pub Sales No. E.99.II.D.15, 2009) 40.

law."[191] This suggests that this version is not restricted to international law but rather lays the parameter for the level of protection that can be claimed by an investor. Nevertheless, the reference to international law in the treaty establishes that tribunals have more room to interpret FET.[192] Thus, this formulation gives a wide discretion to arbitrators to interpret the standard in a broad manner thereby extending the meaning of the FET provision in treaties which is another reason Pakistan excluded this interpretation. Hence, this approach restricts the application of the fair and equitable treatment to principles of public international law which includes customary international law. It is important to stress that Pakistan does not have any IIAs which link FET to public international law. Even though this interpretation is absent from Pakistan's IIAs, it is important to understand why Pakistan should exclude this option.

3.4.4 FET and Minimum standard under Customary International Law

The fourth interpretation of FET is linking FET to the minimum standard under customary international law. The relationship between FET and customary international law was commonly discussed within the context of NAFTA. Article 1105 (1) of NAFTA agreement seeks to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".[193] This version of FET was contested by the parties in the case of *Pope and Talbot v Canada*[194] where the tribunal held that FET is an "additive" to the international minimum standard of treatment. The tribunal commented that another possible interpretation of the "presence of the fairness elements in Article 1105 is that they are additive to the requirements of international law." [195] In essence, the tribunal argued that a foreign investor was entitled under NAFTA to the minimum standard of treatment under international law. In addition to this, the tribunal asserted

[191] UNCTAD, 'Bahrain - United States of America BIT (1999)' (*Investment Policy Hub*, 1999) <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/362/bahrain---united-states-of-america-bit-1999-> accessed 18 August 2022.
[192] UNCTAD, Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements II (2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 19 August 2022.
[193] --, 'North American Free Trade Agreement' (1992) <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng> accessed 18 August 2024..
[194] *Pope & Talbot Inc. v The Government of Canada* (UNCITRAL, Award on the Merits of Phase 2, 10 April 2001).
[195] *Pope & Talbot Inc. v The Government of Canada* (UNCITRAL, Award on the Merits of Phase 2, 10 April 2001) para 115.

that this included fairness as part of the international minimum standard of treatment. Even though the tribunal acknowledged the fact that the element of fairness in Article 1105 is a part of international law, the tribunal stressed that the fairness element was an addition to the elements of international law. The tribunal concluded that the Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be "egregious", "outrageous" or "shocking" or "otherwise extraordinary."[196]

This wording eventually entered signatory countries' BITs which came into force after the NAFTA agreement. The influence of the notes could be found in subsequent IIAs of countries not privy to the NAFTA agreement. For instance, the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (2009) Chapter 11, Article 6 Treatment of Investment states that:

> "1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security.
>
> 2. For greater certainty: (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings; (b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investment; and (c) 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 under customary international law, and do not create additional substantive rights.
>
> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."[197]

[196] *Pope & Talbot Inc. v The Government of Canada* (UNCITRAL, Award on the Merits of Phase 2, 10 April 2001).
[197] --, 'ASEAN-Australia-New Zealand Free Trade Area' (2009) <https://asean.org/wp-content/uploads/2012/05/AANZFTA-legal-text-PRINTED-Signed.pdf> accessed 18 August 2024.

Another example is the Agreement between Japan and the Republic of the Philippines for an Economic Partnership (2006) Article 91:

> General Treatment Each Party shall accord to investments of investors of the other Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. Note: This Article 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 the other Party. 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. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not ipso facto establish that there has been a breach of this Article.[198]

Another example of this is the Rwanda-United States BIT (2008):

> “Article 5 Minimum Standard of Treatment
>
> Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this

[198]--, ‘Philippines-Japan Economic Partnership Agreement’ (2006) <https://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf> accessed 18 August 2024.

Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article. 9 Article 5 shall be interpreted in accordance with Annex A."

Annex A Customary International Law The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."[199]

From these examples, it is clear that the definition provided by NAFTA has made its way to the extensive network of BITs concluded by developed and developing countries. The next section examines state practice in relation to FET and international law. In the Notes and Comments to Article 1 of the OECD Draft Convention on the Protection of Foreign Property the committee that is responsible for drafting this document stated that it is "well established general principle of international law that a State is bound to respect and protect the property of nationals of other States".[200] In the following words:

"The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that – subject to essential security interests – protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the "minimum standard" which forms part of customary international law".[201]

[199] Article 5 of the Rwanda-United States BIT (2008).
[200] Article 1 of the OECD Draft Convention on the Protection of Foreign Property.
[201] Article 1 of the OECD Draft Convention on the Protection of Foreign Property.

This supports the notion that FET is a part of the minimum standard of treatment as the committee has specifically linked FET to the minimum standard of treatment. However, as mentioned preciously, earlier tribunals defined FET in different ways in order to clarify the NAFTA version. The NAFTA Free Trade Commission consisting of member states signatory to NAFTA published a note defining the interpretation of the minimum standard through the "NAFTA Free Trade Commission: Notes of interpretation of certain Chapter 11 provisions, 31 July 2001" as follows:

> "Minimum Standard of Treatment in Accordance with International Law
>
> 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 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.
>
> 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).[202]

The implication of the wide interpretation of this definition was examined in the case of *ADF Group Inc. v. United States of America*[203] where the United States opined that the NAFTA version is not "frozen in time" and it does evolve. The link between FET and customary international law was examined by Canada when NAFTA came into force. In the words of Canada, Article 1105 offers treatment in accordance with international law as it is intended to provide a minimum standard of treatment of investments of NAFTA investors therefore Article 1105 provides for a "minimum absolute standard of treatment, based on long-standing principles of customary international law".[204]

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[202] --, 'North American Free Trade Agreement' (1992) <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng> accessed 18 August 2024.
[203] *ADF Group, Inc vs. United States of America*, ICSID Case No. ARB(AF)/00/1.
[204] *Ibid*, para 110.

The view expressed by Canada aligned with the view of the US that the minimum standard does evolve. Within the context of the *ADF Group Inc. v. United States of America Canada* explained that the minimum standard is in fact 'frozen in amber at the time of the Neer decision'.[205] On a similar note, Mexico, modified the explanation of the submission made by the *Pope & Talbot* Tribunal stating that "the conduct of government toward the investment must amount to gross misconduct, manifest injustice or in the classic words of the Neer claim, an outrage, bad faith or the wilful neglect of duty"[206] and that "the standard is relative and that conduct which may have not violated international law [in] the 1920s might very well be seen to offend internationally accepted principles today".[207] The BITs concluded by the US have been "approved by its Senate on the basis of submissions containing the notice that the general treatment provision incorporated a minimum standard of treatment based on customary international law."[208] In the 1994 US Model Treaty, Article II (3) (a) stipulated that:

> "Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international law".[209]

The innovative US Model BIT of 2004 in Article 5 as well as the US Free Trade Agreements in the Chapter on Investment take it further by attempting to give a definition of the minimum standard of treatment. This chapter states that:

> "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. For greater certainty [the previous paragraph] prescribes the customary international minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments …". [This] obligation to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory

[205] *ADF Group, Inc vs. United States of America*, ICSID Case No. ARB(AF)/00/1, para 113.
[206] *Ibid*, para 180.
[207] *Ibid*.
[208] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (OECD Working Papers on International Investment, 2004/03) <http://dx.doi.org/10.1787/675702255435> accessed 20 August 2022.
[209] Article II (3) (a) of the US Model BIT of 2004.

proceedings in accordance with the principle of due process embodied in the principal legal systems of the world…" [210]

There is an further interpretative note that exists in the US Free Trade Agreements expresses that the parties' shared understanding of the meaning of "customary international law" is "the general and consistent practice of States that they follow from a sense of legal obligation"… and "the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens".[211] This endorses the view that the minimum standard is part of customary international law and not a standard that is frozen in time.

Canada has also used similar words in their Foreign Investment Protection and Promotion Agreement (FIPA) model by connecting the FET to the minimum standard. Canada asserted that the minimum standard of treatment guarantees that the investments of foreign investors, will be treated according to fair and equitable treatment and the minimum standard of treatment acts as a "floor" to make sure that the treatment of a foreign investment does not fall short of treatment regarded as suitable within the guise of standards considered acceptable under customary international law.[212]

Furthermore, support for this view can be detected in the publications of international organisations. For example, The United Nations Centre on Transnational Corporations issued a statement stating that the "fair and equitable treatment is a classical international law standard"[213] and "classical international law doctrine considers certain elements to be firm ingredients of fair and equitable treatment, including non-discrimination, the international minimum standard and the duty of protection of foreign

[210] Article 5 of the US Model BIT of 2004.
[211] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (OECD Working Papers on International Investment, 2004/03) <http://dx.doi.org/10.1787/675702255435> accessed 20 August 2022.
[212] Dina Prokic and Kiran Nasir Gore 'Release of the New Canadian FIPA Model: Reflections on International Investment and ISDS at a Crossroads' (Kluwer Arbitration Blog, 31 May 2021) <https://arbitrationblog.kluwerarbitration.com/2021/05/31/release-of-the-new-canadian-fipa-model-reflections-on-international-investment-and-isds-at-a-crossroads/#:~:text=The%202021%20Model%20expands%20on,equality%2C%20environmental%20protection%20and%20labour> accessed 28 August 2022.
[213] *Ibid.*

property by the host State"[214]. Likewise, the World Trade Organisation stated that it is accepted that FET is embedded in customary international law "to cover the principle of non – discrimination, along with other legal principles related to the treatment of foreign investors, but in more abstract sense than the standards of MFN and national treatment".[215] In this section, my thesis has examined the role of state practice in order to exhibit that the interpretation of the FET standard within the context of the minimum standard is unclear.[216] The different interpretations given to the FET standard in relation to the minimum standard by the US and Canada demonstrates that the countries have struggled to reach consensus on the topic.

3.5 FET and ISDS cases

The task of this section is to demonstrate how the wide interpretation FET in IIAs has made it easy for foreign investors to sue host states. In *Oil Platforms (Iran v. United States)*[217] the tribunal stated that "[t]he key terms 'fair and equitable treatment to nationals and companies' and 'unreasonable and discriminatory measures' are legal terms of art well known in the field of overseas investment protection, which is what is there addressed…".[218] The debate regarding the NAFTA definition questions whether the interpretation of FET is limited to the interpretation given to it in the 20th century or whether it has evolved over the years as it has been influenced by the increase of BITs. In particular, the tribunal in the *Neer* case explains the meaning of the minimum standard of treatment. The actions of a government should be tested according to the standards under international law and the treatment of a foreign investor should be amount to an "outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[219]

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[214] Dina Prokic and Kiran Nasir Gore 'Release of the New Canadian FIPA Model: Reflections on International Investment and ISDS at a Crossroads' (Kluwer Arbitration Blog, 31 May 2021) <https://arbitrationblog.kluwerarbitration.com/2021/05/31/release-of-the-new-canadian-fipa-model-reflections-on-international-investment-and-isds-at-a-crossroads/#:~:text=The%202021%20Model%20expands%20on,equality%2C%20environmental%20protection%20and%20labour> accessed 28 August 2022.

[215] UNCTAD, '*Fair and Equitable Treatment: UNCTAD Series on International Investment Agreements*' (2009) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 28 August 2022.

[216] *Ibid*.

[217] *Oil Platform (Iran v United States)* (Merits) [1996] ICJ Rep 803.

[218] *Oil Platform (Iran v United States)* (Merits) [1996] ICJ Rep 803, para 39.

[219] *Neer v. Mexico case* (1929) 4 RIAA 60, para 4.

Based on the work of Roth and Borchard, there are two stages to the international minimum standard. In the first stage, as pointed out by Nielson in *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926), hereinafter the Neer case, the actions of the state '… should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.'[220] In the second stage, the treatment should be imitated in the practice of the State. Some jurisprudence reveals that the minimum standard reflected in the *Neer* case does not represent modern treaty rules. In *Mondev v Canada*[221] the tribunal held "the content of the minimum standard today cannot be limited to the content of customary international law as recognized in arbitral decisions in the 1920s".[222] The tribunal stated that "it would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the Neer tribunal (in a very different context) meant in 1927".[223] The tribunal ruled that the Article 1105 (1) did not give a NAFTA tribunal an unencumbered choice to make its own decision on a subjective manner that which it deems to be 'fair' and 'equitable' in relation to the circumstances of a case. The Tribunal has to abide by the minimum standard as recognised by State practice as well as the jurisprudence of arbitral tribunals. This means that the tribunal is not free to simply implement its own version fair and equitable treatment without referring to the sources of law".[224]

In another case, *United Parcel Service of America Inc. v. Government of Canada*[225], the tribunal agreed that FET is not an additive of the international minimum standard of treatment. In this case, the tribunal argued that that the "obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard"[226] and instead said fair and equitable treatment should be included in the minimum standard.[227] This issue was, also, contested in *ADF v. United States*[228] where the

[220] *Neer v. Mexico case* (1929) 4 RIAA 60, para 4.
[221] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2.
[222] *Ibid*, para 108.
[223] *Ibid*, para 117.
[224] *Ibid*, para 119.
[225] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1.
[226] *Ibid*, para 95.
[227] *Ibid*.
[228] *ADF Group, Inc vs. United States of America*, ICSID Case No. ARB(AF)/00/1.

tribunal held that customary international law is not a "static photograph"[229] of the minimum standard of treatment as it appeared in the year 1927 in the case of Neer. The tribunal further contended that customary international law and the minimum standard of treatment are constantly undergoing development in international investment law.[230] As such, the tribunal asked whether the US measures were consistent with the standards under customary international law where the treatment required by the host State accorded "fair and equitable treatment" as well as "full protection and security" to the foreign investments.[231] In response to this, the tribunal explained "[w]e are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited contexts) to accord fair and equitable treatment and full protection and security to foreign investments." [232] The tribunal considered the notion that the foreign investor did not show that the aforementioned requirement had been brought into the mass of customary international law as a result of BITs in existence.

The issue was further addressed in the case of *Loewen Group, Inc and Raymond L. Loewen v. United States of America*[233] where the tribunal held that the "effect of the Commission's interpretation is that 'fair and equitable treatment' and 'full protection and security' are not free-standing obligations." [234] The tribunal was of the opinion that that fair and equitable treatment is an obligation which is recognised by customary international law only. Equally, a breach of Article 1105(1) does not mean that it will breach another provision in NAFTA. In essence, the tribunal interrogating the viewpoints of the tribunals in *Metalclad*, *S.D. Myers* and *Pope & Talbot* to be disregarded because they display opposing views to the tribunal in *Loewen*.

As discussed earlier, one of the main issues with the minimum standard of treatment is in relation to the meaning of the standard within the context of NAFTA. According to Article 1105, "[e]ach Party shall accord to investments of investors 'of another Party treatment in accordance with international law, including fair and equitable treatment

[229] *ADF Group, Inc vs. United States of America*, ICSID Case No. ARB(AF)/00/1, para 121.
[230] *Ibid*.
[231] *ADF Group, Inc vs. United States of America*, ICSID Case No. ARB(AF)/00/1.
[232] *Ibid*, para 183.
[233] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3.
[234] *Ibid*, para 128.

and full protection and security."[235] The NAFTA regime has proposed a refined approach to fair and equitable treatment standard by connecting it to the minimum standard under customary international law. In light of this, the tribunal in *Pope & Talbot v. Canada*[236] held that "the fairness elements [of Article 1105 of the NAFTA] must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law"[237]. In *S.D. Myers Inc v. Canada*[238] the tribunal held that a breach of Article 1105 "occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective." [239] Thus, this determination has to be made in the light of the fact that a high level of deference in international law covers the right of national establishments to standardise subjects within their jurisdictions.[240]

Furthermore, Article 1105 articulates that the minimum standard of treatment exists within the premise of customary international law. As such, the notes exist to ensure the interpretation of FET does not go beyond the minimum standard under customary international as tribunals are well versed with the notion of expansive interpretations of FET. Furthermore, the tribunal in *Waste Management v Mexico*[241] deliberated on the minimum standard under customary international law within the context of FET. The tribunal explained that the minimum standard of treatment is overstepped as a result of actions attributed to the host state. These actions are damaging to the foreign investor if the actions of the state are "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."[242]

The approach the tribunal adopted in *Waste Management* was followed in *GAMI v. Mexico*[243] where the tribunal observed that the suggestions came from the analysis in

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[235] --, '*North American Free Trade Agreement*' (1992) <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng> accessed 28 August 2022.
[236] *Pope & Talbot Inc. v The Government of Canada* (UNCITRAL) (Award on the Merits, 10 April 2001).
[237] *Ibid*, para 110 – 111.
[238] *S.D. Myers Inc v Canada* (UNCITRAL) Award, 13 November 2000.
[239] *Ibid*, para 263.
[240] *Ibid*.
[241] *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3.
[242] *Ibid*, para 95.
[243] *Gami Investments Inc v Mexico* (UNCITRAL) (Award, 15 November 2004).

the *Waste Management* case.[244] However, the tribunal in the case of *Merrill v Ring*[245] went in the opposite direction to the approach taken by the tribunals in previous cases. The tribunal said the requirement that a foreign investor should be treated fairly and equitably in matters relating to "business, trade and investment" is part of the prevalent and unswerving practice as reflected in customary international law as a legal obligation. The tribunal acknowledged that the title given to the fair and equitable treatment standard is not significant. It is more important that the standard provides a level of protection that prohibits acts or behaviour that may breach the elements of fairness, equity and reasonableness. In addition, the tribunal asserted that is difficult to define the concepts of fairness, equitableness and reasonableness as these elements need to be applied to the facts of each case. Thus, fair and equitable treatment makes it possible to make an act or behaviour unfair, inequitable or unreasonable even though it is difficult to delineate the standard at present.[246]

Furthermore, in *American Manufacturing & Trading (AMT) (US), Inc. v. Republic of Zaire*[247], the tribunal stated that Zaire "manifestly failed to respect the minimum standard required of it by international law"[248] explaining that the "treatments of protection and security of investment required by the provisions of the BIT of which AMT is beneficiary must be in conformity with its applicable laws and must not be any less than those recognised by international law."[249] The tribunal commented that this requirement is important to determine the level of responsibility the host state is required to have in such a situation. It is an obligation which must not be inferior to the international minimum standard of treatment as required by international law.

In this case, Zaire argued that the political situation of the country could be cited as a defence. Zaire argued that "[n]o one on earth could ignore the fact that for the past four years, the Republic of Zaire has been going through a most painful and unfortunate period in its history."[250] The republic of Zaire requested a "benevolent"[251]

[244] *Gami Investments Inc v Mexico* (UNCITRAL) (Award, 15 November 2004).
[245] *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1.
[246] *Ibid*, para 210.
[247] *American Manufacturing & Trading, Inc. (AMT) (US) v. Republic of Zaire*, ICSID case No. ARB/93/1.
[248] *Ibid*, para 6.10.
[249] *Ibid*, para 6.11.
[250] *Ibid*, para 7.17.
[251] *Ibid*.

and "compassionate"[252] treatment from the parties including those that had experienced disastrous consequence. This is because at one point in time these people were relishing in a good situation until the political situation of the State of Zaire overturned.[253] The tribunal did not think it was necessary to take this into account in order to deliberate on whether a breach of FET had occurred in this situation stating that the Tribunal prefers at this stage to concern itself with the method of calculation of the amount of compensation to which AMT is entitled because of injury sustained.[254] As such, the tribunal negated the political situation of Zaire and instead considered it part of compensation. This case is an example of a situation developing countries often find themselves in where tribunals impose awards that developing countries cannot afford. It is distressing that the tribunal did not consider the political turmoil that had taken over the country for decades and instead ordered Zaire to pay an amount which increased the financial burden for the country.

In another case, namely, *CME (Netherlands) v. Czech Republic*[255] the tribunal held "[t]he standard for actions being assessed as fair and equitable are not to be determined by the acting authority in accordance with the standard used for its own nationals. Standards acceptable under international law apply".[256] The tribunal had to consult the work of an academic in order to find the standard conventional within international law. According to these cases, the tribunals are of the opinion that the resources of a host country cannot be used as aground for determining the liability of a host state within international law. This suggests that the resources of a host country cannot be measured. This implies that the tribunal are denying a host country from making a claim with regards to the lack of resources in their country. This is an important factor because essentially the resources of a country determine whether they can satisfy treaty obligations towards the foreign investors or if the host state is going to struggle to meet them.

The custom of equating fair and equitable treatment to the minimum standard under customary international law has become increasingly important in Pakistan. Often this

[252] *American Manufacturing & Trading, Inc. (AMT) (US) v. Republic of Zaire*, ICSID case No. ARB/93/1, para 7.17.
[253] *Ibid*, para 7.18.
[254] *Ibid*, para 7.12.
[255] *CME (Netherlands) v. Czech Republic (Partial Award)* (13 September, 2001).
[256] *Ibid*, para 611.

relationship is discussed within the context of the NAFTA agreement. Today, this text is widely cited in relation to the application of the minimum standard and fair and equitable treatment and Pakistan is not an exception to this trend. The following table displays the Pakistani IIAs which link FET to the minimum standard:

Country	**Date of Signature**	**Entry into Force**	**FET Provision**
Turkey	22/05/2012	Not in Force	Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with international law minimum standard of treatment, including fair and equitable treatment and full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair the management, maintenance, use, operation, enjoyment, extension, sale, liquidation or disposal of such investments by unreasonable or discriminatory measures.
Kuwait	14/02/2011	10/11/2013	Investments of investors of each Contracting State shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting State in a manner consistent with recognized principles of International Law and the provisions of this Agreement. Neither Contracting State shall in any way impair by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting State. Each

			Contracting State shall observe any obligation it may have entered into with - regard to investments of investors of the other Contracting State.
Germany	01/12/2009	Not in Force	Each Contracting State shall in its territory in any case accord investments by investors of the other Contacting State, fair and equitable treatment as well as fall protection and security in accordance with customary international law. Returns from the investment and, in the event of their re-investment, the returns therefrom shall enjoy the same protection as the investment.

FET standard in Pakistan BITs[257]

The table represents the Pakistani IIAs concluded with developed and developing countries as well as the relevant FET provisions in these IIAs.

Linking of FET to the minimum standard under customary international law creates problems for Pakistan as the definition of the minimum standard is unclear. UNCTAD examined the meaning of the minimum standard concluding that this standard is in itself "indeterminate, lacks a clearly defined content and requires interpretation."[258] This is the result of the decisions tribunals have made in cases which fail to reach consensus on the proper interpretation of the minimum standard under customary international law. This means that to some extent this version of FET is unpredictable despite the steps have been taken to determine the nature of FET.

The observations made by the tribunals in these cases indicate that the nature of the minimum standard changes to reflect state practice. Despite these observations, the

[257] Full text of each bilateral investment treaty available at: United Nations, 'Pakistan' (*Investment Policy Hub,* 2022) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 January 2022.
[258] United Nations, 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II' (*UNCTAD*, 2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 26 August 2021.

standard in the *Neer* case remains substantially influential in arbitral practice. In *Cargill v Mexico*[259] the tribunal held that the Tribunal has made an observation that a trend in previous NAFTA awards, "not so much to make the holding of the Neer arbitration more exacting, but rather to adapt the principle underlying the holding of the Neer arbitration to the more complicated and varied economic positions held by foreign nationals today."[260] Another problem with the minimum standard concerns its relationship with fair and equitable treatment under customary international law. Customary international law requires states to comply with the minimum standard of treatment which governs the treatment of foreign investors.[261] Thus, this treatment is often linked to fair and equitable treatment as one of the prerequisites required by customary international law.

It can therefore be argued that the relationship between the provision and the minimum standard is not self-evident. For example, in *Harry Roberts (U.S.A.) v United Mexican States*[262] the United States and Mexico General Claims Commission explained that the fair and equitable treatment of detainees "is not the ultimate test of the propriety of the acts of the authorities in the lights of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standard of civilisation".[263] Hence, the problem arises because the compendium of arbitral practice denotes that fair and equitable treatment is an embodiment of the minimum standard.

The refined approach to fair and equitable treatment has resulted in an expansive interpretation of the standard. In this context, it should be noted that tribunals have unequivocally rejected the union of the minimum standard and fair and equitable treatment in modern jurisprudence.[264] This is illustrated in *Vivendi v Argentina*[265] where the Tribunal rejected the respondent's argument that fair and equitable treatment equated the minimum standard under customary international law stating that the standard of treatment should be decided based on the conduct of the parties

[259] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2.
[260] *Ibid*, para 284.
[261] *Ibid*, para 134.
[262] *Harry Roberts (U.S.A.) v United Mexican States* (1926) 4 R.I.A.A. 77.
[263] *Ibid*, para 8.
[264] United Nations, 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II' (*UNCTAD*, 2012) <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 26 August 2021.
[265] *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3.

taking all the circumstances into account.[266] Hence, it is essential for Pakistan to exercise caution in applying the minimum standard of treatment under customary international law.

This will be achieved by examining how the FET provision is defined by studying the provision in each of Pakistan's IIA. The main reason for choosing to study the FET standard in Pakistan provisions is due to the fact that Pakistan attracts FDI from both developed countries and developing countries. Since the IIAs of Pakistan contain investment provisions there is nothing stopping a foreign investor from a developed country or a developing country from bringing a claim citing a breach of FET. In other words, investor state disputes can arise from the mere mention or inclusion of FET in Pakistan IIAs which corroborates with Pakistan's own experience.

3.6 Other Substantive standards within FET

This section examines the different substantive contents aligned with FET under the following headings:

1. Denial of Justice
2. Arbitrary, unreasonable and discriminatory measures
3. Breach of treaty norm
4. Level of development
5. Legitimate expectations
6. Full Protection and Security
7. Due Process

3.6.1 Denial of Justice

Denial of justice is a part of customary international law and is considered in three contexts. The first context "seems to embrace the whole field of State responsibility, and has been applied to all types of wrongful conduct on the part of the State towards aliens".[267] While the second context is "limited to refusal of a State to grant an alien

[266] *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, para 2.2.2.
[267] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (*OECD Working Papers on International Investment*, 2004) < http://dx.doi.org/10.1787/675702255435 > accessed 26 August 2021.

access to its courts or a failure of a court to pronounce a judgement".[268] The third context is "employed in connection with the improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions".[269] The tribunals have construed fair and equitable treatment in such a manner that the principles of due process and denial of justice have been embraced openly during the interpretation process.[270] The United Nations Conference on Trade and Development has examined the meaning of this doctrine. Fair and equitable treatment is related to the traditional standard of due diligence and provides a minimum international standard which forms part of customary international law.

Even though denial of justice is often restricted to the court certain international investment agreements make a reference to legal or administrative proceedings. In this context, UNCTAD states that the "majority of modern-day FET claims relate to measures taken by the executive, and sometimes legislative, branches of a government."[271] This implies that that the elements of due process apply to this scenario. A host State has a right to make a decision that is in the interest of the public, however, it is imperative that these decisions do not violate due process.[272] An explicit reference to denial of justice and due process within the context of fair and equitable was pronounced in The United States Free Trade Agreement:

> "[F]air and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world".[273]

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[268] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investments* (3rd edn, Cambridge University Press 2010) 19–20.
[269] Ibid.
[270] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (OECD Working Papers on International Investment, 2004) < http://dx.doi.org/10.1787/675702255435 > accessed 26 August 2021.
[271] Nathalie Bernasconi Osterwalder, 'Rethinking Investment-Related Dispute Settlement' (Investment Treaty News, 2015) <*http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> accessed 27 August 2021.*
[272] *Ibid*.
[273] Andrew P. Tuck, 'The Fair and Equitable Treatment Standard Pursuant to the Investment Provisions of the U.S. Free Trade Agreements with Peru, Colombia and Panama' (2010) 16(3) LBRA < https://scholar.smu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1463&context=lbra> accessed 27 August 2021.

In *Mondev International LTD v. US*[274], a subsidiary of Mondev brought an action against the City of Boston accusing the City of Boston of breaching a contract to build a shopping mall in Boston. The subsidiary won the case, however, the judicial court of the City of Boston changed the judgment in 1998 therefore Mondev brought a lawsuit under NAFTA. The tribunal applied the fair and equitable treatment standard within the context of due process and deliberated on whether the investor had a right to submit a claim. In this case the tribunal held that the standard laid down in Article 1105(1) has to be applied in both situations, i.e., whether or not local remedies have been invoked."[275] The tribunal ruled that this is "admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities"[276]

Similarly, in *ADF Group Inc. v. United States of America*,[277] ADF claimed damages for injuries caused as a result of legislation requiring only steel produced domestically to be used for highway projects. The tribunal relied on the decision in the *Mondev* case in order to decide whether fair and equitable treatment referred to customary international law and to examine the nature of fair and equitable treatment. With regards to the evolving nature of fair and equitable treatment, the tribunal argued that customary international is not a "static photograph"[278] of the minimum standard of treatment as it appeared in 1927 due to the Neer case. The tribunal had to examine whether the US had breached for fair and equitable treatment standard. The tribunal stated that it had "no authority to review the legal validity and standing of the U.S. measures here in question under U.S. internal administrative law."[279] Hence, the tribunal dismissed the claims of the foreign investor.

Furthermore, in *Loewen Group, Inc and Raymond L. Loewen v. United States of America*[280] the tribunal made an attempt to define fair and equitable treatment within the context of denial of justice. The tribunal held state practice, tribunals or

[274] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2.
[275] *Ibid*, para 96.
[276] *Ibid*, para 127.
[277] *ADF Group, Inc vs. United States of America*, ICSID Case No. ARB(AF)/00/1, para 195.
[278] Panis Merkouris and Nina Mileva, 'Customary International Law as a Tool' (2023) 45(2) JIL < https://esil-sedi.eu/wp-content/uploads/2022/08/ESIL-Reflection-Merkouris-Mileva.pdf> accessed 29 August 2022.
[279] *ADF Group, Inc vs. United States of America*, ICSID Case No. ARB(AF)/00/1, para 200.
[280] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID case no. ARB(AF)/98/3.

commentators do not support the notion that bad faith is a component of finding a violation of fair and equitable treatment or that a denial of justice amounts to a violation of international law. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms".[281] The tribunal also said with reference to the *Mondev* case that "a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment".[282] It is pertinent to point out that Pakistani IIAs do not equate FET with a denial of justice in any of their agreements. The reason for this may be due to the power developed countries hold in relation to claims citing a breach of fair and equitable treatment within the context of fair and equitable treatment. If Pakistan decides to add this substantive content to their FET provisions it may have to restrict the wide application of the standard in arbitral cases to alleviate future cases.

3.6.4 Arbitrary, Unreasonable and Discriminatory measures

Arbitrary, unreasonable and discriminatory measures are often linked to FET provisions in IIAs. An example of a treaty with this feature is Article 2(2) of the Netherlands-Oman BIT (2009) which states that:

> "Each Contracting Party shall ensure fair and equitable treatment to the investments or nationals or persons of the other Contracting Party and shall not impair, by unjustified or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals or persons."[283]

Another example of a treaty which confers fair and equitable treatment by way of arbitrary or discriminatory measures is the Romania-United States BIT (1994):

> "Article II(2) […] 2.

[281] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID case no. ARB(AF)/98/3, para 54.
[282] *Ibid*, para 133.
[283] Article 2(2) of the Netherlands-Oman BIT (2009).

(a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments."[284]

It seems that this exercise adds clarity to the broad nature of the FET standard guiding interpreters on how to give meaning to the provision in arbitral cases.[285] Thus, it is important to examine the problematic application of the arbitrary, unreasonable and discriminatory measures alongside the FET standard in treaty practice. Despite, agreements including measures prohibiting arbitrary, unreasonable and discriminatory conduct alongside fair and equitable treatment the position of the FET remains perplexing. This assessment is based on tribunals who have found a breach of FET even though the conduct of the state was not ruled as arbitrary, unreasonable or discriminatory. For example, in *LG&E v. Argentina*[286] the tribunal stated "the charges imposed by Argentina to Claimants' investment, though unfair and inequitable, were the result of reasoned judgment rather than simple disregard of the rule of law"[287] concluding that state conduct was not arbitrary. Hence, the FET standard seems to encompass a broader meaning and an application beyond measures that are labelled arbitrary, unreasonable and discriminatory.

In light of this, suggestions have been made to limit the interpretation of FET to arbitrary, unreasonable and discriminatory conduct to merit a breach of FET. UNCTAD proposes a solution to the problem suggesting states may wish to replace "a general FET standard with a qualified provision."[288] A further issue arises with the prohibition of arbitrary, unreasonable and discriminatory measures and FET in relation to Article 1105 of NAFTA. Tribunals faced with the activity of interpreting these measures within the context of Article 1105 of the NAFTA agreement in relation to claims citing a

[284] Article II (2) of the Romania-United States BIT (1994).
[285] --, '*Recent Trends in IIAs and ISDS' (UNCTAD, 2015) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> accessed 20 August 2021.*
[286] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1.
[287] *Ibid*, para 79.
[288] --, '*Recent Trends in IIAs and ISDS' (UNCTAD, 2015) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf>* accessed 26 August 2021.

violation of FET are problematic. NAFTA tribunals have interpreted the article as a "standalone element" of the FET provision.[289] For example, in *Gamis v United States*[290] the tribunal stated "there is an obligation of each of the NAFTA State Parties inherent in the fair and equitable treatment standard of Article 1105 that they do not treat investors of another State in a manifestly arbitrary manner."[291] Hence, this has become a controversial provision for tribunals equipped with the task of construing the application of fair and equitable treatment "in accordance with international law."[292]

3.6.5 Breach of a Treaty Norm

The interpretative note by the NAFTA Free Trade Commission states that a breach of a one provisions will not automatically result in a breach of FET. An example of this is the Mexico-Singapore BIT (2009) where Article 4(3) states "[a] determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."[293] In *AES v. Hungary*[294] the tribunal said that:

> "[I]t is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a State's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable […] that the standard can be said to have been infringed."[295]

It is not possible to place a benchmark in which the interpretation and the application of the FET standard becomes easy to predict in every situation. At the same time, the threshold that has been used by the tribunals assures host states that "that they will not be exposed to international responsibility for minor malfunctioning of their agencies and that only manifest and flagrant acts of maladministration will be punished."[296]

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[289] Patrick Dumberry, 'The prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 15(1-2) <https://brill.com/view/journals/jwit/15/1-2/article-p117_4.xml?ebody=citedby-117281> accessed 20 August 2021.
[290] *Glamis Gold, Ltd. v. United States*, Award, 8 June 2009, ICSID Case No. ARB(AF)/05/2.
[291] *Ibid*, 626.
[292] *Ibid*, 550.
[293] Article 4 (3) of the Mexico-Singapore BIT (2009).
[294] *AES Corporation vs. Republic of Argentina*, ICSID Case No. ARB/02/17.
[295] *Ibid*, 119.
[296] *Neer v. Mexico* (1929) R.I.A.A. 60, 62.

Thus, the many problems with the FET standard make it difficult to gain an accurate answer as to how the FET standard should be interpreted.

3.6.6 Level of Development

There is a debate as to whether the level of development of a country should be taken into account in finding a breach of the FET standard. This was addressed in the Investment Agreement for the COMESA Common Investment Area (2007):

> "Article 14 (3)
>
> For greater certainty, Member States understand that different Member States have different forms of administrative, legislative e and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 and 2 of this Article [prohibition of the denial of justice and affirmation of the minimum standard of treatment of aliens] do not establish a single international standard in this context."[297]

The language used in this document introduces a degree of flexibility in interpreting the FET standard dependent on the level of development. The UNCTAD sums up that:

> "[i]t may thus be argued that even in the absence of specific language, the level of development of the host-country institutions should be taken into account, as it clearly has an impact on what the investor may legitimately expect from the State authorities in terms of their efficiency and conduct."[298]

3.6.7 Legitimate Expectations

Honouring the legitimate expectations of foreign investors ensures investors have access to fair and equitable treatment. Failure to honour the legitimate expectations of foreign investors will inevitably breach the standard of fair and equitable treatment. The doctrine of legitimate expectations is a core part of the fair and equitable treatment

[297] Article 14 (3) COMESA Common Investment Area (2007).
[298] --, 'Recent Developments in Investor-State Dispute Settlement (ISDS)', (UNCTAD, 2014) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf> accessed 25 April 2015.

standard. This was reaffirmed in *Saluka Investments BV (The Netherlands) v. Czech Republic*[299] that "the standard of fair and equitable treatment is…closely tied to the notion of legitimate expectations which is the dominant element of the standard".[300] This was reiterated in *EDF (Services) Limited v Romania (2009)*[301] by the tribunal stating that the "Tribunal shares the view expressed by other tribunals that one of the major components of the FET standard is the parties' legitimate and reasonable expectations with respect to the investment they have made."[302] The application of the doctrine is expressed by Professor Wälde in *Thunderbird v. Mexico*[303] in that the principle of legitimate expectations pertains to a situation where the action of a party generates sensible and "justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[304]

In other words, the expectations have to be reasonable which can be observed by looking at the conduct of the state. Another requirement is that these expectations must have been relied on by the investor. This reliance should arise based on the legal framework of the host state at the time of the investment. However, the problem with this quote is that the meaning of "expected" is subject to the interpretation given to it by the investor. Hence, the tribunal in *Tecmed* stated that fair and equitable treatment "...requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment...".[305] This quote is a contradiction to the approach proposed by Professor Walde.

Nevertheless, Professor Walde in *Thunderbird* [306] argued that the expectation must be a positive act on the part of the state explaining that "an investor should be protected against unexpected and detrimental changes of policy if the investor has

[299] *Saluka Investments BV (The Netherlands) v. Czech Republic* (Partial Award) (UNCITRAL) (17 03/06).
[300] *Ibid*, 302.
[301] *EDF (Services) Limited v Romania* ICSID Case No. ARB/05/13.
[302] *Ibid*, 216.
[303] *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL (NAFTA), 26 January 2006, 45.
[304] *Ibid*, 147.
[305] *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, 154.
[306] *Ibid*, 122.

carried out significant investment with a reasonable public authority initiated assurance in the stability of such a policy".[307] Thus, the approach proposed by *Tecmed* may cause an investor to invoke an expectation deemed reasonable by the investor however one which the host state had no intention of proposing. These approaches broaden the scope of the expectations of the investor creating an imbalance in the investor-state relationship. For this reason, tribunals have warned against such broad interpretations.

However, an examination of the awards granted by tribunals reveals that legitimate expectations is invoked by foreign investors and endorsed by tribunals. In *EDF (Services) Limited vs. Romania*,[308] the tribunal held:

> "Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State's power to regulate its economic life in the public interest."[309]

The tribunal in *CMS v Argentina*[310] stressed on the importance of providing a stable and predictable environment to meet the standard of fair and equitable treatment.[311] Nevertheless, Michelle Potesta observes that there is hardly any example where legitimate expectations is not evoked by foreign investors and advocated by tribunals[312]. Lord Scott, also made an observation of the transition of legitimate expectations in English Law in the case of *EB (Kosovo) v. Secretary of State for the Home Department* [2008][313] describing the doctrine as "much in vogue"[314]. Hence, the principle of legitimate expectations has transposed into the investment treaty framework.

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[307] *International Thunderbird Gaming Corporation v The United Mexican States* (UNCITRAL (NAFTA), Award, 26 January 2006).
[308] *EDF (Services) Limited v Romania* ICSID Case No. ARB/05/13 (Award on 8 October (2009).
[309] *Ibid*, 219.
[310] *CMS Gas Transmission v Argentina* ICSID Case No. ARB/01/8.
[311] *Ibid*, 278.
[312] Michele Potestà, 'Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept' (ICSID Review, 2013) <https://doi.org/10.1093/icsidreview/sis034> accessed 7 October 2020.
[313] *EB (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41.
[314] *Ibid*, 31.

However, foreign investors that take unreasonable risks cannot make the host state a guarantor of these risks.[315] This was discussed in *Thunderbird v Mexico*[316] that the legitimate expectations in relation to NAFTA refers to a scenario where the action of the host state creates practical and justified expectations for the foreign investor "to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[317] Similarly, in *Parkerings-Compagniet AS vs. Lithuania*[318] the tribunal made it clear it was absurd that a foreign investor in Lithuania "believe at the time, that it would be proceeding on stable legal ground as considerable changes in the Lithuanian political regime and economy were undergoing."[319] The tribunal also considered the legislative power of the host state stating that it had every right to legislate on matters. The legitimate expectations of investors are deemed to be a core feature of fair and equitable treatment. In *Bayindir v Pakistan*[320] the tribunal held the claimant could not "reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time it agreed to the revival of the Contract."[321] This coincides with the expectation set by the tribunals that the business environment should be stable and predictable for foreign investors. However, tribunals have made it clear that this does not supersede the right of a host state to exercise its sovereign legislative power.

3.6.8 Full Protection and Security

In light of this, some treaties refer to fair and equitable treatment within the context of protection and security. For instance, Article 4 of the China-Switzerland BIT (2009) states:

> "[i]nvestments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."[322]

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[315] *Biwater Gauff Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, 564.
[316] *Gami Investment Inc v The Government of the United Mexican States*, UNCITRAL Arbitration Rules Final Award 15 Nov 2004.
[317] *Ibid*, 93.
[318] *Parkerings-Compagniet AS vs. Lithuania* Award 11 September 2007, ICSID Case No. ARB/05/8.
[319] *Ibid*, 306.
[320] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29.
[321] *Ibid*, 34.
[322] Article 4 (1) China – Switzerland (2009).

This is an example of an unqualified version of fair and equitable treatment within the context of an international investment agreement. However, this does not modify the meaning of fair and equitable treatment as it merely inserts two substantive protective standards within the same provision. This has been examined by Judge Asante in *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka.*[323] In this case, the judge stated that the obligation to provide fair and equitable treatment and full protection and security connote the same level of treatment.[324] This approach does not necessarily alter the FET standard as the treaty simply states that both standards can be invoked by either party. In the words of the UNCTAD such a "formulation would not modify the interpretation of the FET standard; it merely lists both standards of treatment in the same provision."[325] Thus, this version of the FET standard raises questions on the approach that should be taken when interpreting the FET standard. The next subsection examines case law on Pakistan's relationship with FET.

3.7 Cases between Pakistan and Foreign Investors

Foreign investors that have accused Pakistan of breaching FET appear in almost every investor-state dispute. This section seeks to examine each case brought against Pakistan where a breach of FET was cited. As will be demonstrated in the following section, these accusations have either been accepted or rejected in these cases by tribunals. The following section analyses the wide range of cases where foreign investors have invoked FET based on Pakistan IIAs. This will help to understand the reason as to why there is a surge in the number of cases and assist in finding solutions for Pakistan to address the challenges caused by the FET standard in Pakistan IIAs. The following cases will be analysed in this section: *SGS v Pakistan*, *Impregilo v Pakistan*, *Tethyan Copper v Pakistan*, and *Bayindir v Pakistan*. It commences with an analysis of the first case, namely, SGS v Pakistan.

3.7.1 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*

[323] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3.
[324] *Ibid, 7.*
[325] --, 'Recent Developments in Investor-State Dispute Settlement (ISDS)' (UNCTAD, 2014) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf> accessed 25 April 2022.

The first case to be brought against Pakistan was *SGS v Pakistan*[326] in 2001. SGS entered into an agreement with Pakistan where the company guaranteed the provision of services with regard to goods exported from various countries. Eventually, both parties began questioning the performance levels of the other party which the parties deemed to be inadequate. The investor alleged a breach of fair and equitable treatment, a failure to protect investment of SGS and breach of commitments arising from the contract. Furthermore, the investor argued breach of Article 11[327] of the Switzerland and Pakistan BIT. Pakistan retaliated by disagreeing with the claim that Article 11 was breached because breach of contractual commitments was considered to be outside of the realm of the BIT in contention. Also, Pakistan claimed that the BIT excludes the tribunal from exercising its discretion over the matter. The dispute resulted in Pakistan filing for arbitration in September 2000 based on the arbitration clause in the agreement. The tribunal was faced with the task of examining the umbrella clause in the form of Article 11 as SGS argued that Article 11 was an umbrella clause for purely contractual claims.[328] The Tribunal rejected the claims brought by SGS and denied jurisdiction.

In 2000, Pakistan decided to initiate arbitration proceedings in an attempt to enforce some of the provisions of the PSI agreement. SGS counter-claimed alleging various breaches of the PSI contract. In 2001, SGS accused Pakistan of breaching the Pakistan-Switzerland BIT and the PSI agreement by putting in a request for arbitration with ICSID. In 2002, SGS requested an injunction counteracting the arbitration proceedings in Pakistan courts. After the request was rejected on multiple occasions by the courts the issue reached the Supreme Court of Pakistan which noted that the Pakistan-Switzerland BIT did not have a legal effect as it was not enacted via municipal law. The matter passed to the ICSID Tribunal despite the ruling of the Supreme Court. In November 2002, the ICSID Tribunal had to determine whether the arbitrator, in this case, had jurisdiction to hear the claims put forward by SGS.

[326] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13.
[327] Article 11 Switzerland-Pakistan (1995) states 'Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party'.
[328] *SGS Société Générale de Surveillance SA v Pakistan* ICSID Case No ARB/01/13, 54.

The ICSID Tribunal held that the arbitrator had jurisdiction to consider SGS's claims in relation to the violations of the Pakistan-Switzerland BIT and the PSI agreement. The respondent did not agree with the tribunal in relation to the claim because the respondent said that the allegations put forward by the claimant failed to prove a breach of fair and equitable treatment. According to the respondent the objection is based on the argument that "to support a claim for Treaty breach, Claimant must allege acts or omissions beyond those that an ordinary counterparty to a contract may take."[329] The respondent claimed that the claimant based the argument on a non-payment under the guise of the contract and a breach of the fair and equitable treatment standard cannot be established based on non-payment under the contract.[330]

SGS argued that Pakistan breached the Pakistan-Switzerland BIT for several reasons, including a violation of the fair and equitable treatment standard. The tribunal explained that the tribunal examined the allegations put forward by the Claimant and come to the decision that there is a chance that a breach of fair and equitable treatment occurred. The tribunal said that non-payment did have the potential of violating the fair and equitable provision within the relevant BIT. The tribunal opined that a "State's non-payment under a contract is, in the view of the Tribunal, capable of giving rise to a breach … where the non-payment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value."[331] The tribunal also stated that if anything more than non-payment is requisite to triumph over a claim of violating fair and equitable treatment standard then it is a question based on the evidences of the case. SGS, also, argued that Pakistan violated Article 11 of the Pakistan-Switzerland BIT pertaining to an umbrella clause. Article 11 reads "[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."[332]

[329] *SGS Société Générale de Surveillance SA v Pakistan* ICSID Case No ARB/01/13, 166.
[330] *Ibid*, 164.
[331] *Ibid*, 165.
[332] Article 11 of the Switzerland-Pakistan BIT (1996).

The claimant accused Pakistan of failing to pay invoices to the claimant and attempting to terminate an agreement in relation to customs clearance and control processes in Pakistan. The claimant alleged a breach of fair and equitable treatment, most favoured nation, and indirect expropriation. The tribunal made the following statement:

> "In the Tribunal's view, the distinction between treaty and contract claims is well established, and it disposes of Respondent's core objection here. Claimant has advanced claims for breach of the Switzerland-Paraguay BIT: it claims that SGS suffered unfair and inequitable treatment in violation of Article 4(2) of the BIT; that its use and enjoyment of its investment was impaired by undue and discriminatory measures of the authorities of Paraguay in violation of Article 4(1) of the BIT; and that the Republic of Paraguay failed to constantly guarantee the observance of commitments it had entered into with respect to the investments of SGS, in violation of Article 11 of the BIT."[333]

This case has a profound impact on Pakistan as it was the first case to be brought against the country. In his interview, the former Attorney General of Pakistan was asked about the impact this case had on Pakistan to which he responded:

> "The secretariat of the Chief Executive [former President Pervez Musharraf] issued a directive which provided that no more BITs were to be signed by Pakistan until the Attorney General's office was consulted and all other government stakeholders were onboard. This was a first for Pakistan. Previously, I don't think any ministry—except that in charge—even knew that the BITs had been signed, and I couldn't find files on record demonstrating that meaningful negotiations had actually taken place. The maximum level of input to the negotiations from Pakistan appears to have been proof-reading, and at times, albeit rarely, some not very significant suggestions on the text.
>
> Secondly, the Board of Investment BOI [the agency now in charge of BITs] and I brought in experts from abroad to speak with the government stakeholders. If someone of any note in the world of public or private international law was

[333] *SGS Société Générale de Surveillance SA v Pakistan* ICSID Case No ARB/01/13, 169.

> visiting the region, we would invite them to come and speak. This was an education process of sorts, allowing us to understand what could, and could not, be the consequences of signing BITs. This, combined with a couple of excellent officials within the BOI, meant that Pakistan's negotiating capacity was upgraded significantly at the time."[334]

An analysis of this case reveals issues relating to fair and equal treatment surface whenever arbitral tribunals change their interpretation and application of FET even when there is a change in the degree of political stability. Foreign investors may encounter difficulties if a regime transition takes place and the new government falls short of the promises made by the previous government. However, it is essential that arbitral tribunals remain consistent in their interpretation and application of FET as failure to do so leads to different interpretations of FET. In light of this, since FET provisions are contained in BITs these agreements fail to act as an effective framework for balancing the rights of foreign investors and the host state. FET provisions in Pakistan's BITs should offer first-level protection for international investors as well as a reliable and open dispute settlement process while respecting the host state's right to regulate. Thus, issues with fair and equal treatment may be addressed by using such metrics.

3.7.2 Impregilo v Pakistan

In *Impregilo v Pakistan*[335], the parties entered into a joint venture known as the Ghazi-Barotha Contractors. The purpose of the contract was to build hydroelectric power facilities in Pakistan under Swiss law. On 19 December 1995, Impregilo entered into two contracts with the Pakistan Water and Power Development Authority (WAPDA). Eventually, Impregilo alleged that Pakistan violated the fair and equitable treatment clause in the relevant BIT. The claim was based on the BIT concluded between Italy and Pakistan. Interestingly, the claimant purported to advance its case on behalf of its non-Italian partners. The Tribunal rejected the claim explaining that although the joint venture contract permitted the claimant to represent its non-Italian partner "the scope

[334] *SGS Société Générale de Surveillance SA v Pakistan* ICSID Case No ARB/01/13, 28.
[335] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3.

of the BIT cannot be expanded by municipal law contract to which Pakistan is not a party."[336]

Impregilo S.p.A. filed a motion requesting ICSID for arbitration against Pakistan on the 21st of January 2003. In the request Impregilo relied on some of the provisions in the Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan. In 1995, both parties concluded two contracts between Impregilo and the Water and Power Development Authority (WAPDA) on behalf of Pakistan. The contracts foresaw completion of the project in March 2000. However, the completion date of the project was delayed due to obstacles which Impregilo claimed were caused by WAPDA. As a result, Impregilo demanded compensation for the losses in incurred due to the delay in the project. WAPDA refused to compensate for the loss suffered by Impregilo. Further delays to the project occurred in 2001 owing to the September 11 attacks on the United States causing Italian authorities to ban Italian personnel from working in Pakistan resulting in a delay to the project. Despite this, both parties attempted to resolve the matter before seeking redress from ICSID however these talks failed. In 2002, Impregilo filed a motion before ICSID requesting arbitration. Jurisdiction was established under Article 9 of the BIT between Italy and Pakistan which entered into force in 2001. Since the BIT came in after some of the breaches of the contract had occurred the claimant argued :

> "while some of the acts and omission took place before the date of the entry into force of the BIT, the situation that they have created has not ceased to exist as of the date of entry into force. In addition, acts and omission subsequent to that date have aggravated the situation and, as a whole, constitute a serious breach of the protections granted to Impregilo by the BIT and its rights under the Contracts."[337]

Pakistan responded to this argument requesting the tribunal to:

> "infer that, save where Impregilo complains of acts that are expressly alleged to have occurred subsequent to the entry into force of the 1997

[336] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, 315.
[337] *Ibid*, 358.

Treaty, all other specific acts complained of by Impregilo substantially took place before the entry into force of the 1997 Treaty."[338]

Pakistan also argued that the Italy – Pakistan BIT came into force on 22 June 2001 so it did not have an retroactive effect which meant that Impregilo could not rely on it prior to it coming into force. In this respect Pakistan stated that Impregilo 'has sought to avoid the basic rule on non-retroactivity of treaties by i) failing to plead the specific dates of alleged breaches, and ii) asserting that the breaches it alleges are continuing in character.'[339] In relation to the breaches of the contract and the treaty the claimant argued that the respondent failed to complete with the contract by:

"causing delays in the performance of the Contracts, denying Impregilo's rights to extensions of time and additional costs, frustrating the dispute settlement mechanism under the Contracts, requiring Impregilo to continue the work in spite of the serious security risks, and threatening to impose liquidated damages."[340]

Furthermore, in terms of the breaches of the treaty between Italy and Pakistan, the claimant argued several breaches had occurred and these were as follows:

"1. Respondent is in breach of its obligations under Article 2 (2) of the BIT to "at all times ensure fair and equitable treatment of the investments of investors of the other Contracting Party."
2. Respondent is in breach of its obligation under Article 2 (2) not to subject investors and investments to unjustified measures.
3. Respondent's acts and omissions constitute "measure[s] which might limit permanently or temporarily the right of ownership, possession, control or enjoyment" by Impregilo of its investment in Pakistan – measures that are prohibited by Article 5 of the BIT.

[338] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, 57.
[339] *Ibid*, 73.
[340] *Ibid*, 33.

4. Respondent's acts and omissions constitute measures that have an effect similar to expropriation under Article 5 (2). Respondent's failure to honor the Contracts has destroyed the value of Impregilo's Investment. The Contracts are the principal asset of Impregilo. The continuous failure to observe their terms is tantamount to an expropriation of Impregilo's investment under Article 5(2) of the BIT for which compensation is due."[341]

Article 2 of the Italy – Pakistan BIT is the relevant provision cited by the claimant arguing a breach of fair and equitable treatment. This provision is as follow:

"1. Both Contracting Parties shall encourage investors of the other Contracting Party to invest in their territory, and shall authorize these investments in accordance with their legislation.
2.Both Contracting Parties shall at all times ensure fair and equitable treatment of the investments or investors of the other Contracting Party. Both Contracting Parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures."[342]

Impregilo argued that the Tribunal has jurisdiction to investigate the breaches of the contract under Article 9 of the Italy – Pakistan BIT. Impregilo argued that:

"[m]any of these brraches consist of actions or omissions by WAPDA. Others relate to acts or omissions of the Engineer that have given rise to claims by GBC against WAPDA that remain unresolved to this date. Still others relate to acts of other governmental authorities such as the Customs and military authorities. WAPDA is responsible for these actions and omissions of the Engineer."[343]

[341] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, 34.
[342] *Ibid*, 54.
[343] *Ibid*, 57.

Due to the breaches alleged by Impregilo, the claimant stated that the respondent had caused $450 million worth of damages. As a result, Impregilo requested the following in terms of relief:

> "1.Impregilo seeks compensation for the entirety of the damages, including interest and the costs of the arbitration proceedings. Impregilo is entitled to claim the entirety of the damages suffered by GBC because of its role in the Joint Venture with its partners. Under Swiss law, the law governing the Joint Venture Agreement, and under the Joint Venture Agreement itself, Impregilo's rights, duties and liabilities are such as to entitle, if not oblige, it to assert a claim for the full amount of the damages suffered by GBC.
> 2.In any event, if the Tribunal finds it cannot award Impregilo damages in excess of its proportionate interest in GBC, Impregilo claims, in the alternative, 57.80% of the total damages."[344]

The tribunal responded to the allegation by the claimant that the respondent breached the fair and equitable treatment provision in the Italy – Pakistan BIT ruling that that the Tribunal did not have jurisdiction in considering this allegation. Moreover the Tribunal referred to the case of *SGS v Pakistan* commenting that '… an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV"[345]. Furthermore, the Tribunal stated that there was not enough factual evidence to determine whether the Tribunal could consider each of the alleged breaches under Article 2 (2) of the Italy – Pakistan BIT.

An analysis of this case reveals that in order to resolve concerns of fair and equitable treatment in international investment law arbitral tribunals play a vital role. Tribunals have the authority to review the laws of the host nation to decide if they violate the fair and equitable treatment doctrine and to grant foreign investors remedies if they do. However, there are worries that the tribunals are unfair in their interpretation and application FET to host states leading arbitral tribunals to pass judgments that restrict the rights of host states. It mandates that arbitral tribunals give international investors

[344] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, 35.
[345] *Ibid*.

the same protection as host states, however there are difficulties when there is a question of jurisdiction. However, because they can provide foreign investors with proper protection, arbitral tribunals play a critical role in ensuring that they do.

3.7.3 *Bayindir v Pakistan*[346]

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S., the claimant, agreed to build a six-lane motorway with the National Highway Authority (NHA) who was acting as an agency on behalf of the Pakistani government. Due to disagreements over the construction schedule the project experienced delays covering an eight year period. Bayindir placed the blame on NHA while an independent engineer accused the claimant of delaying the project for failing to invest in the necessary equipment required to complete the project. The project was dismissed when NHA decided to terminate the contract with the claimant and the Pakistan army securing the claimants work site.

The claimant threatened to take the matter to arbitration in 2002. The claimant cited the Pakistan-Turkey BIT accusing Pakistan of breaching some of the provisions of the BIT including the Fair and Equitable Treatment provision, Most Favoured Nation and National Treatment, and requested compensation for expropriation. Bayindir faced a challenge when citing the Pakistan-Turkey BIT as the treaty does not contain a fair and equitable treatment clause. Following from this, the claimant argued that the FET provision could be imported from other BITs devoid of FET provisions as Pakistan owed such treatment under the Most Favoured Nation.

This argument was advanced when the claimant referred to the preamble of the Pakistan-Italy BIT which states that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources."[347] The tribunal deliberated on the matter concluding that the Pakistan-Turkey BIT does not bar the MFN from being applied to specific standards of treatment included in various Pakistan BITs. According to the tribunal, the preamble of the Pakistan-Italy BIT debilitated the argument Pakistan

[346] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29.
[347] *Ibid, 229.*

advanced that the absence of the FET clause was deliberately excluded from the Pakistan-Italy BIT.

Furthermore, the tribunal examined the political environment to ascertain whether the political turmoil faced by Pakistan at the time contributed towards a breach of the legitimate expectations as part of FET. The tribunal cited three decisions that depended on all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. Furthermore, the tribunal explained that the claimant should expect to see unpredictable outcomes during political turmoil where successive governments have divergent interpretations on investment ventures. On this point, the tribunal stated stressed the legitimacy of the investors' expectations during political instability:

The tribunal concluded that the investor did not expect stability in the country which negated the claimant's argument that Pakistan had breached the legitimate expectations as part of the FET standard. The tribunal was willing to take the political situation of Pakistan into consideration which was present during General Musharraf's reign as Prime Minister of the country. The tribunal stated that:

> "… the Tribunal is of the view that the Claimant could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time it agreed to the revival of the Contract. Indeed, the Claimant expressly acknowledges that it suffered severely from political changes in Pakistan during the preceding years."[348]

The tribunal was aware of the political changes that had occurred in the region incriminating the investments of foreign investors. Thus, the tribunal suggested that investors should consider the political circumstances of a country prior to investing in order to comprehend the risks of investing in that country. Accordingly, the tribunal ruled:

[348] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, 245.

> "Pakistan does not contest that the expulsion could amount to a violation of fair and equitable treatment. It alleges, however, essentially that 'any suggestion that Bayindir was expelled from the site at gunpoint in implementation of some Pakistan political or economic agenda is simply wrong'… More specifically, it insists that (i) Bayindir's allegations are largely based on press reports, (ii) Bayindir's claim presupposes corruption on the part of Pakistan – which cannot be readily inferred by an international tribunal, and (iii) the delays were real and NHA had a right to expel Bayindir…"[349]

However, this approach has been criticised and tribunals have adopted a different approach to the matter. Moreover, this case is an example of how the fair and equitable treatment standard can be implemented by way of a Most-Favoured Nation clause. This is a perfect illustration of a tribunal acknowledging a foreign investor's argument despite the fair and equitable treatment standard being absent from the relevant treaty.

> "It is true that the reference to FET in the preamble together with the absence of a FET clause in the Treaty might suggest that Turkey and Pakistan intended not to include an FET obligation in the Treaty. The Tribunal is, however, not persuaded that this suggestion rules out the possibility of importing an FET obligation through the MFN clause expressly included in the Treaty. The fact that the States parties to the Treaty clearly contemplated the importance of the FET rather suggests the contrary. Indeed, even though it does not establish an operative obligation, the preamble is relevant for the interpretation of the MFN clause in its context and in the light of the Treaty's object and purpose pursuant to Article 31(1) of the VCLT [Vienna Convention on the Law of Treaties]."[350]

The fact that the tribunal was willing to take the political situation of Pakistan into consideration reflects the instability that is inherent in the country. Therefore, foreign investors should understand the political risks involved in investing in a country that has a long history of battling political risks.

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[349] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, 245.
[350] *Ibid*, 177.

An analysis of this case presents difficulty, particularly in terms of fair and equal treatment and the political environment of Pakistan. The notion of fair and equitable treatment (FET) and its relationship with the political situation of a host state is crucial to determining the interpretation of FET and whether BITs act as an effective framework for both parties. International investment law is surrounded by a complicated and shifting political environment. International treaties, agreements, and national legislation from many nations control investment law. These rules aim to safeguard investors and control their actions, but they frequently also cause controversy and discussion.

Moreover, the conflict between FET and taking the political situation of a country into consideration is one of the main problems with the interpretation of FET in international investment law. Arbitral tribunals should be focused on fostering economic growth and defending the rights of the foreign investors by considering the political situation of a third world country. The investments of foreign investor should be prioritised and protected against political meddling in terms of the FET provision. At the same time, arbitral tribunals should remain consistent in their approach to interpreting FET. Hence, the settling of this debate will be essential to advancing the current position of FET and enabling solutions that are consistent and paramount to balancing the rights of the foreign investor and the host state.

3.7.4 *Tethyan Copper*[351]

Tethyan, a joint venture which was registered in Australia, established a subsidiary in Pakistan. In 2006, Tethyan took the place of BHP Chagai Hills Exploration Joint Venture Agreement (CHEJVA) with the primary aim of exploring and developing gold and copper found in the province of Balochistan, Pakistan. After Tethyan explored the relevant part of Balochistan the company found gold and copper pieces which prompted them to apply for a mining lease from Balochistan. However, Balochistan declined to issue a mining lease on this occasion. Thereafter, Tethyan appealed the decision but Balochistan refused to grant the lease to Tethyan. In November 2011,

[351] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1.

Tethyan argued Pakistan breached the FET, expropriation and non-impairment obligations under the Pakistan-Australia BIT (1998). The provision covering fair and equitable treatment is Article 3 (2) of the Pakistan-Australia BIT:

> "2. Each Party shall ensure fair and equitable treatment in its own territory to investments."[352]

The tribunal stated that fair and equitable treatment is an autonomous standard as the treaty does not link fair and equitable treatment to customary international law. According to the tribunal the "dominant principle of the FET standard is the protection of the investor's legitimate, investment-backed expectations".[353] On this basis, the tribunal viewed the mining lease as part of the legitimate expectations of Tethyan due to the assurance Pakistan gave in the CHEJVA as well as assurances provided by some of the representatives of the Pakistan Government.

This case is still being contested by Pakistan to this day. Recently, Pakistan used corruption as a reason for challenging the decision of an arbitral tribunal. Judge Robin Knowles ruled that the:

> "Descriptions of or references to corruption are insufficient: the question with which the corruption allegation is concerned is whether the Supreme Court of Pakistan found that the [agreement] and related agreements were void due to the existence of corruption".[354]

The judge also stated that:

> "In my judgment, it did not. If the province has evidence relating to corruption that was not before the ICC tribunal ... then it is for the province to seek to address those matters with the arbitral tribunal; it does not make it legitimate for the province to raise them with the court as a challenge to the jurisdiction of the arbitral tribunal,"[355]

[352] Article 3 (2) of the Pakistan-Australia BIT (1998).
[353] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1.
[354] Zaffar Abbas, 'UK Judge Dismisses Broadsheet's Claim against Pakistan' (*Dawn,* 2021) < https://www.dawn.com/news/1633846 > accessed 20 August 2022.
[355] *Ibid*.

Since the tribunal ordered Pakistan to pay 4087.00 million USD to Tethyan Copper, Pakistan has continued to contest the amount. Those involved in the negotiation process have continued to negotiate the amount ordered by tribunal.

An analysis of this case reveals that the project has faced legal challenges and political controversies, causing a halt in operations and unresolved contract disputes. One of the main reasons why this has occurred is due to the FET provision in the Pakistan – Australia BIT. This contests whether BITs act as an effective framework in balancing the rights of foreign investors and the host state. Hence, the future of Tethyan Copper in Pakistan remains uncertain with the Pakistani government and foreign investors at odds over the project's fate.

3.7.5 Agility v Pakistan

Furthermore, in *Agility v Pakistan (2011)*[356], Agility Public Warehousing of Kuwait secured a pilot contract with Pakistan for software developed to assess imports and exports in Pakistan. Thereafter, the Government of Pakistan's Karachi International Container Terminal introduced the Pakistan Automated Customs Clearance System software. Agility alleged Pakistan had infringed the intellectual property rights of Agility and had lead the company on until it could take over the software developed by Agility. Thus, the Kuwaiti company decided to sue Pakistan when it failed to secure a long term contract. However, Agility decided to retract its claim which cost Pakistan $650 million as a result of defending itself against the serious allegations made by Agility.

An analysis of this case reveals the idea of treating foreign investors fairly and equally can be criticised for being subjective in the absence of precise criteria. As a result, various arbitral tribunals, foreign investors, and host states may have different ideas about what constitutes fair and equal treatment, which may result in inconsistent interpretation and application of FET. This increases uncertainty and lessens the allure of foreign investment since potential investors may be wary of making investments in nations where they believe they would not get fair or equitable treatment. Additionally, detractors contend that this theory might be applied by

[356] *Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/11/8).

investors to contest legal government legislation and programmes, thus impeding host states' capacity to accomplish their policy goals.

3.7.6 Allawi v Pakistan

Furthermore, Pakistan found itself amidst three proceedings in 2012. In *Allawi v Pakistan*[357] (2012) the claimant alleged the Government interfered in operations pertaining to a liquid gas petroleum terminal resulting in an alleged expropriation of the terminal in Karachi. The tribunal dismissed the claim brought by the investor which was worth $573 million. In 2013 Pakistan acted as a respondent state against Turkey in the case of *Karkey Karadeniz v Pakistan*[358]. Karkey lodged a complaint against Pakistan for loss incurred as a result of a breach of the contract concluded between Turkey and Pakistan. The investor brought a claim against Pakistan on the basis that contractual obligations were not honoured and for the unlawful detention of four vessels. The tribunal ruled in favour of Turkey and ordered Pakistan to pay $800 million in damages.

Fair and equitable treatment is a fundamental principle in any legal system therefore this principle is equally as important for the legal system in Pakistan. However, Pakistan is enduring barriers due to disputes arising from BITs. In particular, the country is struggling to achieve a balance between a need to protect the investment of nationals and a desire to uphold the commercial interests of the country. Primarily, this is due to the nature of the fair and equitable provision in BITs which is vague, broad, undefined, and unclear thus giving investors excessive freedom without making them accountable for their behaviour.

As a result, investors are utilising the expansive interpretation afforded to fair and equitable treatment permitting them to denounce policies and procedures not in favour of the interests of the investors. Policies popularly targeted by investors include but are not limited to oil, gas, environment, tax, fiscal, transportation, storage, manufacturing, construction, waste management and water supply. In most of the cases, investors sue the country for trivial breaches and violations. This acts as a lack

[357] *Ali Allawi v. Islamic Republic of Pakistan*, PCA Case NO. 2012-23.
[358] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1.

of protection for foreign investors. As a result, this has resulted in lawsuits against Pakistan for billions of dollars. Most notable cases include *SGS v Pakistan*[359], *Impregilo v Pakistan*[360] and *Bayindir v Pakistan*[361]. Moreover, external factors thwart the economic reform of the business environment in the country. Terrorism and corruption are the main issues threatening revival of the economy making investors contemplate whether investing in a country mauled by violence is wise.[362] This arises from a need to balance the investment objectives of investors and attract commercial interests.

3.8 Public Policy and Fair and Equitable Treatment

Public policy has attracted considerable attention within the area of international investment law. Michael Reisman describes public policy as "an unruly horse and when once you get stride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."[363] He, also, stated that "[n]o private undertaking is valid if it is incompatible with overriding community policies"[364] The general definition of public policy: "consists of the set of actions—plans, laws, and behaviours—adopted by a government." While the legal definition of public policy is "agreed principles or ideas guiding how a government entity or its representatives acts in relation to specific public issues, which may be social, economic, or political."[365] For this reason, it is important to analyse the role public policy in relation to fair and equitable treatment.

In the case of *Saluka Investments BV v. Czech Republic*[366] the tribunal expressed the connection between the fair and equitable treatment standard within the context of public policy as follows:

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[359] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13.
[360] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3.
[361] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29.
[362] Sadaf Mustafa, 'Impact of Terrorism on FDI Inflow in Pakistan - A Time Series Analysis' [2019] 8(3) ABRJ < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3584161> accessed 26 August 2022.
[363] Nartnirun Junngam 'Public Policy in International Investment Law: The Confluence of the Three Unruly Horses' (2016) 32(3) Texas International Law Journal < https://heinonline.org > accessed 21 August 2022.
[364] *Ibid*.https://heinonline.org/HOL/LandingPage?handle=hein.journals/tilj51&div=5&id=&page=
[365] *Ibid*.
[366] *Saluka Investments BV v Czech Republic* (Partial Award) (UNCITRAL, 17 March 2006).

> "The "fair and equitable treatment" standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, [sic] in light of the object and purpose of the Treaty, so as to avoid conduct [. . .] that clearly provides disincentives to foreign investors. The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e., unrelated to some rational policy), or discriminatory (i.e., based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances."[367]

However, such a protection is, however, not unconditional or ever-lasting. It leads to a balancing process between the needs for flexible public policy and legitimate reliance on investment backed expectations. In *Tecmed v. Mexico*,[368] the tribunal held:

> "The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. 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."[369]

In these cases, tribunals have found a breach of fair and equitable treatment despite conduct not unreasonable due to the fact that the public policy did not confer with the tribunals. UNCTAD states:

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[367] *Saluka v. Czech Republic*, UNCITRAL Rules.
[368] *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2.
[369] *Ibid*, 154.

> "[i]f States and investors believe that the fair and equitable standard is entirely interchangeable with the international minimum standard, they could indicate this clearly in their investment instruments; but most investment instruments do not make an explicit link between the two standards. Therefore, it cannot be readily argued that most States and investors believe fair and equitable treatment is implicitly the same as the international minimum standard. Attempts to equate the two standards may be perceived as paying insufficient regard to the substantial debate in international law concerning the international minimum standard. More specifically, while the international minimum standard has strong support among developed countries, a number of developing countries have traditionally held reservations as to whether this standard is a part of customary international law."[370]

The rules regarding public policy are rather unclear as there is no answer to role public policy has in regards to this area. For example, in *LG&E v. Argentina*[371], the tribunal held that "the charges imposed by Argentina to Claimants' investment, though unfair and inequitable, were the result of reasoned judgment rather than simple disregard of the rule of law".[372] From this case, the host state conduct breached fair and equitable treatment which creates ambiguity in the application of the rule. In this respect, Burke-White states that in an increasingly globalised world where certain circumstances such as financial crisis, terrorist threats, and public health emergencies are a common phenomenon the ability of host states to make practicable policies becomes a necessity. In relation to this, the Argentine cases refer to the extent to which a host state has the freedom to make practicable policies in order to reach the level of investor protection required under BITs and customary international law "in the face of exceptional, but far from uncommon, emergencies."[373] Therefore, this adds to the argument that the public policy under international investment law is complicated.

Another argument regarding public policy and fair and equitable treatment refers to the notion that a definition of public policy in relation to fair and equitable treatment

[370] Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2015) 94(3) < https://unl.edu > accessed 19 July 2022.
[371] *Ibid*.
[372] *Ibid*.
[373] *Ibid*.

does not exist. Farhad Ghodoosi revisited the meaning of public policy in his article describing it as an elusive term attributed to controversial case law.[374] This means that a lack of a definition creates a multitude of problems in its application. Thus, this adds to the complicated application of fair and equitable treatment so how do tribunals approach the situation. However, host states need to understand that the tribunals have gone further in some cases holding some host states accountable for failing to maintain a stable investment framework. In *CMS v. Argentina* and *Enron v. Argentina*,[375] the tribunals thought that the FET standard has made it a requirement that a "stable framework for the investment"[376] is a part of the provision. The tribunal stated that "[e]ven assuming that the Respondent was guided by the best of intentions, which the Tribunal has no reasons to doubt, there is here an objective breach [of the FET standard]".[377] Likewise, in *PSEG v. Turkey*,[378] the tribunal stressed that a host state is required to "ensure a stable and predictable business environment for investors to operate in, as required […] by the Treaty".[379] Hence, the right to make a public policy is the right of any government therefore tribunals have to take this into account. The UNCTAD remarks on the detriment this has on a host State in the following words:

> "In these cases, tribunals have gone so far as to suggest that any adverse change in the business or legal framework of the host country may give rise to a breach of the FET standard in that the investors' legitimate expectations of predictability and stability are thereby undermined. This approach is unjustified, as it would potentially prevent the host State from introducing any legitimate regulatory change, let alone from undertaking a regulatory reform that may be called for. It ignores the fact that investors should legitimately expect regulations to change over time as an aspect of the normal operation of legal and policy processes of the economy they operate in. Considerations of this kind have led

[374] Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2015) 94(3) < https://unl.edu > accessed 19 July 2022.
[375] *CMS Gas Transmission v Argentina* ICSID Case No. ARB/01/8.
[376] *Ibid*, 259.
[377] *Ibid*, 268.
[378] *PSEG Global Inc. vs. Republic of Turk*ey, ICSID Case No. ARB/02/05, Award, 19 January 2007.
[379] *Ibid*, 253.

some tribunals to require further qualifying elements to the notion of investors' legitimate expectations."[380]

Otherwise, failure to take this into consideration delineates the host state and to some extent restricts the freedom of the host state. As such, a developing country that engages in policy making should not be penalised simply for making a public policy that is in the best interest of the host state.

3.9 Reform of Investor-State Dispute Settlement

This section discusses the need to reform the current Investor State Dispute Settlement system. This is important because faults in the ISDS system may be linked to the rise in ISDS cases brought by the foreign investor. A thorough examination will be essential for my thesis as it will reveal the need to reform the system to alleviate the unprecedented number of ISDS cases brought against Pakistan. The UN Secretariat proposed possible reforms of the system via the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.[381] The Secretariat highlights a number of issues with the system and makes a series of reforms for the United Nations to take into consideration.[382] One of the main criticisms made by the Secretariat is that international investment treaties tend to have wide substantive protective standards which allow the various interpretations of substantive protective standards.[383] As a result, some countries have made attempts to adjust the substantive investment protection standards restricting the room for broad interpretations. While other countries have restricted the provisions in treaties by limiting them to the ISDS system.

These concerns are as follows:

"(i) inconsistency in arbitral decisions,

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[380] Abdul Razzak Dawood, 'Pakistan's Investment Guide' (*Board of Investment*, 2013) < https://invest.gov.pk/sites/default/files/inline-files/Investment%20Guide%20.pdf> accessed 08 December 2021.

[381] United Nations, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its Thirty-Eighth Session' (UNCITRAL, 2019) < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/report_wg_iii_advance_copy.pdf> accessed 09 December 2021.

[382] *Ibid*.

[383] *Ibid*.

(ii) limited mechanisms to ensure the correctness of arbitral decisions,

(iii) lack of predictability, (iv) appointment of arbitrators by parties ("party-appointment"),

(v) the impact of party-appointment on the impartiality and independence of arbitrators,

(vi) lack of transparency, and

(vii) increasing duration and costs of the procedure."[384]

The identification of these concerns regarding the current system gives an indication of how the system should be revised to reflect the current problems posed by broad substantive protective standards, including fair and equitable treatment. The Working Group made a proposition to establish an appellate mechanism to take into consideration manifest errors of law. The Working Group has been advised to take into account "errors of interpretation"[385] and "application of law".[386] In this sense, the Working Group is advised to establish the scope of the law by referring to international investment agreements, domestic laws, or sources of public international law encompassing the country of the respondent or the host state.[387] The Working Group has been given an option to limit the scope of the errors of interpretation and application of the law to specific issues, including but not limited to substantive protective standards, such as fair and equitable treatment.[388]

This further confirms that the fair and equitable treatment standard is a problematic standard and an examination of the standard within the context of Pakistan is important in order to find solutions to the concerns presented by the broad interpretation of FET in international investment agreements. This is important because the vast number of international investment agreements contain a provision offering fair and equitable treatment to the foreign investor. Mostly, the developing countries suffer from the discrepancies caused by the wide treaty interpretations

[384] United Nations, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its Thirty-Eighth Session' (UNCITRAL, 2019) < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/report_wg_iii_advance_copy.pdf> accessed 09 December 2021.
[385] *Ibid*.
[386] *Ibid*.
[387] *Ibid*.
[388] *Ibid*.

afforded to the fair and equitable treatment standard. It is imperative that the Working Group address these issues and if an appellate court is an option then it is worth exploring.

The establishment of an appellate court has become a controversial topic. Some argue that this will increase cost and the duration of the proceedings. With respect to the appellate mechanism, there is a concern that the grounds for making an appeal has the potential of becoming too broad. This would have a negative impact on the proceedings. The Working Group has been strongly advised to limit the appeals to errors of interpretation and application of law to avoid a negative impact of cost and time on the proceedings. Otherwise this would go against the very essence of the appellate court which is to promote consistency and coherency in treaty interpretation.

3.10 Conclusion

This chapter commenced with a historical analysis of the fair and equitable treatment standard. Thereafter, this chapter described the different interpretations of the fair and equitable treatment standard in IIAs. The chapter then articulated the presence of the standard in the IIAs concluded by Pakistan in their various investment treaties to shed some light on the issues and controversies which are inherent in the standard within the context of the way in which the fair and equitable treatment standard has been inserted in the international investment agreements. Therefore, it is clear that tribunals will interpret and apply fair and equitable treatment standard either as an autonomous standard; according to international law or in accordance with the minimum standard of treatment under customary international law. This conclusion has been reach on the basis of the research conducted in this this chapter which points to the view that wide interpretation has taken place and will continue to take place in the majority of international investment cases involving Pakistan or with other countries. Having clearly problematised the issue in this chapter, the next chapter presents evidence of the impact of FET on policy making in Pakistan.

Chapter 4: A Case Study of Pakistan's Construction and Mining Sectors

4.1 Introduction

In the previous chapter, my thesis discussed the international legal framework in relation to the fair and equitable treatment standard. The purpose of this chapter is to critically examine the construction and the mining sector as case studies to provide evidence to support the claim that fair and equitable treatment has an adverse impact on policymaking in Pakistan. This includes a discussion on the history of each sector; the number of foreign investors that have invested; the role of employment policies in regard to protecting employees and employers' rights; the role of environmental policies; and the potential for future cases being brought by foreign investors. The chapter will now commence with a critical examination of the construction sector in Pakistan.

4.2 Case Study 1: The Construction Sector

This section undertakes an examination of the construction sector as it is crucial to understand the problems which have the potential of allowing fair and equitable treatment to become a challenging provision for Pakistan. This section also discusses cases that were brought by foreign investors harbouring the belief they were mistreated during their involvement in activities within the construction sector.

From a historical point of view, Pakistan was always known for being an agricultural nation since its independence in 1947.[389] However, over the years, this sector has seen a decline due to the limited technology required to advance the sector leading the government of Pakistan to turn its eye to other sectors.[390] This was in part implemented by the policies introduced by the Government of Pakistan in the 2000s who started focusing on the private sector.[391] It was during the 2000s that Pakistan

[389] Ali Mudasar, 'An Outlook of Pakistan's Economic History: 1947-2021' (Modern Diplomacy, 12 August 2021) https://moderndiplomacy.eu/2021/08/12/an-outlook-of-pakistans-economic-history-1947-2021/ accessed 3 September 2021.
[390] Muhammad Abdul Wasay, 'Economic Status of Pakistan from 1947–2020' (Economy.pk, 7 August 2020) https://economy.pk/economic-status-of-pakistan-from-1947-2020/ accessed 11 August 2021.
[391] Ali Mudasar, 'An Outlook of Pakistan's Economic History: 1947-2021' (Modern Diplomacy, 12 August 2021) https://moderndiplomacy.eu/2021/08/12/an-outlook-of-pakistans-economic-history-1947-2021/ accessed 3 September 2021.

witnessed growing interest from foreign investment leading to an increase in FDI.[392] Thereafter, Pakistan saw an increase in FDI, which boosted the economy of the country.

Nevertheless, Pakistan has since moved on from the reputation of being an agricultural nation and is now known for its construction, mining, and financial sectors which have attracted a myriad of opportunities for economic growth in the region. In this sense, the construction industry is seen as a lucrative opportunity to transform the ailing economy of Pakistan. In particular, the construction industry has seen demand grow for housing projects to meet the needs of the population resulting in interest from different countries resulting in new and successful projects. Foreign investors are on board and likely to invest provided Pakistan examines its current policies and procedures to make investing in Pakistan more safer and lucrative.

The construction industry of Pakistan has progressed over the years which has given robust reasons to foreign investors to focus their attention on this sector. The Pakistan Economic Survey reports that Pakistan's construction industry represents 2.53 of Gross Domestic Product in the country.[393] Meanwhile the construction industry is responsible for employing 7.61% of the employed labour force.[394] Furthermore, according to Fitch Solutions, the predicted growth of the industry amounts to a value of 2,705.5 billion rupees by the year 2028 which is based on the accumulation of construction projects.[395] Hence, the performance of the construction industry offers foreign investors good reasons to invest in this sector.

The foreign companies that have invested in this sector will be discussed in this section to demonstrate the significance of this industry on developing the economy of Pakistan. Pakistan has managed to attract foreign investors from different countries to

[392] Fitch Solutions, 'Pakistan's Current Account Deficit To Widen In FY2021/22' (Fitch Solutions, 2 September 2021) https://www.fitchsolutions.com/country-risk/pakistans-current-account-deficit-widen-fy202122-02-09-2021 accessed 7 September 2021.
[393] Ali Mudasar, 'An Outlook of Pakistan's Economic History: 1947-2021' (Modern Diplomacy, 12 August 2021) https://moderndiplomacy.eu/2021/08/12/an-outlook-of-pakistans-economic-history-1947-2021/ accessed 3 September 2021.
[394] Muhammad Abdul Wasay, 'Economic Status of Pakistan from 1947–2020' (Economy.pk, 7 August 2020) https://economy.pk/economic-status-of-pakistan-from-1947-2020/ accessed 11 August 2021.
[395] Fitch Solutions, 'Pakistan's Current Account Deficit To Widen In FY2021/22' (Fitch Solutions, 2 September 2021) https://www.fitchsolutions.com/country-risk/pakistans-current-account-deficit-widen-fy202122-02-09-2021 accessed 7 September 2021.

invest in the construction sector. An example of a project that is currently underway concerns Pakistan and Dubai which is known as Al-Ghurair Giga Pakistan (Private) Limited.[396] The purpose of this project is to develop and enhance the "places where people live, work, and play by understanding the changing necessities of societies as they step into the future and hence delivering totally sustainable developments of distinction on time and within budget."[397] Other examples of foreign investments include The Centaurus, Platinum Square, and Emaar Properties.[398] Therefore, the construction industry of Pakistan has seen light at the end of the tunnel after a growing interest from foreign investors from countries with close ties to Pakistan has surfaced.

The level of foreign direct investment in this sector benefits the nation as it stimulates economic development. The main contributor of foreign direct investment is China which has replaced the United Kingdom and the United States.[399] This is mainly due to the China Pakistan Economic Corridor (CPEC) which has attracted foreign investment to shift their focus on Pakistan which has boosted the foreign direct investment in the country.[400] The construction sector is a key mechanism for attracting foreign direct investment into the country. The infrastructure of the country needs development, such as railways, airports and highways. This is important for the people that live in different parts of the country in order to enable opportunities for employment, education and healthcare.

4.2.1 Foreign Direct Investment

FDI is a key tool for strengthening the economic sphere of a developing country like Pakistan. FDI is beneficial for boosting the economic growth of the ailing economy of Pakistan as it brings in capital, transfers skills, and formulates managerial practices. This has an important role to play for Pakistan as FDI has the potential to revive the economy of the country. Between 2016-2021, Pakistan experienced a surge in FDI

[396] Sheikh Zayed Bin Sultan Al Nahyan, 'Al Ghurair Giga' (-, 2019) < https://alghurairgiga.com/contact-us/> accessed 7th September 2021.
[397] *Ibid*.
[398] Muhammad Abdul Wasay, 'Economic Status of Pakistan from 1947 – 2020' (economy.pk, 7 August 2020) < Economic Status of Pakistan from 1947-2020 - Economy.pk > accessed 11 August 2021.
[399] Ministry of Finance, 'Pakistan Economic Survey 2013-2014' < www.finance.gov.pk/survey/chapters_14/08_Trade_a nd_Payments.PDF > accessed 15 August 2021.
[400] Massarat Abid and Ayesha Ashfaq, 'CPEC: Challenges and Opportunities for Pakistan' (2015) JPV 17(2) < CPEC-Challenges-Oppertunities-for-Pakistan.pdf (mcqsnotes.com) > accessed 19 August 2021.

which was mainly attributed to Chinese investment. UNCTAD in its World Investment Report for 2020, reports that FDI in Pakistan went from 1.7 billion in 2018 to 2.2 billion in 2019.[401] The State Bank of Pakistan states that for the first part of the fiscal year for 2019-2020, FDI inflows increased by 68.3% to $1.34 billion and, Pakistan's FDI was $114.3 million in July 2020 compared to $71.1 million in July 2019.[402] The main recipient of FDI is the financial sector; followed by the chemicals industry; and the construction industry.[403] The FDI for the construction industry for the last five years is presented in the following table:

Year	**2017**	**2018**	**2019**	**2020:**	**2021**
Amount	8.3	40.4	70.2	20.7	22.7

Despite this significance, Pakistan has weaknesses which deter foreign investors from investing in the country, including corruption, terrorism, and limited fiscal resources.[404] As such, foreign investors require some type of protection to encourage them to turn their attention to a country which has the potential to offer incentives for foreign investors. From these statistics, it is clear that FDI in the country has increased between 2018 and 2021 which is a key factor for the economy of the country. However, this does not mean that this industry has not been impacted by economic determinants. The economic growth of Pakistan was clearly impeded by the advent of Covid-19. UNCTAD finds that FDI in 2020 fell below $1 trillion since 2005 for the first time due to COVID-19.[405] In light of this, the Overseas Investors Chamber of Commerce and Industry (OICCI) Secretary General M. Abdul Aleem explained that, Covid-19 has affected the economy of Pakistan, however the country "has a huge potential to attract foreign investment in a number of new sectors considering it is a growing market for a majority of sectors of the national economy."[406]

[401] United Nations, 'International Investments Agreements Navigator' (Investment Policy Hub, 2022) < https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 December 2021.
[402] *Ibid*.
[403] *Ibid*.
[404] Trading Economics 'Foreign Direct Investment in Pakistan increased by 89.90 USD Million in July of 2021' (-, 2021) < https://tradingeconomics.com/pakistan/foreign-direct-investment> accessed 7 September 2021.
[405] *Ibid*.
[406] *Ibid*.

However, Pakistan has experienced rising contribution in investment projects. For the Fiscal Year 2021 China brought in $651 million; followed by Hong Kong attracting $106 million; and the United Kingdom with $105 million.[407] This is mainly due to the CPEC agreement between Pakistan and China which has considerably boosted the economic growth of Pakistan. The decision to enter the CPEC agreement has helped Pakistan to increase its GDP.[408] CPEC is a major project between both countries consisting of a series of projects aimed at developing the infrastructure of the country. The project is a major development aimed at upgrading the infrastructure in a bid to strengthen the economy of Pakistan.

The projected growth of the country has a positive outlook on the construction industry. Under the CPEC agreement, China has invested in various industries of Pakistan making it the main contributor of foreign direct investment. The State Bank of Pakistan reported a surge in foreign direct investment by 61% due to China's investment in various projects in Pakistan.[409] However, Pakistan needs to tread carefully because there are many weak points in the construction sector. These weaknesses can quickly become a reason for foreign investors to allege a breach of the principles of fairness and equity. These loopholes can result in foreign investors invoking a breach of the fair and equitable treatment standard.

However, Pakistan should pay close attention to its relationship with China as it has the potential of becoming a problem. This is because Pakistan and China signed a BIT in 1989 and this BIT contains a FET provision which is as follows:

> "ARTICLE 3
>
> Investments and activities associated with investments of investors of either Contracting Party Shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting Party."[410]

[407] Trading Economics 'Foreign Direct Investment in Pakistan increased by 89.90 USD Million in July of 2021' (-, 2021) < https://tradingeconomics.com/pakistan/foreign-direct-investment> accessed 7 September 2021.
[408] *Ibid*.
[409] *Ibid*.
[410] Pakistan and China BIT (1989).

Given the fact that the fair and equitable treatment provision is notoriously invoked by foreign investors, there is a pressing need for Pakistan to address its FET provision in its IIAs.

In order to attract FDI in the country, Pakistan has introduced and offered a variety of tax incentives for foreign investors. The first incentive that Pakistan has offered is a regional incentive in the form of a five-year tax holiday. Another incentive is a sectoral incentive which is a 40% reinvestment allowance for infrastructure services. The government, also, offers a housing incentive as a housing programmes for poor and no wealth tax for five years on the value of houses or apartments. Other tax incentives included an export incentive at a concessional tax rate of 0.5, 0.75 and 1.0 per cent.[411] These tax incentives are monitored by legislation which includes the Finance Act 1999, the Income Tax Ordinance of 1979, and the Pakistan Customs Act of 1969.[412]

However, Pakistan requires ample investment from foreign investors as there is a shortage of houses and Pakistan is not attracting enough FDI to meet this shortfall.[413] Even though, the housing sector has gained interest from foreign investors, it is not enough to fulfil the housing needs of the country. For example, the government of Pakistan announced 30 billion rupees for the Naya Pakistan Housing Development Authority (NPHDA) to build houses that are affordable.[414] Furthermore, according to the Association of Builders and Developers Pakistan has pending housing projects worth a total 1.1 trillion Pakistan rupees.[415] In the words of Mian Anjum Nisar, former president of Federation of Pakistan Chambers of Commerce and Industry (FPCCI), Pakistan "needed to prepare groundwork for attracting considerable foreign direct investment (FDI) in medium and long-term."[416] He, also, explained Pakistan "will continue receiving FDI under the China-Pakistan Economic Corridor (CPEC) and it can also accelerate inflows by gaining wider domestic socio-political support for CPEC

[411] Zahir Shah, Fiscal Incentives, the Cost of Capital and Foreign Direct Investment in Pakistan: A Neo-Classical Approach (Pakistan Institute of Development Economics, 2003) < https://www.pide.org.pk/pdf/psde%2018AGM/Fiscal%20Incentives.pdf > accessed 19 January 2022.
[412] *Ibid*.
[413] Muhammad Abdul Wasay, 'Economic Status of Pakistan from 1947 – 2020' (economy.pl, 7 August 2020) < Economic Status of Pakistan from 1947-2020 - Economy.pk > accessed 11 August 2021.
[414] Ministry of Finance, 'Pakistan Economic Survey 2013-2014' < www.finance.gov.pk/survey/chapters_14/08_Trade_a nd_Payments.PDF > accessed 15 August 2021.
[415] -- (The Nation, 21 March 2021) < https://nation.com.pk/21-Mar-2021/fpcci-wants-serious-steps-to-win-investors-confidence-as-fdi-declining > accessed 7th September 2021.
[416] -- (The Nation, 21 March 2021) < https://nation.com.pk/21-Mar-2021/fpcci-wants-serious-steps-to-win-investors-confidence-as-fdi-declining > accessed 7th September 2021.

projects and removing procedural bottlenecks that delay their timely implementation".[417] Therefore, Pakistan has made slow progress in accruing a sizeable investment inflow from foreign investors from projects outside of CPEC.

The construction industry brings in ample foreign direct investment for the country as the FDI in this sector continues to increase. In this sense, the industry has grown over the years owing to China's interest in Pakistan resulting in the billion dollar CPEC agreement opening the doors to many opportunities for Pakistan. However, efforts to increase FDI in the housing sector are at a halt despite the tax incentives offered by the government of Pakistan. Nevertheless, the construction industry has the potential to attract foreign investors as a source of capital to sustain economic development and growth provided Pakistan remedies the anomalies in the construction industry to accommodate FDI in this sector.

The construction activities that have taken place in the country have had an adverse effect on these communities. These effects include discord amongst the people in local communities. For example, Shahid Mahmood, Muazzam Sabir, and Ghaffar Ali conducted a study examining the impact of CPEC on sustainable development in the communities where the projects are being undertaken.[418] In this study, the researchers found that the local people had low financial expectations from different projects implemented under CPEC causing dissatisfaction and tensions amongst the local people. The researchers proposed an equitable allocation of the projects to help reduce the dissatisfaction and tensions faced by these communities.[419] These activities have, also, had a negative impact on sustainable development in Pakistan. In 2005, Chief Justice Iftikhar Mohammad Chaudhry sought a *suo moto* in relation to the Islamabad Chalets Housing Scheme in response to devastation caused by an earthquake.[420] The Chief Justice acted on a note claiming that "development and construction in disregard of environmental concerns could wreak havoc and cause immense loss of life and property".[421] In recent years, the effect these activities are

[417] -- (The Nation, 21 March 2021) < https://nation.com.pk/21-Mar-2021/fpcci-wants-serious-steps-to-win-investors-confidence-as-fdi-declining > accessed 7th September 2021.
[418] Muhammad Abdul Wasay, 'Economic Status of Pakistan from 1947 – 2020' (economy.pl, 7 August 2020) < Economic Status of Pakistan from 1947-2020 - Economy.pk > accessed 11 August 2021.
[419] Trading Economics 'Foreign Direct Investment in Pakistan increased by 89.90 USD Million in July of 2021' (-, 2021) < https://tradingeconomics.com/pakistan/foreign-direct-investment> accessed 7 September 2021.
[420] *Suo Moto Case No 1 of 2005*, decided *Pakistan v XYZ*.
[421] *Ibid*, 11.

having on the local communities is becoming a cause for concern for the country which foreign investors will certainly consider prior to commencing any new investment decisions.

4.2.2 Construction Sector Cases

4.2.2.1 *Bayindir v Pakistan*

The claimant in this case, Bayindir Insaat Turizm and Ticaret Ve Sanayi A.S, and the respondent Pakistan entered into a contract where the National Highway Authority agreed to build the Pakistan Islamabad-Peshawar Motorway. Thereafter, disputes arose under the contract in 1993 which were settled when the parties decided to form a new contract in 1997. Under the new contract the claimant requested additional time in relation to some of the works and some of the requests were accepted by the respondent. Eventually, the project had fallen behind which the both parties acknowledged, however, the parties disputed over who was responsible for the delay.

During this period, the parties held meetings in relation to the delays that had caused the project to fall behind. However, the NHA issued a notice of termination to the claimant under which the claimant had to empty the vicinity. Subsequently, the army took over the premises alleviating the claimant's employees of their duties. The NHA requested repayment of the monies paid to the claimant under the Mobilisation Advance Guarantees. This prompted the claimant to commence proceedings in ICSID.

The claimant accused the respondent of violating the Turkey-Pakistan BIT (1995) due to the actions of the respondent in requesting repayment of monies under the Mobilisation Advance Guarantees and for securing the work site of the claimant. Furthermore, the claimant argued that Pakistan failed to comply with the fair and equitable treatment obligation which the claimant invoked through the most favoured nation clause. In addition, the claimant alleged the respondent breached the most favoured nation clause and illegally expropriated the property of the claimant. Thus, Bayindir sought $494.6 million dollars as well as interest.

In terms of the argument that Pakistan failed to treat the claimant fairly and equitably this notion was contested by the respondent as Article II (2) of the Pakistan-Turkey BIT did not make a provision for fair and equitable treatment. However, Bayindir

argued that the obligation arises from the preamble of the treaty through the most favoured nation clause. The preamble projects that:

> "The Islamic Republic of Pakistan and the Republic of Turkey […] agre[e] that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources."[422]

Even though this clause agreed to offer fair and equitable treatment to the claimant the tribunal had to deliberate on the matter as to whether the preamble itself constituted a fair and equitable treatment obligation. Nevertheless the tribunal had to decide whether fair and equitable treatment could be invoked through the most favoured nation clause in Article II(2) which reads as follows:

> "Each party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, which ever is the most favourable."[423]

Pakistan did not contest during the jurisdiction hearing or in its reply to the claimant that the treaties with France, the Netherlands, China, Switzerland, Australia and the United Kingdom did not specifically contain a fair and equitable standard provision.

4.2.2.2 Shehla Zia vs. WAPDA (1994) [424]

In this case, a group of residents challenged the Water and Power Development Authority's (WAPDA) decision to build an electricity grid station on a green belt in the region. The case was brought and heard under the area of human rights citing Article 184 (3) of the Pakistan constitution which allows the Supreme Court of Pakistan to enforce rights that are of a public importance. According to the petition, the electricity grid station posed a threat to the constitutional right to life under the constitution of Pakistan. The Supreme Court of Pakistan did not ask the WAPDA to

[422] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, 229.
[423] *Ibid*, 230.
[424] *Ms. Shehla Zia v. WAPDA* [1994] PLD SC 693.

cease the project instead asked the National Engineering Services of Pakistan (NESPAK) to review and write a report on the project as well as suggesting alternative locations for the project to be undertaken. Furthermore, the court ruled that from now on WAPDA must involve a group of international renowned scientists to decide and review any future projects initiated by WAPDA.

The decision in this case is a highly important one in terms of developing the outmoded approach Pakistan had towards the environment. It was this case that recognised the right to a healthy environment since the constitution of Pakistan does not contain a provision on the protection of the environment. The tribunal's perception of the right to life in this case extended the meaning of the right to life to incorporate the right to a healthy environment. In the words of the Supreme Court of Pakistan the right to life

> "…does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally."[425]

Furthermore, this case establishes the precautionary principle which placed a restriction on any project that posed a risk to the environment and placed an obligation on the state to ensure the environment is sanitary and healthy. Thirdly, the court cited the salt miners case stating that right to have water free of contamination and pollution is a right in itself. Another consideration placed before the court requested the court to set a precedent to ease the process of courts on matters relating to the environment. Nevertheless, this is an important case it considers problems with environmental protection in Pakistan and the meaning of right to life in relation to the environment. The effect of this case can be seen in another case brought before the Supreme Court of Pakistan which is discussed in the next section.

4.2.2.3 Leghari v Attorney-General (2015) [426]

[425] *Ms. Shehla Zia v. WAPDA [1994]* PLD SC 693, 711.
[426] *Leghari v Attorney-General* (2015) W.P. No. 25501/201.

In this case, a farmer brought a claim before the Supreme Court of Pakistan because his land had been affected by climate change. He accused the Government of Pakistan of failing to adhere to their own environmental policies. The tribunal ruled in favour of the farmer stating that this claim fell within the remit of the right to life.[427] As a result of this decision, the tribunal ordered that the Government of Pakistan to establish a regulatory body in the form of a Climate Change Commission to oversee the implementation of the environmental policies.

In this light, this case has widened the meaning of the right to life provision to include climate change as Pakistan has recognised that the right to life extends to all living creatures and is not merely restricted to human beings. However, it is worth noting that this case was brought 11 years after the decision in the *Shehla Zia* case which suggests that the obligations of the authorities in relation to protecting the environment are still very much a subject of discussion. Although, Pakistan has acknowledged the rights of the environment, implementing these rights and policies is a, albeit, at a slow pace despite international pressures to address the issues of climate change.

4.2.3 Sectorial Employment Policies

First and foremost, the international investment agreements of Pakistan do not make provisions for the employment rights of foreign investors.[428] Pakistan's IIAs are primarily conducive to addressing investment flows as opposed to employment issues. Nevertheless, the rights of foreign investors working in Pakistan are protected under Pakistan Law.[429] These rights are invested in one of the main documents on employment right which stems from the Constitution of Pakistan. The relevant section is "Part II: Fundamental Rights and Principles of Policy" which includes the labour rights under this section. Pakistan, also, has statutes, such as The Industrial and

[427] *Leghari v Attorney-General* (2015) W.P. No. 25501/201.
[428] Iftikhar Ahmed, 'Labour and Employment Law: A profile on Pakistan' (2010) <https://wageindicator.org/documents/Labour_and_Employment_Law-A_Profile_on_Pakistan.pdf> https://wageindicator.org/documents/Labour_and_Employment_Law-A_Profile_on_Pakistan.pdfaccessed 2 August 2021.
[429] Bilal Shaukat, Shafaq Rehman, Sara Ansari 'Doing business in Pakistan' (1 August 2016) <https://content.next.westlaw.com/1-504-0890?__lrTS=20210610180927109&transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 7 September 2021.

Commercial Employment (Standing Orders) Ordinance 1968[430] which addresses the relationship between the employer and the employee and the contract of employment.

Despite the government of Pakistan pledging to address employment issues in the country Pakistan is still in the public eye for failing to address labour rights. A prime example of this occurred in 2017 when one of the top lifestyle brands in Pakistan, Khaadi, experienced an backlash in May 2017.[431] The company experienced protests held by workers for inhumane working conditions of the employees. The brand fired 32 workers for demanding their rights under employment law in Pakistan. Khaadi rejected the allegations causing the protests to go viral. The employees grievances included unfair dismissal, unsanitary conditions, long hours, pay below minimum wage. As a result Khaadi decided to enter a deal with union leaders causing some to withdraw complaints. However, some of the workers are yet to receive a decision. Another incident occurred in Ali Enterprises in September 2012 where the garment factory after catching fire killed approximately 225 workers and injures more than 100.

Pakistan has been accused of human rights violations according to international organisations. The Human Rights Watch reports females in the garment industry have reported experiencing physical and verbal abuse, denied maternity leave, prevented from taking toilet break and denied medical leave.[432] The organisation, also, reports that these factories employ young children and these children have been found to be without written contracts. Another issue which the organisation has declared is that the factories have been misusing the benefits granted by the government. These issues suggest that Pakistan has a weak domestic regime which acts as a deterrent for foreign investors. In order to give confidence to foreign investors Pakistan should consider strengthening its employment laws as a reliable employment environment will influence the decision of foreign investors to invest in Pakistan.

It is observed that Pakistan has built a reputation for suppressing the voices of employees who fight for their rights in the workplace. An example of this is the

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[430] Bilal Shaukat, Shafaq Rehman, Sara Ansari 'Doing business in Pakistan' (1 August 2016) https://content.next.westlaw.com/1-504-890?__lrTS=20210610180927109&transitionType=Default&contextData=(sc.Default)&firstPage=true accessed 7 September 2021.

[431] Samreen Ashraf, 'CSR in Pakistan: The Case of the Khaadi Controversy' (Research Gate, 2018) < https://www.researchgate.net/publication/321343329_CSR_in_Pakistan_The_Case_of_the_Khaadi_Controversy> accessed 19 January 2022.

[432] *Ibid*.

Mustansar Randhawa murder which occurred on 6th July in 2010. Mustansar Randhawa was a leader of the political party Labor Qaumi Movement and well-known for fighting for labourers rights in the District of Punjab.[433] He was killed for announcing a strike in a bid to increase the wages and working conditions of labourers. His death caused a stir in the community resulting in protests where workers demanding an increase in their wages and an improvement to their working conditions. Police intervened using force against protestors causing about 100 arrests, and injuries to protestors. These protests led to six trade union leaders being sentenced to life imprisonment under anti-terrorism laws. From this event, the question thus arises if the citizens of Pakistan do not have rights and are killed as a result of demanding their legal rights does a country like Pakistan appeal to foreign investors who have an interest in Pakistan. Hence, it is argued that events like these may not appeal to foreign investors who would choose to invest in a country offering better legal protection than Pakistan does at present.

Pakistan's labour laws have drawn international attention from NGOs bringing in a negative. These international invention are obligating Pakistan to adhere to employment law. The United Nations Guiding Principles on Business and Human Rights requested that business are required to "avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur."[434] The nature of the employment environment in Pakistan means that foreign investors need protection and this protection exists in the form of fair and equitable treatment as it acts as a guarantee that foreign investors will receive treatment that is fair and equitable. Hence, the violation of employers rights in Pakistan is certainly problematic for foreign investors that have shown an interest in investing in the country.

4.2.4 Sectorial Policies: Environmental

[433] Bilal Shaukat, Shafaq Rehman, Sara Ansari 'Doing business in Pakistan' (1 August 2016) https://content.next.westlaw.com/1-504-890?__lrTS=20210610180927109&transitionType=Default&contextData=(sc.Default)&firstPage=true accessed 7 September 2021.

[434] United Nations 'United Nations Guiding Principles on Business and Human Rights' (United Nations Human Rights, 2011) < https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 19 January 2022.

This section examines the environmental policies that exist in Pakistan in order to understand the role these policies play in creating a stable and authentic environment for foreign investors. Foreign investors need to be familiar with the environmental impact of any of their investment endeavours. For this reason, this section undertakes an analysis of legislation on the environment enacted by the Government of Pakistan to protect the environment as well as whether any of the companies within this sector have sued Pakistan.

First and foremost, Pakistan has enacted legislation aimed at protecting the environment in the country, albeit, at a slow pace compared to other nations.[435] The Pakistan Environmental Protection Act 1997 is the main piece of legislation prohibiting environmental destruction and implements international environmental laws. In the preamble of the Act it clearly states this act is to "provide for the protection, conservation, rehabilitation and improvement of the environment, for the prevention and control of pollution, and promotion of sustainable development."[436]. This is one of the first comprehensive legislation in Pakistan to legislate on sustainable development through the legal, administrative, and technical institutions.[437] This Act is responsible for establishing the Pakistan Environmental Protection Council which is headed by the Prime Minister of Pakistan, and relevant ministers, NGOs, trade and industry, and educational establishments.[438] The Act establishes the Federal and Provincial Environmental Protection Agencies and the four Environmental Protection Agencies created for the supervision of import of hazardous waste which is prohibited under the Act. This Act explains that Pakistan has taken formidable steps towards protecting the environment, however, these laws continue to be broken by the elite and sometimes go unnoticed until locals petition against unlawful construction activities.

[435] Draft Commentary on the Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/XX, E/CN.4/Sub.2/2003/WG.2/WP.1, section G, 14(e).
[436] Pakistan Environmental Protection Act 1997.
[437] John Gerard Ruggie 'Business and Human Rights: The Evolving International Agenda' The American Journal of International Law (2007) 101 (4) 819, 826; Carlos M. Vazquez, 'Direct vs. Indirect Obligations of Corporations Under International Law' (2005) 43 Columbia Journal of Transnational Law 927, 950-54.
[438] Elisa Morgera, *Corporate Environmental Accountability in International Law* (2nd edn Oxford University Press 2020) 102.

Construction projects have the potential of causing harm to the environment and there are examples of projects which have been declared detrimental to the environment according to the higher courts in Pakistan. For example, the Margala housing society, Islamabad chalets, and the Pir Sohawa valley villas signal the potential environmental destruction brought about by construction projects in Pakistan.[439] In each case, environmentalists fought to protect the environment contesting a range of issues, including de-forestation, climate change, and pollution.[440] Another example is the New Muree City project which was declared fatal to the environment and was brought on a suo motu basis. In this case the Supreme Court of Pakistan ruled in favour of the residents of murree ordering the project to end as it was a threat to the Murre Hill forest and the Simly and Rawal dam reservoirs. Under the Pakistan Environmental Protection Act 1997 all activities are banned in the Murree, Kahuta, and Kotli Sattian tehsils regions. The Murree project was being completed without any opposition despite the activities directly breaching Pakistan environment laws until the locals contested the activities.[441] From these examples, it seems that Pakistan is taking environmental legislation lightly adding to the accusation that corruption subsists in the Pakistan government and as such these practices only add to the accusations of corruption which continue to be inherent in Pakistan.

The environmental policies of the country have attracted international attention from different organisations.[442] These organisations have urged Pakistan to revisit their position in relation to the environment and to take initiatives with the purpose of tackling the environmental issues that have afflicted various areas of the country. In particular, The World Health Organisation (WHO) points that 200 deaths per 100 000 population is linked to environmental issues in Pakistan. Similarly the World Bank reports 22 000 premature adult deaths attributed to diseases that are caused by air pollution. In response to these statistics the WHO developed a regional plan

[439] Elisa Morgera, *Corporate Environmental Accountability in International Law* (2nd edn Oxford University Press 2020) 102.
[440] Pakistan Environmental Protection Act 1997.
[441] United Nations General Assembly, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises (United Nations Human Rights Council, 2007) < file:///C:/Users/ZahraFatima/Downloads/A_HRC_17_31-EN.pdf> accessed 28 March 2022.
[442] United Nations, 'OHCHR and Business and Human Rights' <https://www.ohchr.org/en/business> accessed 28 March 2022.

for Pakistan to develop a strategy aimed at developing a healthy environment. An improvement to the environmental landscape can encourage an influx of investment opportunities from foreign investors and has the potential of barring foreign investors from abusing the gaps in the country's environmental policies and laws unless Pakistan remedies these anomalies.

Hence, if Pakistan cannot treat its own citizens fairly and equitably then there is no guarantee that foreign investors will be treated fairly and equitable. This is based on an analysis of the construction sector as it is clear that the domestic climate of Pakistan is problematic. Pakistan already encounters several difficulties in attracting foreign investors to make investments. Pakistan has experienced an increase in political, territorial, and economic instability due to the construction sector. Investors have experienced uncertainty as a result of the frequent changes of administrations, security concerns, and the absence of cogent policies. As a result, in order to increase economic growth in Pakistan and attract steady, long-term investment, foreign investors require protection. Pakistan must thus take action to safeguard foreign investment.

Thus, having fair and equitable treatment as part of the protection afforded to foreign investors can ensure that their investment is secure is one method to defend to foreign investors. For foreigners to invest in the country, Pakistan must be dedicated to provide a secure environment. The nation must also provide financial incentives to these investors, such as tax cuts, subsidies, and other forms of economic encouragement. In order to provide legal protection to foreign investors, a strong legal structure must be constructed. Additionally, fostering trust with foreign investors will increase their confidence. This may be done by effectively communicating with them and providing regular updates on any changes to policy or security-related problems. Foreign investment has the ability to boost Pakistan's economy, but doing so would need the implementation of effective policies. Hence, my thesis is able to propose solutions based on the case study of the constructions sector.

Another way in which FET relates to the construction sector is that for foreign investors that there is guarantee that foreign investors offer fair and equitable treatment under Pakistani investment legislation. The IIAs assure that international

investors will be treated equally with domestic investors and forbids any sort of discrimination against them. The law also makes sure that foreign investors may easily repatriate their cash, dividends, and profits. The law also provides assurances that foreign investors won't be subjected to any arbitrary measures imposed by the government or any other body with the intention of fostering a favourable business climate.

Therefore, the levels of instability in Pakistan require protection for foreign investors because Pakistan has a lengthy history of political and economic unrest, which has made doing business there difficult for outside investors. Many international businesses have been hesitant to invest in the nation due to its unstable infrastructure, erratic political situation, and security worries. Additionally, over the years, foreign investors who have entered the nation have typically encountered a variety of difficulties like bureaucracy, ingrained corruption, and a dim legal system.

Furthermore, in recent years, Pakistan has taken a few actions to safeguard foreign investments. For instance, the government has provided tax rebates, subsidies, and duty-free imports as incentives to foreign investors. Pakistan has also ratified a number of international investment treaties and accords with nations throughout the world, which give foreign investors legal protection from any potential government action. Pakistan has also made steps to enhance its legal and regulatory framework, including the formation of an investment board to examine and approve foreign investments and a specialised court for commercial disputes.

Pakistan's political unpredictability continues to be a major reason for concern notwithstanding these actions. Threats of terrorism, rioting, and governmental corruption are just a few of the recent political turmoils the nation has faced. Furthermore, it is difficult for foreign investors to make future plans and confident investments in Pakistan due to the country's unstable geopolitical situation. As a consequence, the nation still has to do some work to safeguard foreign investments over time. The investment climate in Pakistan might, nevertheless, improve with the correct regulations, incentives, and policies.

4.3 Case Study 2: The Mining Sector

Pakistan has an abundance of minerals, including gold, copper, mineral salt, coal, chromite, and bauxite. For this reason, the mining sector is an attractive prospect for foreign investment as it offers a myriad of opportunities for foreign investors. Today, the mining sector is considered one of the most dangerous industries in the country. The lack of health and safety procedures, technology, equipment, and threat of poisoning endanger the lives of workers on a daily basis. Furthermore, there are reports of explosions, collapsed mines, and carbon monoxide poisoning risking the lives of miners from the beginning.[443] Despite the dangers of the mining industry foreign investments continue to invest in the sector.

The history of the mining industry goes all the way back to 327 B.C. According to legend, the Army of Alexander the Great discovered the salt reservoirs in Khewra[444] when the army ordered the horses to rest due to the summer heat in a cave. After entering the cave the horses rested in the cave which turned out to be a salt cave.[445] The horses began licking the walls of the cave which cured their dehydration and replenished lost salts from the heat.

Although, this information is not documented, it is believed that the earliest recording of activities pertaining to the mining sector point to the reign of the Mughal Empire. During the Mughal Empire, the salt mines were under the control of the government, so mining became a largely practiced activity in India. The Mughal emperors quickly overturned the production of different minerals maintaining steady growth of the mining sector. It was during their rule that monuments were bult, currencies were modified, and statues were erected using the minerals found in the coal mines of India.

According to historical records, in 1774, the East India Company gave permission to an English company to commence mining in Raniganj (Bengal). In 1849 the

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[443] Iftikhar Ahmed, 'Labour and Employment Law: A profile on Pakistan' (2010) < Microsoft Word - Labour and Employment Law - A Profile on Pakistan.doc (wageindicator.org) > accessed 2 August 2021.

[444] Ahmad Salim, 'A Rapid Assessment of Bonded Labour in Pakistan's Mining Sector' (Working Paper, 3 January 2004) https://www.ilo.org/global/topics/forced-labour/publications/WCMS_082032/lang--en/index.htm accessed 7 September 2021.https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082032.pdf

[445] Ahmad Salim, 'A Rapid Assessment of Bonded Labour in Pakistan's Mining Sector' (Working Paper, 3 January 2004) https://www.ilo.org/global/topics/forced-labour/publications/WCMS_082032/lang--en/index.htm accessed 7 September 2021.https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082032.pdf

British took over Punjab and the Khewra mines as the absence of stringent tariffs and innovative technology played a considerable role in opening the doors for British colonial rule over the mining sector.[446] During the colonial period, the Royal Commission on Labour in India reported that two thirds of the people employed were by the mining sector.

4.3.1 FDI in the Mining Sector

The economy of Pakistan has undergone restructuring over the years as the emergence of national corporations has taken centre stage.[447] Today the economy of the country is seen as a mixed economy due to the changes circumventing the gross domestic product of Pakistan.[448] Before the entry of national corporations, a significant portion of the economy was occupied by private enterprise until the 1970s when the nationalisation took precedent over the mining industry. In the 1980s, Zia ul Haq implemented shariah law prohibiting practices such as interest, alms, and land tax.[449] Some of these practices continued to be implemented with regards to the economy of Pakistan. In the 1990s, the economy began to witness an increase in the privatisation of more parts of the economy.[450]

Over the past decade, Pakistan has witnessed an unsteady flow of investment in the mining sector even though the country has a lot to offer in terms of its mineral deposits. In relation to the mining sectors, the Gross Domestic Product in 2020 fell from 309823 million to 349684 million in 2019 for Pakistan and the highest it has ever been at any point is

[446] Trading Economics 'Foreign Direct Investment in Pakistan increased by 89.90 USD Million in July of 2021' (-, 2021) < https://tradingeconomics.com/pakistan/foreign-direct-investment> accessed 7 September 2021.https://tradingeconomics.com/pakistan/gdp-from-mining

[447] Board of Investment, 'Invest Pakistan' ('Pakistan at a glance', 7 September 2021) <https://invest.gov.pk/pakistan-at-a-glance> accessed 7 September 2021.

[448] Ahmad Salim, 'A Rapid Assessment of Bonded Labour in Pakistan's Mining Sector' (Working Paper, 3 January 2004) https://www.ilo.org/global/topics/forced-labour/publications/WCMS_082032/lang--en/index.htm accessed 7 September 2021.https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082032.pdf

[449] Marc L.Ross, 'Working with Islamic Finance' (11 January 2022) < Working With Islamic Finance (investopedia.com) > accessed 23 January 2022.

[450] Ahmad Salim, 'A Rapid Assessment of Bonded Labour in Pakistan's Mining Sector' (Working Paper, 3 January 2004) https://www.ilo.org/global/topics/forced-labour/publications/WCMS_082032/lang--en/index.htm accessed 7 September 2021.https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082032.pdf

356667 million.[451] In terms of sectors, the main recipient of FDI is the power sector, followed by the financial sector, oil and gas sector, and trade; mining has not even made the top five sectors for the fiscal year 2021.[452] From the statistics it seems that Pakistan is falling behind its competitors despite having a huge potential for foreign investment.

4.3.2 Companies that have invested in the Mining Sector

The ample opportunities for foreign investors in the mining sector of Pakistan has attracted a steady influx of investment from different countries. For example, in 2019, Saudi Arabia invested about 7.5 million SAR in projects targeting energy renewal in Pakistan. Saudi Arabia Mining Co agreed to build a copper mine in the Reko Diq area of Pakistan in order to produce approximately 600,000 tons of copper per annum. This is part of a bigger deal with Pakistan to invest in the mining industry with projects amounting to about 22.5 billion.[453] Additionally, in 2021 the Saudi Arabia Mining Co has entered into a contract with Pakistan worth $880 million for the Mansourah-Massarah gold mines. The project purports to increase local production by providing operational mining services in the region, such as drilling, hauling and dewatering. The high investment potential of the mining sector means that foreign investors are keen to invest in the mining sector due to the broad potential this sector has for foreign investors.

4.3.3 Environmental Policies in the Mining Sector

The mining activities in the region have become an essential source for the economic development of Pakistan. However, the activities involved in mining have had an adverse effect on the environment in the relevant mining provinces as the cluster of coal mines have contributed to the problem increasing the vulnerability of the people that live in Pakistan. The main issue with mining in these regions is the

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[451] Trading Economics 'Foreign Direct Investment in Pakistan increased by 89.90 USD Million in July of 2021' (-, 2021) < https://tradingeconomics.com/pakistan/foreign-direct-investment> accessed 7 September 2021.https://tradingeconomics.com/pakistan/gdp-from-mining

[452] Board of Investment, 'Invest Pakistan' ('Pakistan at a glance', 7 September 2021) <https://invest.gov.pk/pakistan-at-a-glance> accessed 7 September 2021.

[453] --, '*Saudi Arabia to invest in Pakistan's renewables, mining sectors: Al-Falih*' (Argaam, 18 February 2021) https://www.argaam.com/en/article/articledetail/id/595108 accessed 7 September 2021.

high pollution levels administered as a result of the production of various minerals. According to the World Air Quality Report (IQAir) 2020 Pakistan has been ranked as the second most polluted country in the world.[454] While, Karachi, Lahore, Peshawar, and Faisalabad have been labelled the most polluted cities in the world.[455] As per the report, the pollution levels far exceeded the guidelines set by the World Health Organisation. Furthermore, pollution is responsible for 20% of the total reported deaths resulting in a reduction of life expectancy.[456] Also, from an economical point of view the cost of pollution to the country is about $12.51 billion dollars a year.[457] Thus, the mining activities within the country have long-standing effects on the environment putting pressure on the government to deal the environmental damage.

In response to the environmental damage caused by the mines, Pakistan is on a mission to reduce emissions to an acceptable level. The Ministry of Climate Change (MoCC) has drafted a report for the "Pakistan Clean Air Programme 2020" to rectify the damage done to the environment.[458] The programme has vowed to decrease the damage done to the environment produced by vehicles, industries, waste disposal and dust. This will be achieved by incorporating ongoing and new initiatives targeting the most pollution causing sectors in the country. From this initiative it seems that as a developing country Pakistan has less stringent measures in place for tackling environmental issues due to a lack of regulations on the environment making it a popular arena for foreign direct investment. At the same time, foreign investors expose their properties to environmental damage and a lack of regulations means protection of their investments is rather limited in Pakistan. Thus, the scope for invoking fair and equitable treatment is immeasurable for foreign investors in such circumstances.

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[454] --, 'Air quality and pollution city ranking' (IQAIR, 2022) < https://www.iqair.com/world-air-quality-ranking > accessed 19 January 2022.
[455] --, 'Air quality and pollution city ranking' (IQAIR, 2022) < https://www.iqair.com/world-air-quality-ranking > accessed 19 January 2022.
[456] *Ibid*.
[457] *Ibid.*
[458] --, ''We must protect our children's health from air pollution', says Deputy Minister for Climate Change, 17 June 2021) < https://gov.wales/we-must-protect-our-childrens-health-air-pollution-says-deputy-minister-climate-change > accessed 7 September 2021.

4.3.4 Human Rights and the mining sector

Pakistan has a long history of human rights violations in relation to the mining industry, such as poor working conditions, inadequate protective equipment for workers, and child abuse. The National Commission for Human Rights (NCHR) in Pakistan established under the Human Rights Act 2012 is Pakistan's first National Human Rights Institution.[459] The NCHR reports that the health and safety of workers in the mines in Balochistan are neglected. The report acknowledges the deaths rate associated with the mines in the province of Balochistan, including the collapsed mine in 2017 resulting in the death of 23 workers and injuring several others.[460] According to the Pakistan Central Mines Labour Federation, 100 to 200 coal miners die on average every year.[461]

4.3.5 Employment Policies and the Mining Sector

The main issue with the employment sector is the lack of a modern piece of legislation overseeing the mining industry. The first piece of legislation managing the mining sector predates the partition of India and Pakistan.[462] This appeared in the form of the Mines Act which was signed on 23rd February in the year 1923 as an "Act to amend and consolidate the law relating to the regulation and inspection of mines."[463] Under the Mines Act 1923 the onus is on the Department of Inspectorate of Mines to supply equipment to ensure the health and safety of coal miners. Despite this duty, violations of workers' rights still persist in the regions where coal mining activities are undertaken. Hence, the lack of a robust legal

[459] Rabeya Agha, 'Death in Mines (A Report on Coal Mines in Balochistan' (The National Commission for Human Rights, 2021) < https://nchr.gov.pk/wp-content/uploads/2019/01/Coal-Mines-in-Balochistan.pdf > accessed 19 January 2022.
[460] Ahmad Salim, 'A Rapid Assessment of Bonded Labour in Pakistan's Mining Sector' (Working Paper, 3 January 2004) https://www.ilo.org/global/topics/forced-labour/publications/WCMS_082032/lang--en/index.htm accessed 7 September 2021.https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082032.pdf
[461] Rabeya Agha, 'Death in Mines (A Report on Coal Mines in Balochistan' (The National Commission for Human Rights, 2021) < https://nchr.gov.pk/wp-content/uploads/2019/01/Coal-Mines-in-Balochistan.pdf > accessed 19 January 2022.
[462] Ahmad Salim, 'A Rapid Assessment of Bonded Labour in Pakistan's Mining Sector' (Working Paper, 3 January 2004) https://www.ilo.org/global/topics/forced-labour/publications/WCMS_082032/lang--en/index.htm accessed 7 September 2021.https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082032.pdf
[463] Pakistan - Mines Act 1923 (No IV of 1923).

framework governing the area of mining may prevent and facilitate missed foreign investment opportunities for Pakistan.

Pakistan has created a set of policies made by provinces in order to govern the mining industry. The policies in existence are as follows: The Coal Mines Regulations, 1926; The Mining Board Rules, 1951; The Consolidated Mines Rules, 1952; The Metalliferous Mines Regulations, 1926; and the Sindh Coal and Metalliferous Mines (supplementary) Regulations, 1986. Although, Pakistan has made efforts to devise policies to tackle issues within the industry these regulations are reluctantly executed in workplaces. This is supported by Chaudhry Naseem, President Pakistan Workers Federation who states "[e]ven though the present laws are not updated but, unfortunately, even these laws are not implemented."[464] However, the successful implementation of these policies have been marred by political disturbances in the coal mining regions.

Although the law is outdated in this area Pakistan has managed to attract foreign direct investment in the country. In 2016, for example, Pakistan entered into coal mining agreement in relation to Sindh which aims to generate 3.8 million tonnes of coal a year.[465] The Sindh Engro Coal Mining Company (SECMC) was formed to produce coal in the area of Tharparkar, Sindh.[466] However, the abuse at these sites is very much a taboo subject especially the existence of corruption. Secretary General Mines and Gypsum Quarries Union, Pind Dadan Khan, Yousaf Naz, state that "[t]he concerned department does not want the window of corruption to be closed forever".[467] The Cabinet Committee of the Punjab Assembly have accepted a draft to make changes to the Factories Act 1934 to ensure the health and safety of workers is up-to-date, and health facilities are available to the workers.[468]

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[464] Rabeya Agha, 'Death in Mines (A Report on Coal Mines in Balochistan' (The National Commission for Human Rights, 2021) < https://nchr.gov.pk/wp-content/uploads/2019/01/Coal-Mines-in-Balochistan.pdf > accessed 19 January 2022.

[465] Ahmad Salim, 'A Rapid Assessment of Bonded Labour in Pakistan's Mining Sector' (Working Paper, 3 January 2004) https://www.ilo.org/global/topics/forced-labour/publications/WCMS_082032/lang--en/index.htm accessed 7 September 2021.https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082032.pdf

[466] --, 'bringing energy security to Pakistan' (Engro Energy, 2021) https://www.engroenergy.com/sindh-engro-coal-mining-company/ accessed 7 September 2021.

[467] *Ibid*.

[468] *Ibid*.

One of the key elements that affects fair and equitable treatment of foreign investors when deciding whether to invest in a country is its stability. Unfortunately, Pakistan has long been among the most unstable nations in the world, which has had an impact on international investment. Numerous political and economic upheavals the nation has experienced have led to a lack of confidence from international investors. With very modest investments in other industries the majority of investments continue to be restricted to the mining sector. Furthermore, the Pakistani Government is still taking action to address the challenges in this sector. The frequency of attacks in this sector has not decreased as a result of these actions, which is a key step towards building stability in the country and providing the adequate fairness and equity required for foreign investors.

Fair and equitable treatment is a key consideration for foreign investors when making decisions in the mining sector. Equity for foreign investors in Pakistan lacks transparency and justice while having a substantial potential for investors. The bulk of international investors have been deterred from making additional investments in the region by this factor. Additionally, the market's larger participants are favoured by the current economic structures and rules, making it challenging for smaller firms to achieve any major progress. However, the government should work towards establishing clear, transparent, and equitable regulations to attract foreign investors as it has started to see the need to build a more inclusive economy.

Moreover, Pakistan's unpredictability and unfair economic policies have made it challenging to entice international investors, which has had a huge impact on the mining sector. Pakistan must handle the inherent problems, develop an open economy with inclusive policies, and attract more foreign investment if it hopes to attract more of them. These actions will not only help domestic investors but will also promote the economy and increase investment interest. Pakistan cannot afford to lose out on the advantages of foreign investments in its economy in an increasingly globalised world.

Levels of instability in Pakistan require protection for foreign investors. For many years Pakistan has struggled with political and economic instability in his sector. Not only has the country's security situation gotten worse, but it also poses a threat to the safety of international investors. Due to the country's growing insecurity, there

has been an increase in terrorism, extremism, abduction, and target killings, which eventually deters international investors from making investments there. To guarantee the security of foreign investors, the Pakistani government has taken a step by including FET in its IIAs. The standard, however, has not been sufficient to eliminate the stability concerns and dangers that still remain. The current government is making an effort to entice international investment by providing special incentives and tax exemptions, but the country's ongoing instability remains a significant deterrent. Therefore, it is imperative that the government act in a manner to end the instability, improve the legal system, and lower economic risks in order to entice international investment. Hence, the huge potential that foreign investment may offer Pakistan can only then be realised.

4.4 Conclusion

The issues within the construction and the mining sectors has a strong correlation with the relationship between the foreign investor and the host states. The lack of regulation in these sectors attests to the imbalance in the unequal relationship which exists between the foreign investor and Pakistan. Pakistan has an upper hand on these sectors leading to exploitative working environments for many people in the country. The two most common forms of exploitation in these sectors is child labour and debt bondage. Often, these employers will end up tricking workers into enslavement leading to debt bondage. This prevents miners from leaving hazardous situations as they indebted to the employers despite being subjected to extreme abuse and suffering. Sometimes the debts are passed through generations resulting in the enslavement of children due to unpaid debt. Modern slavery in Pakistan thrives in the coal mines of different provinces of Pakistan. Likewise, child labour has become a common practice in the construction industry. The next chapter examines the findings from these two case studies and explores reform options in relation to the FET standard.

Chapter 5: Analysis of findings and recommendations

5.1 Introduction

In Chapter 5, my thesis selected two sectors namely, the mining and construction sectors, to examine the problems fair and equitable treatment poses on these sectors, which have had several investment cases against them. It has found that the fair and equitable treatment standard poses uncertainties and risks for the country. This chapter is divided into two parts: Part A discusses the findings and Part B discusses the solutions for Pakistan. Part A takes it a step further by aiming to mention the findings based on the content in previous chapters. The previous chapters presented the issues with the fair and equitable treatment, the challenges posed by fair and equitable treatment, and the inconsistent interpretation and application of fair and equitable treatment. This chapter will present six findings from the case studies.

Part B proposes solutions for Pakistan on how to approach the fair and equitable treatment in its international investment agreements. It is the aim of this chapter to propose solutions on how to tackle FET in Pakistan IIAs in order to balance the interests of foreign investors and the host state. This is achieved by presenting a picture of how countries, and institutions who have taken steps to resolve the issues with fair and equitable treatment have approached the standard. As far as the treaty practice of Pakistan is concerned, the FET obligation has been given a broad interpretation and application. The main aim is to identify the problems caused by inserting FET in Pakistan IIAs. This chapter examines each issue with reference to investor-state disputes, arbitral practice, and IIAs to establish the scope of the problem. Please note it is not the intention of this chapter to provide an elaborate view of FET but merely to bring to light the contemporary issues FET poses for Pakistan. It is important for my thesis to present the key issues to support the rationale for undertaking this study. This section will now commence with an examination of the findings from the legal analysis in Chapter 4.

5.2 Findings

5.2.1 The meaning of FET is unclear in Pakistan's IIAs which has resulted in various interpretations of FET by tribunals pin investor – state disputes.

The different formulations of FET have caused confusion for tribunals who are responsible for interpreting the standard in disputes between foreign investors and host states.[469] The United Nations Centre on Trade and Development (UNCTAD) explains the struggle tribunals face in interpreting the FET standard in investor-state disputes:

> "Some [tribunals] use an unqualified FET provision that simply states that investments shall be accorded fair and equitable treatment, while others qualify this statement with references to the source of the obligation, be it international law, customary international law or the of treatment of aliens under customary international law. The precise impact of such wording has been controversial. Indeed, some tribunals have disregarded the sources of the FET standard and concentrated purely on the content of the standard based on case-by-case readings of what is fair or equitable in light of the specific facts. This has been the case particularly when tribunals have been applying an unqualified FET clause, which lends itself to a more general fairness and equity appraisal."[470]

The UNCTAD clarifies that there are various interpretations of FET and tribunals have been given the task of selecting interpretation tribunals believe is most suitable for achieving the standard of fairness and equity.[471] Therefore, tribunals have struggled to adequately interpret and apply the FET standard in accordance with the notions of fairness and equity in disputes where foreign investors have accused Pakistan of breaching FET.

[469] UNTACD, 'World Investment Report 2021' (2021) <World Investment Report 2021: INVESTING IN SUSTAINABLE RECOVERY (unctad.org)> accessed on 27 November 2021.
[470] *Ibid*.
[471] *Ibid*.

5.2.2 Secondly, FET is a vague provision which has become a significant problem for Pakistan.

As demonstrated in chapter 4, no successful attempt has been made by the tribunals to define the standard in IIAs.[472] In the words of Stephan Schill:

> "Fair and equitable treatment does not have a consolidated and conventional core meaning as such nor is there a definition of the standard that can be applied easily. So far it is only settled that fair and equitable treatment constitutes a standard that is independent from national legal order and is not limited to restricting bad faith conduct of host States. Apart from this very minimal concept, however, its exact normative content is contested, hardly substantiated by State practice, and impossible to narrow down by traditional means of interpretative syllogism."[473]

Schill proposes that it is difficult to define FET in IIAs simply because it will not be easy to apply the standard stringently. As a result, tribunals should exercise discretion in applying FET in ex aequo et bono adding to the vague nature of FET. Hence, this issue extends to Pakistan who has made no efforts to define the FET standard in its IIAs.

5.2.3 Thirdly, FET has been applied expansively resulting in wide interpretations of the standard threatening the autonomy of the host state.[474]

This has led the United Nations Centre on Trade and Development (UNCTAD) to launch the IIA Reform Accelerator on 12 November 2020 to accelerate reform of eight IIA provision "that are most in need of reform in line with the SDGs and the State's right to regulate".[475] These eight provisions are as follows:

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[472] Draft Commentary on the Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/XX, E/CN.4/Sub.2/2003/WG.2/WP.1, section G, 14(a).

[473] Stephen W. Schill 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' (Global Administrative Law Series, 2006) < Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law - Institute for International Law and Justice (iilj.org) > accessed 12 April 2022.

[474] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (4th edn, Hart Publishing 2020) 78.

[475] Stephen W. Schill 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' (Global Administrative Law Series, 2006) < Fair and Equitable Treatment under

"(i) definition of investment,

(ii) definition of investor,

(iii) NT, (iv) MFN treatment,

(v) FET, (vi) full protection and security,

(vii) indirect expropriation and

(viii) public policy exceptions."[476]

According to the UNCTAD, FET is one of eight provisions in need of reform due to the affect the provision has on a host states right to regulate. The changes initiated by organisations, such as UNCTAD reflect the criticisms made by scholars, tribunals, host states and foreign investors of FET. The international investment community has made FET a central topic in its discussions constantly critiquing the provision.

5.2.4 Fourthly, Pakistan's bilateral and multilateral agreements which contain FET as a clause lack uniformity.

The meaning of FET does not appear exactly the same in every bilateral investment treaty and multilateral agreement of Pakistan. In relation to this, Ioana Tudor critiques the lack of uniformity present in IIAs when it comes to drafting the FET clause in bilateral and multilateral agreements which means each clause must be analysed meticulously.[477] An example of this is *Bayindir*, in which the tribunal held the inclusion of FET in the preamble of the Pakistan – Turkey BIT (1995)[478] permitted the claimant to import the most favoured nation clause. Even though Pakistan protested against the tribunals decision arguing that FET should not be inferred from another IIA the tribunal ruled in favour of the claimant.[479] In light of this, the OECD states that "[t]here is a view that the vagueness of the phrase is intentional to give arbitrators the

Investment Treaties as an Embodiment of the Rule of Law - Institute for International Law and Justice (iilj.org) > accessed 12 April 2022.

[476] UNCTAD, 'World Investment Report 2021' (2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.

[477] Ioana Tudor, 'The fair and equitable treatment standard in the international law of foreign investment' (2008) Oxford University Press.

[478] Pakistan – Turkey BIT (1995).

[479] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (4th edn, Hart Publishing 2020) 78.

possibility to articulate the range of principles necessary to achieve the treaty's purpose in particular disputes."[480] Therefore, tribunals face a great deal of discretion in deciding cases based on the arbitrators notion of fairness and equity.

5.2.5 Fifthly, the threshold for finding a host state guilty of breaching the FET standard in IIAs has not been established.

There have been mixed signals from tribunals in relation to setting the liability threshold for state actions deemed to be in breach of FET. The issue concerning the liability threshold was examined by the UNCTAD in its report arguing that tribunals:

> "…established under IIAs other than NAFTA and applying FET clauses not linked to the minimum standard of treatment of aliens have on the whole been paying less attention to the discussion of the applicable liability threshold. Some of them have suggested that it is "a high one"; others held the view that it is lower than under the minimum standard of treatment, while most did not address the matter."[481]

This acts as an obstacle to the economic development of Pakistan because from the point of view of the host state and foreign investor the actions deemed to be a breach of FET are unclear.[482] Thus, my thesis will examine the reasons as to why tribunals have been unable to establish a liability threshold.

In this regard, FET is a controversial problem for Pakistan ever since it has been included in Pakistan IIAs. Despite the problems Pakistan faces due to the FET standard, the government of Pakistan has failed to address these problems. For this reason, this section has brought the key issues FET poses for Pakistan to the forefront in order to analyse the issues in depth in subsequent chapters. Hence, the criterion by which states are held responsible for breaching FET will ensure that the choices a host state makes is a responsibility threshold for state acts towards foreign investors. This criterion will establish whether a state may be held accountable for any losses

[480] OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435.
[481] UNCTAD, 'World Investment Report 2021' (2021) <World Investment Report 2021: World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.
[482] UNCTAD, 'World Investment Report 2021' (2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.

sustained as a result of breaching FET. The threshold can change based on the particular investing rules and regulations in each state, but generally speaking, it calls for a state to behave in good faith and with the amount of caution and care.

5.2.6 Broad FET poses social, political, and economic challenge

The first finding is that the interpretation and application of the FET standard in Pakistan international investment agreements is too broad. Unfortunately, Pakistan has not adopted any measures in a bid to clarify or restrict the meaning and application of fair and equitable treatment in any of their IIAs. The case studies have shown that the broad nature of fair and equitable treatment can pose a wide range of problems social, political and economic challenges for Pakistan.

The international investment agreements between Pakistan and other countries do not contain a definition of fair and equitable treatment.[483] Pakistan IIAs simply state that the investments of foreign investors will receive fair and equitable treatment from Pakistan.[484] In Chapter 4, my thesis gave examples of agreements traditionally promising foreign investors treatment that is not less than fair and equitable. An example of this is Article II of the Pakistan – Turkey BIT:

> "Each party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, which ever is the most favourable."[485]

This is an example of the type of FET provision and orthodox approach Pakistan IIAs have implemented throughout their agreements. Furthermore, it should be noted that Pakistan has left it up to the tribunals to construe the true meaning of fair and equitable treatment.[486] Currently, this is its only mechanism for interpreting FET when it faces accusations of FET violations by foreign investors. As a result of this the application

[483] United Nations, 'Pakistan Population' (Worldometer, 13 August 2021) < https://www.worldometers.info/world-population/pakistan-population/> accessed 13 August 2021.
[484] UNTACD, 'World Investment Report 2021' (2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.
[485] Article II of the Pakistan – Turkey BIT.
[486] Matthew Buckle, 'The application of bilateral investment treaties to international joint venture' (Norton Rose Fulbright, February 2021) < The application of bilateral investment treaties to international joint ventures | Pakistan | Global law firm | Norton Rose Fulbright > accessed 13 April 2022.

of the standard is not clear and tribunals are left with a difficult task of deciding whether FET is an autonomous standard; or restricted to the minimum standard of treatment under customary international law; or limited to other substantive protective standards. This also makes it difficult for a foreign investor to understand what Pakistan is in fact offering when it includes a FET provision in any of its IIAs. The only way a foreign investor can decipher the meaning of fair and equitable treatment is by consulting the decisions of tribunals in cases. Thus, this adds uncertainty to the interpretation and application of FET for a host state and foreign investor.

The broad nature of FET provisions caused tribunals to interpret the cases brought before Pakistan in an inconsistent manner. My thesis in chapter 4 has demonstrated that the awards granted by the tribunals are an example of this inconsistent approach the tribunals have adopted towards fair and equitable treatment. In *Bayindir*, the tribunals considered the political instability attributed to Pakistan as the tribunal stated that the political circumstances of a country could be taken into account.[487] While in *Tethyan Copper*, the tribunals did not acknowledge the political situation of the country at the time despite Pakistan being a developing country which has been plagued by years of political turmoil.[488] This is disrupted by the fact that that in international investment law tribunals are not bound by precedence making it harder to follow the decisions of tribunals even though the tribunals have attempted to clarify FET in cases to no avail.

This has led to a divergent application of the fair and equitable treatment standard by tribunals in cases against Pakistan. The Pakistan-Switzerland BIT was so broad that a mere mention of fair and equitable treatment in the preamble of the treaty permitted the tribunal in *Bayindir v Pakistan*[489] to allow the claimant to invoke fair and equitable treatment from the Pakistan Turkey BIT. Even though Pakistan strongly argued that they had no intention of including fair and equitable treatment to foreign investors in

[487] UNTACD, 'World Investment Report 2021' (2021) < Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.
[488] United Nations, 'National Action Plans on Business and Human Rights' < https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights> accessed 29 March 2022.
[489] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29.

the Pakistan-Switzerland BIT.[490] However, there was nothing in this BIT that could have supported the claim put forward by Pakistan which contested the argument advanced by *Bayindir*.[491] This also points to the fact that the existence of another substantive protection standard, namely, the most favoured nation clause supported Bayindir's claim.

The expansive interpretation of FET in these agreements extends to the legitimate expectations of foreign investors. As my thesis has demonstrated in Chapter 4 the way in which the tribunals interpret the legitimate expectations aspect of a foreign investor is rather confusing. For example, the tribunals extended the scope of FET in the case of *Bayindir v Pakistan* citing that the legitimate expectations of foreign investors was breached when Pakistan refused to grant a mining licence to *Bayindir*. This notion is further complicated by the fact that Pakistan IIAs fail to define legitimate expectations. These agreements complicate the form of protection offered to foreign investors due to the area of legitimate expectations.

From an economical point of view, the syndicate of agreements concluded by Pakistan act as a detriment for the country. Pakistan has limited resources as it is a developing country trying to rebuild itself which means it will struggle to protect the investments of foreign investors. For example, in Tethyan Copper, the tribunal ordered Pakistan to pay a staggering 5.8 billion dollars and, although, the case was brought before ICSID in 2012 Pakistan is still engaged in negotiations with Tethyan Copper on how to pay the damages ordered by ICSID.[492] Hence, a lack of resources will implicate Pakistan in front of foreign investors weakening their position as a host state obligating to act fairly and equitably.

5.2.7 Lack of regulation of sectors gives rise to FET claims amongst foreign investors

[490] Jarrod Wong, Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes, 14 Geo. Mason L. Rev. 137 (2006).
[491] Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 INT'L L. 655 (1990) https://scholar.smu.edu/til/vol24/iss3/7.
[492] Jarrod Wong, Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes, 14 Geo. Mason L. Rev. 137 (2006).

The case studies found that a lack of regulation of the mining sector has allowed a great deal of flexibility in allowing foreign investors to invoke a violation of fair and equitable treatment in cases. The absence of regulatory measures is an issue and acts as a high risk for a developing country like Pakistan.[493] The case studies have revealed that Pakistan has limited regulations in place to regulate the sectors.[494] The problem with this is that individuals are less likely to be held accountable for behaviour deemed illegal. For example, in chapter 5, my thesis examined how the workers in the mining sector were treated by their employers. My thesis found that employment policies were virtually non-existent which resulted in child labour, appalling working conditions, and work-related injuries and deaths. Furthermore, the only remedy offered to workers was financial recompense which existed in the form of compensation.[495] This was only available for the families of Pakistan workers and this exempted Afghan workers even though they make up most of the workforce. Based on this examination, a lack of accountability affects any obligations Pakistan has made towards foreign investors preventing potential investments from investors.

A discussion of the mining sector revealed that illegal mining activities flourished in the mining provinces due to a lack of regulations. As a result, people involved in these illegal activities are not held accountable for their behaviour, decisions, and actions because these individuals are in powerful positions. Tethyan Copper is an example of how people in the government can make decisions which may not necessarily benefit the foreign investor in any shape or form due to relaxed regulations. This case reveals how a failure to provide a mining license to Tethyan Copper resulted in a financial loss to Pakistan after the tribunal ordered the respondent to pay a large amount in damages. This increases the likelihood of a host state usurping the rights of a foreign investor. This can occur when a host state creates circumstances which can give a rise to a claim causing a foreign investor to invoke a breach of fair and equitable treatment.

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[493] Matthew Buckle, 'The application of bilateral investment treaties to international joint venture' (Norton Rose Fulbright, February 2021) < The application of bilateral investment treaties to international joint ventures | Pakistan | Global law firm | Norton Rose Fulbright > accessed 13 April 2022.

[494] Elisa Morgera, *Corporate Environmental Accountability in International Law* (2nd edn Oxford University Press 2020) 117.

[495] Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 INT'L L. 655 (1990).

Another area where Pakistan has limited regulations is on issues with the environment. Due to this, Pakistan restricts the level of protection granted to the investments of foreign investors.[496] In Chapter 5, my thesis discussed that Pakistan's constitution did not specifically mention the environment. It was not until the case of *Shehla Zia* that the Supreme Court of Pakistan ruled that the right to life included the right to a health environment. In other words, Foreign investors with an eye on Pakistan need to understand that Pakistan lags in terms of environmental policies. As mentioned in Chapter 5, Pakistan has high pollution problem which is a leading cause of death in the country. Furthermore, Pakistan does not have anything in place to combat the environmental factors that can deter foreign investors from taking an interest in the investment opportunities of Pakistan.[497] Hence, the foreign investors need a safe environment to undertake their investment opportunities which Pakistan has failed to address. As a result, Pakistan continues to experience challenges within the mining sector for failing to implement ample measures to tackle the inadequacies of the mining sector.

Pakistan has also experienced problems with the administration of mining licences to foreign investors which has led to an accusation of a violation of fair and equitable treatment.[498] In *Tethyan Copper*,[499] Pakistan did not issue a mining licence to the claimant on multiple occasions which prompted *Tethyan Copper* to accuse Pakistan of breaching fair and equitable treatment under Article 3 (2) of the Pakistan Australian BIT.[500] In this case, the award rendered against Pakistan suggests that a range of measures can constitute a breach of fair and equitable treatment.[501] After the decision in this case, Pakistan has failed to address the problem inherently present in the mining sector in Pakistan.[502] Nevertheless, foreign investors will continue to

[496] Ayaan Butt, 'Economic Evaluation of Foreign Direct Investment in Pakistan' Pakistan Economic and Social Review Volume 46, No. 1 (Summer 2008), pp. 37-56.
[497] Muhammad Nouman Shafiq, ' Pakistan Journal of Humanities and Social Sciences' Volume 9, Number 1, 2021, Pages 10 – 1.
[498] Sofia De Murard, ' Tribunal finds Pakistan breached FET, expropriation and non-impairment obligations in the context of a mining joint venture with Australian investor Tethyan Copper Company' (ISDS, 17 December 2019) < Tribunal finds Pakistan breached FET, expropriation and non-impairment obligations in the context of a mining joint venture with Australian investor Tethyan Copper Company - Investment Treaty News (iisd.org) > accessed 13 April 2022.
[499] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1.
[500] Pakistan – Australia BIT (1998).
[501] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1.
[502] Ayaan Butt, 'Economic Evaluation of Foreign Direct Investment in Pakistan' Pakistan Economic and Social Review Volume 46, No. 1 (Summer 2008), pp. 37-56.

experience problems with mining licences which means Pakistan can expect to see further claims citing a breach of fair and equitable treatment as well as witness the economic detriment to the country.

On this note, the decisions of tribunals ruling in favour of the foreign investor demonstrate that different actions of the government can be found to be a breach of fair and equitable treatment. The cases brought against Pakistan show that administrative and legislative conduct has caused foreign investors to cite a violation of fair and equitable treatment. Hence, the results of cases increases the scope of fair and equitable treatment being invoked against Pakistan.

Hence, the decisions of tribunals creates an imbalance in the different economic areas as a result of a lack of regulation. The widespread exploitation of fair and equitable treatment by foreign investors is a result of the lack of adequate control in international investment law. Host states now find themselves unable to access fundamental justice and in light of this, it is essential that the tribunals provide the development and application of relevant rules, which will guarantee the fair and equal treatment of all foreign investors without unbalancing the rights of the host state.

5.2.8 FET is the most invoked substantive protective standard

The expansive nature of FET in Pakistan IIAs has made FET the most invoked substantive protection standard amongst the country. The case studies examined the implications of having an expansive interpretation of FET in Chapter 5. The vagueness of the standard in Pakistan IIAs has given rise to claims of denial of fair and equitable treatment.[503] This is primarily due to the various interpretations given by tribunals in cases brought by foreign investors against Pakistan. Furthermore, Pakistan has left the meaning and interpretation of fair and equitable treatment to the tribunals who have been equipped with the responsibility of providing normative content to the standard. Since the first case, *Bayindir*, Pakistan has witnessed a surge in cases citing breach of fair and equitable treatment. Thus, it is entirely up to the arbitrators to construe the meaning of fairness and equity in cases.

[503] Draft Commentary on the Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/XX, E/CN.4/Sub.2/2003/WG.2/WP.1, section G, 14(e)

Another reason foreign investors invoke fair and equitable treatment is that it has not been defined in any of the IIAs. For example, in *Bayindir* the claimant sought damages when the National Highway Authority ceased all construction activities. While, in Tethyan Copper, the claimant sought damages when the respondent refused to administer a mining licence to the claimant. There are an array of reasons cited by foreign investors as a means of invoking fair and equitable treatment ranging from the mining sector to the construction sector. Hence, foreign investors are quick to rely on fair and equitable treatment as a basis for seeking awards for damages from tribunals against Pakistan.

Pakistan has, also, failed to limit the fair and equitable treatment standard in its IIAs. This approach has led fair and equitable treatment to become an evolving standard which is decided on a case by case basis. In the previous chapters, an analysis of the cases brought against Pakistan demonstrate that tribunals attempted to define and interpret FET depending on the wording, object and purpose of the relevant IIA. These cases have shown that the interpretation and application of the standard evolves as the years go on to reflect modern treaty practices.

The region of legitimate expectations in the international investment agreements of Pakistan is another area disrupted by the wide interpretation of FET. In other words, the meaning of FET is so wide that the legitimate expectations of an investor can give rise to a claim citing a breach of fair and equitable treatment.[504] In Bayindir, the claimant argued that the sudden change of government in Pakistan breached the legitimate expectations of the claimant.[505] Since, legitimate expectations in Pakistan IIAs has not been defined, it has paved the way for unprecedented claims against Pakistan.[506] As such, Pakistan has struggled to efficiently combat the economic, political, and social challenges posed by the legitimate expectations of a foreign investor in investor-state disputes.[507] Unfortunately, Pakistan has failed to address

[504] Iona Tudor, 'Legitimate Expectations' (Jus Mundi, 17 March 2022) < Legitimate Expectations (jusmundi.com) > accessed 13 April 2022.
[505] Muhammad Nouman Shafiq, ' Pakistan Journal of Humanities and Social Sciences' Volume 9, Number 1, 2021, Pages 10 – 1.
[506] Shaun Matos, 'Investor Due Diligence and Legitimate Expectations' (BRILL, 15 December 2021) < Investor Due Diligence and Legitimate Expectations in: The Journal of World Investment & Trade - Ahead of print (brill.com) > accessed 11 April 2022.
[507] Ayaan Butt, 'Economic Evaluation of Foreign Direct Investment in Pakistan' Pakistan Economic and Social Review Volume 46, No. 1 (Summer 2008), pp. 37-56.

some of the challenges caused by the wide application of legitimate expectations in cases.

5.2.9 Pakistan does not have an organisation dedicated to negotiating IIAs

In the previous chapter, the case studies found that Pakistan does not have a single organisation or specialist team dedicated to negotiating IIAs. The only organisation that exists to negotiate and finalise agreements is the Board of Investment.[508] Although the board was founded in 1992, it has made little efforts in establishing control of the fair and equitable provisions in its IIAs. Even after 7 cases were lodged against the country since 2009, the Board of Investment has not taken any steps to come to a sound resolution. Collectively, the board has the potential to identify issues, initiate decisions, coordinate resources, and implement changes addressing the issues caused by the fair and equitable treatment. However, it is staffed with individuals who may not have the skill set required to negotiate modern IIAs on behalf of Pakistan.

Furthermore, the decision to not form an organisation is political since Pakistan has been dogged by political uncertainty caused by sudden change of government, army takeovers, and disagreements over the implementation of policies.[509] For this reason, Pakistan has struggled to initiate a common goal aimed at addressing the issues created by the fair and equitable treatment standard in its BITs.[510] Even though, the rise of cases where foreign investors have cited a breach of fair and equitable treatment has exposed Pakistan to the social and economic challenges, Pakistan has still been slow to make effective action in tackling these issues.

Moreover, Pakistan has always relied on government officials to negotiate IIAs.[511] In Chapter 4, my thesis demonstrated that the signing of IIAs was one of the doables which prime ministers signed on their trips abroad as per the advice given by individuals accompanying the prime minister of Pakistan at the time. It was not until Pakistan faced its first case in 2009 that the government of Pakistan decided to cease

[508] Muhammad Ahsan, 'Board of Investment: BOI' (Pakistan, 2022) < BOI | Board Of Investment > accessed 10 April 2022.
[509] Ahmad, N., Hayat, M.F., Luqman, M., & Ullah, S. (2012). The Causal Links Between Foreign Direct Investment And Economic Growth In Pakistan. *European Journal of Business and Economics, 6*.
[510] Ahmad Ghazali, 'Analyzing the Relationship between Foreign Direct Investment Domestic Investment and Economic Growth for Pakistan' International Research Journal of Finance and Economics ISSN 1450-2887 Issue 47 (2010).
[511] *Ibid*.

all activities related to the signing of BITs. Even after this experience, Pakistan made no attempt to set up an organisation dedicated to tackling issues arising from its range of protections. As a result, Pakistan continued to experience cases where foreign investors cited a breach of fair and equitable treatment. Despite the fact that the obligation to offer fair and equitable treatment appears in the majority of IIA's Pakistan has not set up an organisation to review the standard and IIA programme.

5.2.10 Corruption has paved the way for future FET claims amongst foreign investors

Corruption is one of the main reasons Pakistan can expect to see a surge in cases. Since fair and equitable treatment is the most invoked standard amongst foreign investors, Pakistan is likely to continue to experience cases where fair and equitable treatment is cited.[512] The reason for this observation is that in Chapter 5 discovered that corruption is widespread and affects almost every aspect of the government.[513] Furthermore, the case studies demonstrated that corruption had a correlation with inflows of foreign direct investment in Pakistan.

Pakistan has a serious issue with its approach to corruption as corruption is perceived as widespread.[514] Both Pakistan and foreign investors have been affected by corruptive practices in different sectors. Pakistan was ranked number 124 out of 180 according to the Corruption Perceptions Index by Transparency Index.[515] The Chair of Transparency International, Delia Ferreira Rubio, stated:

> "The past year has tested governments like no other in memory, and those with higher levels of corruption have been less able to meet the challenge. But even

[512] Sofia Karadima, 'Is corruption a barrier to FDI? It's complicated' https://www.investmentmonitor.ai/analysis/fdi-corruption-investment-transparency accessed 19 January 2022.
[513] Ahmad Ghazali, 'Analyzing the Relationship between Foreign Direct Investment Domestic Investment and Economic Growth for Pakistan' International Research Journal of Finance and Economics ISSN 1450-2887 Issue 47 (2010).
[514] Ferreira Rubio, 'Corruption' (Corruption Perceptions Index by Transparency Index. The Chair of Transparency International, 2020) < https://www.transparency.org/en/cpi/2020/index/nzl> accessed 19 January 2022.
[515] Muhammad Qasim, 'Impact of herding behavior and overconfidence bias on investors' decision-making in Pakistan' (Growing Science Ltd., 2019) < doi: 10.5267/j.ac.2018.07.001> accessed 10 April 2022.

those at the top of the CPI must urgently address their role in perpetuating corruption at home and abroad."[516]

As a result, foreign investors were reluctant to gear towards investment opportunities in Pakistan. For example, in *Tethyan Copper* Pakistan accused Tethyan of engaging in corruption in the form of bribery in order to secure a mining licence in the province of Baluchistan from government officials. When Pakistan refused to grant any further licences it was an opportunity for the claimant to accuse Pakistan of breaching the fair and equitable treatment standard. This is a particular concern for Pakistan because it affects the investor-state relationship and adds to the reputation of the country. Thus, Pakistan has made little progress in reforming this area.

It should also be noted that Pakistan has been accused of facilitating corruption. Corruption exists in the judiciary, education, healthcare, police, sports and taxation. There are long term implications for Pakistan if continued to practice corruption. For example, this can have an adverse effect on foreign direct investment inflows for the country. According to Glenn " analysis shows that there is a statistically significant, positive relationship between the Corruption Perception Index (CPI) score and levels of FDI,".[517] She also elucidates that "[t]here are outliers, but in general, if a country has lower corruption (i.e. a higher CPI score) we should expect higher volumes of FDI."[518] Furthermore, Phil Mason states that there "is a strong correlation between corruption and [a country attracting] less foreign investment, as effectively corruption acts as a tax on FDI". He further states that "[i]ndeed, in high-growth transition countries, corruption has been identified as the most important determinant of investment growth, ahead of factors such as firm size, ownership, inflation and openness to trade".[519] In the words of the OECD corruption "undermines economic and social progress and steals the future of young generations. Globalisation brings many benefits but also increases opportunities for crimes across multiple jurisdictions and the chance of

[516] Ferreira Rubio, 'Corruption' (Corruption Perceptions Index by Transparency Index. The Chair of Transparency International, 2020) < https://www.transparency.org/en/cpi/2020/index/nzl> accessed 19 January 2022.
[517] Sofia Karadima, 'Is corruption a barrier to FDI? It's complicated' https://www.investmentmonitor.ai/analysis/fdi-corruption-investment-transparency accessed 19 January 2022.
[518] *Ibid*.
[519] *Ibid.*

impunity."[520] Foreign investors have accused Pakistan of engaging in illegal activities which were facilitated by the government. However, it has been difficult to establish corruptive practices in the government without concrete evidence. Moreover, in this chapter corruption deterred foreign investors from seeking investment opportunities in Pakistan.

5.2.11 A lack of predictability in terms of the actions that can prompt a violation of fair and equitable treatment

Pakistan's IIAs are unclear in terms of the types of actions that can constitute a breach of fair and equitable treatment which often puts Pakistan in potentially difficult situations. This expands the scope of fair and equitable treatment in Pakistan IIAs resulting in wide application of the provision in cases. My thesis aims to show that a lack of predictability can lead to an unbalanced approach in investor-state relationships which is why there is a strong need to revise the fair and equitable treatment provision in its IIAs.

As mentioned in Chapter 3 and 4, the tribunals in cases have given a broad interpretation to fair and equitable treatment in cases brought against Pakistan. For example, in *Tethyan Copper*, the tribunal ruled that the failure to give a mining licence to the claimant constituted a breach fair and equitable treatment. Likewise in *Bayindir*, the tribunal ruled that Pakistan breached the legitimate expectations of the foreign investor resulting in a breach of fair and equitable treatment.[521] These cases are examples of the implications the decisions of tribunals can have on the investor-state relationships.[522] These decisions fail to meet the overarching aim of balancing the rights of Pakistan and the foreign investor.[523] Arbitral awards often lead to an unpredictable investor-state relationships which usually favouring the foreign investor

[520] OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435.

[521] Sofia Karadima, 'Is corruption a barrier to FDI? It's complicated' https://www.investmentmonitor.ai/analysis/fdi-corruption-investment-transparency accessed 19 January 2022.

[522] Ferreira Rubio, 'Corruption' (Corruption Perceptions Index by Transparency Index. The Chair of Transparency International, 2020) < https://www.transparency.org/en/cpi/2020/index/nzl> accessed 19 January 2022.

[523] Ahmad Ghazali, 'Analyzing the Relationship between Foreign Direct Investment Domestic Investment and Economic Growth for Pakistan' International Research Journal of Finance and Economics ISSN 1450-2887 Issue 47 (2010).

over the host state as demonstrated in the above cases. Hence, this can cause bitterness amongst the host state as well as the foreign investor.

A lack of predictability is, also, caused by the words used in the text of treaties referring to the fair and equitable treatment standard in treaties. The language used in the treaties in relation to fair and equitable treatment in Pakistan IIAs is rather minimal.[524] The problem with these texts is that they are prone to broad interpretations and applications before an arbitral tribunal.

Furthermore, the probability of giving a wide interpretation by a tribunal is not helped by the fact that Pakistan does not have any guidance on how to interpret and apply fair and equitable treatment in cases. At the same time, the fact that fair and equitable treatment is specifically mentioned as protection for the foreign investor automatically leads to decisions which favour the foreign investor.[525] Instead of examining the text of treaties in order to decipher the true meaning of fair and equitable treatment in Pakistan IIAs the tribunals seek reliance on the awards granted in similar cases.[526] This problem is further exacerbated due to the non-existence of a doctrine of precedent which does not bind the tribunals to follow the decisions in earlier cases. The end result is that there are a wide range of decisions deliberating on matters concerning fair and equitable treatment in cases.

Pakistan's approach to fair and equitable treatment adds to the unpredictable nature of the standard in its IIAs for the host state and the foreign investor. Before a foreign investor decides to engage in any investment venture with Pakistan, it will consult the relevant BIT in order to familiarise itself with the various provisions. However, this will not be an easy task and is put by the UNCTAD as follows:

> "The lack of predictability is further increased by the absence of a clear legal test of fair and equitable treatment. Ultimately, the decision may rest on little more than whether, in the circumstances of the specific case, the tribunal feels

[524] United Nations, 'International Investments Agreements Navigator' (Investment Policy Hub, 2022) < https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 December 2021.
[525] OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435.
[526] Eric De Brabandere, 'Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity' Journal of World Investment & Trade 18 (2017) 530 – 555.

that the investor had been treated fairly or not. It has even been suggested that due to its extreme vagueness the FET obligation lacks legitimacy as a legal norm."[527]

This is where it becomes challenging for a foreign investor because it is difficult to determine what Pakistan means when it offers protection in the form of fair and equitable treatment to the foreign investor in its IIAs.[528] This also becomes problematic for Pakistan because it means that Pakistan cannot take reasonable steps to protect itself against any potential claims citing a breach of fair and equitable treatment. Furthermore, Pakistan is also prevented from making any necessary regulatory or substantive changes to its investment framework that will protect it from being accused of breaching fair and equitable treatment in future cases. Thus, this can result in unpredictable situations which can be taxing for a developing country like Pakistan.

5.3 Proposal for reform

This section proposes solution for Pakistan on how to approach fair and equitable treatment in its international investment agreements.

5.3.1 The Comprehensive Economic and Trade Agreement

The European Union and Canada have taken a pioneering approach to fair and equitable treatment. The Comprehensive Economic and Trade Agreement (CETA) is an agreement between the European Union and Canada. CETA confirms that Canada and the EU have the "right to regulate and to achieve legitimate policy objectives, such as public health, safety, environment, public morals, social or consumer protection and the promotion and protection of cultural diversity."[529]

Some parts of CETA have been in force since September 2017 while others have not been enforced.[530] The aim of the agreement is to increase trade between the EU and Canada.[531] Supporters of CETA believe it is a "milestone in European Trade policy"

[527] United Nations, 'International Investments Agreements Navigator' (Investment Policy Hub, 2022) < https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 December 2021.
[528] *Ibid*.
[529] The Comprehensive Economic and Trade Agreement 2016.
[530] Dominic Webb, 'CETA: The EU Canada free trade agreement' (House of Commons, 7 May 2019) < CETA: the EU-Canada free trade agreement (parliament.uk) > accessed 10 January 2022.
[531] *Ibid*.

while critics believe it favours business and can lower regulatory standards.[532] Furthermore, CETA contains a provision on fair and equitable treatment and a discussion of CETA is important for my thesis because it shows the approach CETA has taken in relation to the fair and equitable treatment in order to mitigate the risk caused by the standard.

The EU and Canada have adopted a different approach to the fair and equitable treatment standard in CETA.[533] CETA has approached fair and equitable treatment more precisely this time replacing the orthodox approach usually seen in EU treaty practice. Fair and equitable treatment is contained in "Article 8.10 – Treatment of investors and of covered investments":

> "1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.
>
> 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
>
> a. denial of justice in criminal, civil or administrative proceedings;
> b. fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
> c. manifest arbitrariness;
> d. targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> e. abusive treatment of investors, such as coercion, duress and harassment; or

[532] Martin Wolfgang Zankl, 'The Effects of CETA on the Continuous Implementation of the Precautionary Principle within the European Union' Volume 14, Issue 4 (2019) pp. 179 – 198.
[533] United Nations, 'International Investments Agreements Navigator' (Investment Policy Hub, 2022) < https://investmentpolicy.unctad.org/international-investment-agreements/countries/160/pakistan> accessed 19 December 2021.

f. a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

5. For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments.

6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.

7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1."[534]

According to the text, a breach of fair and equitable treatment occurs if one or more measures are breached. Furthermore, a breach of legitimate expectations is restricted

[534] Article 8.10 of The Comprehensive Economic and Trade Agreement 2016.

to a specific promise or representation made by the state. However, there seems to be a number of issue with the text of the CETA agreement. Firstly, a breach of legitimate expectations is left entirely at the discretion of the tribunal. Secondly, the agreement fails to specify what is meant by the term representation which means that the meaning of representation is unclear. Thus, the issues with the interpretation of fair and equitable treatment in CETA point to a rather vague application of the standard.

This is an example of an approach Pakistan can adopt in order to deal with fair and equitable treatment in its international investment agreements. Pakistan has the option to restrict the meaning of fair and equitable treatment in its international investment agreements. This can be subjected to a list of actions deemed to breach fair and equitable treatment in the relevant international investment agreement.

5.3.2 Model Indian Bilateral Investment Treaty

Since the 1990s, India has created a large international investment treaty program. Indian signed its first agreement with the United Kingdom in 1994.[535] In comparison to Pakistan, Indian has given the responsibility of negotiating treaties to the Ministry of Finance.[536] However, India is an example of a country facing numerous challenges as a result of the existence of fair and equitable treatment in its international investment agreements.[537] The problem with these agreements is that the wording in relation to fair and equitable treatment is wide encouraging expansive interpretations of fair and equitable treatment.

My thesis seeks to demonstrate a different solution to remedying the problems caused by fair and equitable treatment in Pakistan International Investment Agreements. This is an alternative approach to the one the EU and Canada have taken to resolve the issues cause by fair and equitable treatment.[538] Pakistan's neighbouring country India has adopted a different approach to the fair and equitable treatment standard as is

[535] Prabhash Ranjan, 'Fair and Equitable Treatment in Indian International Investment Agreements: An overview' (IISD, 2011) < https://www.iisd.org/publications/fair-and-equitable-treatment-indian-international-investment-agreements-overview > accessed 10 January 2022.
[536] *Ibid*.
[537] Anand Pushkar and Prabhash Ranjan, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Discussion' (2017) 38(1) Northwestern Journal of International Law & Business.
[538] *Ibid*.

evident in its new Model BIT. In January 2016, India revealed a new Model Bilateral Investment Treaty replacing previous international investment agreements. In the new treaty India has taken a new approach to fair and equitable treatment by replacing it with customary international law in Article 3.1. Article 3(2) states that:

> "Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party."[539]

India has taken a step further by limiting customary international law to conduct constituting denial of justice, due process, discrimination and coercion. Furthermore, legitimate expectations, which is a key feature of fair and equitable treatment, has not been specifically protected. However, the previous IIAs of India contained a fair and equitable treatment provision providing foreign investors with broader protection. Furthermore, only time will tell whether the new Model BIT is successful as it is recent phenomenon and the result of the new BIT will depend on the bargaining power of the parties.

Despite India's Model BIT, it seems India has not been able to move on from the problems linked to fair and equitable treatment. Until recently India has faced new disputes in two cases where foreign investors have accused India of violating the relevant fair and equitable treatment provisions. In *Cairn Energy v India*[540] and *Vodafone v India*[541] the tribunals ruled in favour of the foreign investors accusing India of breaching fair and equitable treatment in the relevant bilateral investment treaties. The awards demonstrate that in both cases it is a major setback for India. Therefore, it is no surprise that India has decided to take a step in renovating the fair and equitable treatment standard.

Pakistan and India have been neighbours since the partition of British India in 1947.[542] Prior to this event, people living in these countries coexisted peacefully together. Today, despite their violent history both nations continue to have many similarities.

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[539] Article 3(2) of the Indian Model BIT 2015.
[540] *Cairn v. India Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-7.
[541] *Vodafone International Holdings BV v. Government of India* [I], PCA Case No. 2016-35 (Dutch BIT Claim).
[542] Prabhash Ranjan, 'Fair and Equitable Treatment in Indian International Investment Agreements: An overview' (IISD, 2011) <https://www.iisd.org/publications/fair-and-equitable-treatment-indian-international-investment-agreements-overview > accessed 10 January 2022.

Certain areas of Pakistan and India share similar demographics, languages, customs and cuisines. Both countries remain bound geographically and culturally.

The economy of India is growing exponentially in the current climate. The International Monetary Fund has described India as one of the fastest economies in the world.[543] Currently, India has entered into 86 bilateral investment agreements and 73 of these agreements are at present in force.[544] The country has had a stimulating relationship with the investment world dealing with many obstacles in challenging investment disputes. Subsequently, the country has been sued for millions of dollars. The United Nations Centre for Trade and Development reported that India was the most sued country in 2015 and 2016 with 17 investor states disputes filed against the country by foreign investors in 2015. The statistics show that 9 of these cases have been resolved while 8 are still pending against the nation. Consequently, some of these cases have resulted in a huge amount of damages being awarded to foreign investors. This emerged in the cases of *White Industries Australia Limited v The Republic of India*[545] and Devas *Multimedia Private Ltd v Antrix Corporation Ltd*[546]. Nevertheless, the true number of investor-state disputes where India acts as the respondent state remains unclear since arbitration is a private affair.

Increased attention was being diverted towards the bilateral investment agreement framework in India. Many scholars critiqued the provisions in India's bilateral investment treaties. Rajput urged the country to revamp their investment regime to avoid a repeat of the 2015 humiliation. Due to the criticisms of academics India purported to editorialise the provisions in their bilateral investment agreements. Thus, India decided to adopt a new model bilateral investment treaty. Hence, in 2015 India replaced the old bilateral investment treaty with an improved version. Thereafter, in 2016 India released a statement clarifying the new framework for the public. The agreement implemented many key changes to the text of the treaty. One of these

[543] Yan Carriere – Swallow, Vikram Haksar, and Manasa Patnam 'Stacking up Financial Inclusion Gians in India' (International Monetary Fund, July 2021) < https://www.imf.org/external/pubs/ft/fandd/2021/07/india-stack-financial-access-and-digital-inclusion.htm> accessed 15 August 2021.

[544] United Nations UNCTAD, 'India' (Investment Policy Hub, 15 August 2021) < https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india> accessed 15 August 2021.

[545] *White Industries Australia Limited v The Republic of India* (Final Award) (UNCITRAL, 30 November 2011).

[546] *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK.

changes included removing fair and equitable treatment and replacing the provision with customary international law. The purpose behind this was to prevent wide interpretations being afforded to the provision as evidenced from the decisions of arbitrators in investor-state disputes.[547] Hence, the text incorporates a section titled "Treatment of Investments". Instead, the model BIT states:

> "No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv) manifestly abusive treatment, such as coercion, duress and harassment".[548]

Therefore, the argument put forward by this thesis is that Pakistan should revise its outdated bilateral investment treaty framework. Focus should be on narrowing the broad treaty provisions, such as fair and equitable treatment as it opposes the wider interests of the country. Broad definitions in bilateral investment treaties should be replaced with defined and succinct provisions.

Consequently, the bilateral investment treaty programme in Pakistan has made slow progress. Interestingly, this occurred at the same time as the country faced its first ever lawsuit in 2001 in *SGS v Pakistan*[549] under the Switzerland and Pakistan bilateral investment treaty. Despite the result favouring Pakistan, the effect of the case had a substantial impact on the Pakistan administration. Until 2001, the country saw bilateral investment treaties as innocent pieces of paper designed to portray Pakistan as an investor friendly nation. This explains why Pakistan signed bilateral investment agreements without thoroughly understanding the consequences of signing such agreements. Shortly thereafter, Pakistan faced lawsuit after lawsuit. Notwithstanding the ramifications of these cases, expert

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[547] Yan Carriere – Swallow, Vikram Haksar, and Manasa Patnam 'Stacking up FINANCIAL INCLUSION GAINS IN INDIA' (International Monetary Fund, July 2021) < https://www.imf.org/external/pubs/ft/fandd/2021/07/india-stack-financial-access-and-digital-inclusion.htm> accessed 15 August 2021.

[548] Article 3 (1) "BILATERAL INVESTMENT TREATY BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND ----".

[549] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13.

scholars with the specialism to identify and propose suitable solutions in this area is virtually non-existent.

Therefore, it is the argument of this thesis that Pakistan revises the approach adopted in the past and espouse the steps taken by India to reform its bilateral investment treaty programme. Pakistan requires that it take matters seriously by engaging in meaningful negotiations; without passively signing these agreements. The community in Pakistan should reprise the risks involved in signing these treaties before it is too late. India is a prime example for a country like Pakistan as it has paved the way for treaty reform.[550] Re-examining the bilateral investment treaty programme in India, especially fair and equitable treatment, is an effective mechanism deployed to resolve disputes or diminish the problems altogether for the future. Therefore, if India can rebalance its investment treaty programme then there is a high probability that Pakistan can achieve this task too.

The reason for choosing India is due to the fact that they have made an attempt to resolve the issues the country has been facing as a result of the fair and equitable treatment provision in their bilateral investment treaties. Unfortunately, Pakistan has failed to take steps to counteract the problem derived from the fair and equitable treatment provision in Pakistan bilateral investment treaties. Furthermore, Pakistan has not produced a model bilateral investment treaty which means that the wording of every treaty is different. This inconsistency poses a great threat for the economy of Pakistan. The approach taken by India can be discovered from the wording of the old Indian Model bilateral investment treaty and the new Indian bilateral investment treaty:

Old Indian Model BIT 2003[551]	**New Indian Model BIT 2015[552]**
Article 3: Promotion and Protection of Treatment	**Article 3: Standard of Treatment** 1/ Each Party shall not subject Investments of Investors of the other

[550] Anand Pushkar and Prabhash Ranjan, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Discussion' (2017) 38(1) Northwestern Journal of International Law & Business.
[551] Prabhash Ranjan, 'Fair and Equitable Treatment in Indian International Investment Agreements: An overview' (IISD, 2011) < https://www.iisd.org/publications/fair-and-equitable-treatment-indian-international-investment-agreements-overview > accessed 10 January 2022.
[552] Article 3 (1) Indian Model BIT (2015).

1/Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and policy. 2/ Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. **Article 4: National Treatment and Most-Favoured-Nation Treatment** (l) Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State.	Party to Measures which constitute: (i) Denial of justice under customary international law; (ii) Un-remedied and egregious violations of due process; or; (iii)Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment. **Article 4: National Treatment** Each Party shall not apply to Investments, Measures that accord less favourable treatment than that it accords, in like circumstances, to domestic investments with respect to the management, conduct, operation, sale or other disposition of Investments in its territory.

Table: The New Indian Model BIT and the Old Indian BIT

The table showcases the differences between the fair and equitable standard in the text of the old treaty and the new treaty. In December 2015, India decided to create its own model bilateral investment treaty after frequently responding to foreign investor investment related cases.[553] The position taken by India is a significant attempt by a country to protect itself against new investor-state disputes and to create a new

[553] Anand Pushkar and Prabhash Ranjan, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Discussion' (2017) 38(1) Northwestern Journal of International Law & Business.

generation of BITs which aligns itself with the investment requirements of the country.[554] Nevertheless, the Model BIT has raised a few eyebrows as it removes some of the most significant provisions relied on in BITs. The language and the meaning in both treaties is dissimilar and distinct. The new Indian model bilateral investment treaty makes significant changes to deliberately safeguard the interests of the host state. This version has implemented a series of innovations to its bilateral investment treaties. Firstly, India excludes the Most Favoured Nation clause from its text. Secondly, India removes the fair and equitable treatment by replacing it with a provision entitled "Treatment of Investments". Thirdly, the Model BIT prioritises national treatment before international treatment. Lastly, this version makes it difficult for foreign investors to challenge disputes. Only after exhausting all local remedies, for at least five years, are foreign investors permitted to select arbitration.[555]

This is another example of an approach Pakistan can adopt in response to risks fair and equitable treatment in their international investment agreements has for Pakistan. Also, model bilateral investment treaties are gaining prominence in the international investment community.[556] This is due to the nature of the model BIT which has been created to protect the host state from uncertainties posed as a result of the capacious wording of the standard in international investment agreements. Pakistan has the option to restrict the meaning of fair and equitable treatment in its international investment agreements. This can be subjected to a list of actions deemed to breach fair and equitable treatment in the relevant international investment agreement.

5.3.3 Pan African Investment Code 2017

There has been a sharp rise in the number of legal instruments encouraging a development of investment in Africa. The Pan African Investment Code (PAIC) was created in October 2017 for the purposes of promoting, facilitating and protecting investments that "foster the sustainable development of each Member State, and in particular, the Member State where the investment is located."[557] The PAIC removes

[554] Martin Soderman, 'India's 2016 Model Bilateral Investment Treaty' (Stockholms Universitet, 2020) https://www.diva-portal.org accessed 14 April 2020.
[555] Article 14.4 India Model BIT 2015.
[556] Josef Ostransky and Facundo Aznar, 'Investment Treaties and National Governance in India: Rearrangements, Empowerment, and Discipline' (Cambridge University Press, 2021) https://www.cambridge.org accessed 14 April 2022.
[557] Article 1 Draft Pan-African Investment Code.

fair and equitable treatment from its code due to the unpredictability and broad interpretation of the provision.

This decision was adopted by African countries in relation to rising investment cases. In 2012, African declared a strong interest in establishing a "Continental Free Trade Area" with the aim of "boosting intra-African trade".[558] This unprecedented ambition of Africa became a reality on 30 May 2019 in the form of an African Continental Free Trade Agreement (AfCFTA) which was signed by 54 Member States and ratified by 28. However, there was no consensus amongst Member States in deciding whether fair and equitable should be incorporated into the agreement. Some Member States argued that fair and equitable treatment should not be included because of broad interpretations adopted by arbitral tribunals. Therefore, the idiosyncratic provision was excluded from AfCFTA.

The reasons for adopting this approach to fair and equitable treatment seems to be a based on the notion that FET is an established standard of international law. Over the years, the standard has become an intrinsic part of international investment agreements as a result of imposing an obligation on host states to protect the investment of foreign investors.[559] Furthermore, the probability of succeeding in a dispute claiming breach of FET is considerably high. Despite FET being the most invoked provision, its interpretation is vague and this creates uncertainty in BITs. Due to this, a number of problems have arisen in its application. Arbitrators are often faced with the task of deciding which principles to apply in a dispute without compromising the objective of the applicable treaty. Another problem occurs when tribunals attempt to define the obligations of host states on investors by giving expansive interpretations to principles. Tribunals end up giving more than one interpretation as is the case for disputes arising from denial of justice, breach of legitimate expectations and due

558 Makane Moïse Mbengue and Stefanie Schacherer 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (The Journal of World Investment & Trade, 2017) https://brill.com/view/journals/jwit/18/3/article-p414_4.xml#:~:text=The%20Pan%2DAfrican%20Investment%20Code%20(PAIC)%20is%20the%20first,view%20to%20promote%20sustainable%20development accessed 19 January 2022.

559 Rose Rameau, ' The Pan-African Investment Code as a Model for Negotiation on the Investment Protocol to the Agreement Establishing the African Continental Free Trade Area' (Transnational Dispute Management, 2021) < The Pan-African Investment Code as a Model for Negotiation on the Investment Protocol to the Agreement Establishing the African Continental Free Trade Area - Journal | TDM Journal (transnational-dispute-management.com) > accessed 14 April 2022.

process[560]. In the absence of strict guidelines as to how these principles should be applied there is potential for broad interpretations which differ from one host state to another host state. This issue extends to FET as the meaning of the standard differs from treaty to treaty.[561] It seems the interpretation of FET is subject to the wording of the text, origins, and actions infiltrating the intention of the parties. Subsequently, the interpretation can have miscellaneous meanings for developed and developing countries like Pakistan hindering the process of balancing national interests with the interests of the international investment community.

The everlasting debate is based on FET promising a plethora of rights to investors which are ambiguous or clearly undefined. Arbitrators and tribunals use complex language to define FET and this makes it challenging for the lay man to understand the proper interpretation of the standard.[562] Inevitably, the extent to which FET can extend its helping hand to the host state or foreign investor is blurred. Therefore, the meaning of the provision is inescapably too broad or too narrow. This is evidenced from the relationship India and Pakistan have towards investment law in their respective countries. Therefore, this thesis purports to examine various FET provisions in the BITs concluded by Pakistan with other countries. The current position of Pakistan dictates it is facing a number of problems in tackling FET. The wide and broad meaning of FET has attracted countless claims against the country. The boundless provision has determined the fate of the country by allowing the country to be sued for billions of dollars. The following cases attest to this notion.

Pakistan is one of the emerging economies in the world with a keen interest on production. The country is showcasing signs of stability by removing obstacles restraining economic growth in Pakistan despite the country experiencing slow

[560] Makane Moïse Mbengue and Stefanie Schacherer 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (The Journal of World Investment & Trade, 2017) https://brill.com/view/journals/jwit/18/3/article-p414_4.xml#:~:text=The%20Pan%2DAfrican%20Investment%20Code%20(PAIC)%20is%20the%20first,view%20to%20promote%20sustainable%20development accessed 19 January 2022.

[561] Rose Rameau, ' The Pan-African Investment Code as a Model for Negotiation on the Investment Protocol to the Agreement Establishing the African Continental Free Trade Area' (Transnational Dispute Management, 2021) < The Pan-African Investment Code as a Model for Negotiation on the Investment Protocol to the Agreement Establishing the African Continental Free Trade Area - Journal | TDM Journal (transnational-dispute-management.com) > accessed 14 April 2022.

[562] Mouhamed Kebe, ' The Case for a Permanent African Continental Investment Dispute Settlement Tribunal' ((Transnational Dispute Management, 2021) < The Case for a Permanent African Continental Investment Dispute Settlement Tribunal - Journal | TDM Journal (transnational-dispute-management.com) > accessed 14 April 2022.

economic growth over the years.[563] The country is implementing measures to alleviate problems preventing global connectivity by counteracting public debt and resolving the trade deficit. The future of the economy is not entirely bleak. Currently, Pakistan is in negotiations with the International Monetary Fund (IMF) over plans to stabilise the economic climate by focusing on the prospects of economic developments.[564] Further developments to the economy of Pakistan are continuing with the advent of the China Pakistan Economic Corridor (CPEC).[565] CPEC will enhance the growth of the economy and initiate developments through regional and globalised economic developments thus attracting a high volume of trade and business. It is evident that international investment is signatory to the economic development of Pakistan keeping a close eye on the economic climate in the country.[566] Their new framework declares a promising future for foreign investors through increased production, low cost labour, import and export incentives, economic development, trade developments in a global market as well as exponential market growth. Hence, Pakistan is facilitating economic order by encouraging an influx of foreign investors thereby attracting foreign direct investment into its country.

Pakistan can follow this example to determine the level of flexibility tribunals will have when faced with a claim from a foreign investor alleging a breach of fair and equitable treatment. This approach takes into account the interests of the foreign investor and the rights of a host state therefore it is a feasible option for Pakistan since it is important to have a balanced approach to the investor state relationship. This is an example of another option Pakistan has in order to deal with fair and equitable treatment in its international investment agreements. Pakistan has the option to restrict the meaning of fair and equitable treatment in its international investment agreements. This can be

[563] Massarat Abid; Ayesha Ashfaq, 'CPEC: Challenges and Opportunities for Pakistan' < CPEC-Challenges-Oppertunities-for-Pakistan.pdf (mcqsnotes.com) > accessed 19 August 2021.
[564] Nadeem Akhtar, 'Exploring the Determinants of the China-Pakistan Economic Corridor and Its Impact on Local Communities' (SAGE Journals, 2021) < Exploring the Determinants of the China-Pakistan Economic Corridor and Its Impact on Local Communities - Nadeem Akhtar, Hidayat Ullah Khan, Muhammad Asif Jan, Cornelius B. Pratt, Ma Jianfu, 2021 (sagepub.com) > accessed 14 April 2022.
[565] Khalid Manzoor Butt; Anam Butt 'IMPACT OF CPEC ON REGIONAL AND EXTRAREGIONAL ACTORS' (Journal of Political Science, 2015) < Butt-Butt.pdf (gcu.edu.pk) > accessed 14 April 2022.
[566] Massarat Abid; Ayesha Ashfaq, 'CPEC: Challenges and Opportunities for Pakistan' < CPEC-Challenges-Oppertunities-for-Pakistan.pdf (mcqsnotes.com) > accessed 19 August 2021.

subjected to a list of actions deemed to breach fair and equitable treatment in the relevant international investment agreement.

5.3.4 Morocco and Nigeria Bilateral Investment Treaty

In the past decade, an increasing number of countries have played a key role in reforming aspects of their international investment laws. On 3rd December 2016, Morocco and Nigeria signed the Morocco and Nigeria bilateral investment treaty to "to strengthen the bonds of friendship and cooperation between the State Parties".[567] The new treaty addresses some of the issues curtailing the investment regimes of Morocco and Nigeria. In particular, both countries have taken a pragmatic approach to the fair and equitable treatment standard in the treaty. Tarcisio describe this as a valuable decision:

> "Although it has not entered into force yet, the BIT is a valuable response from two developing countries to the criticism raised in the last few years against investment treaties, most prominently unbalanced content, restrictions on regulatory powers and inadequacies of investment arbitration."[568]

A discussion of the Morocco – Nigeria BIT is important for my thesis because it acts as an example for countries seeking to revise the fair and equitable treatment provision in their IIAs.[569] This is equally applicable to Pakistan if the country finds that the approach Morocco and Nigeria have taken may help Pakistan to revise fair and equitable treatment.[570] Therefore, the underlying aim of this section to discuss the fair and equitable treatment feature of the BIT and its relevance to the fair and equitable treatment standard in Pakistan IIAs.

Furthermore, my thesis has incorporated a discussion of the Morocco – Nigeria BIT to guide Pakistan that the Morocco - Nigeria BIT is an example of many examples on how to approach the fair and equitable treatment provision. The BIT offers a form of

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[567] Morocco–Nigeria BIT (2016) available at: http://investmentpolicyhub.unctad.org/IIA/treaty/3711 [Accessed 7 December 2017].
[568] Thomas Kendra, 'The Morocco-Nigeria BIT: a new breed of investment treaty?' (Thomson Reuters, 2017) < The Morocco-Nigeria BIT: a new breed of investment treaty? | Arbitration Blog (practicallaw.com) > accessed 14 April 2022.
[569] Tarcisio Gazzini, ' The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties (IISD, 2017) < iisd-itn-september-2017-english.pdf > accessed 14 April 2022.
[570] Nyombi, C., Mortimer, T. and Ramsundar, N. 2018. The Morocco-Nigeria BIT: towards a new generation of intra-African BITs. International Company and Commercial Law Review. 29 (2), pp. 69-80.

direction for Pakistan on how to embark on reforming one of the most controversial provision in their IIAs.[571] For this reason, my thesis has decided to expose Pakistan to this route in that following the footsteps of Morocco and Nigeria may be a suitable option for Pakistan.

The goal behind the Morocco – Nigeria BIT was to make the relationship between the two states stronger. The way in which the countries have strengthened this relationship is by departing from their traditional BITs. The BIT has new innovative features including amendments to the standards of treatment including a reform to fair and equitable treatment. It is Article 7 (2) of the Morocco – Nigeria BIT that states that a host state has to "accord to investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[572] The second part of the same provision, also, states that "the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal system of a Party".[573] The last part of this article incorporates full protection and security which "requires each Party to provide the level of police protection required under customary international law".[574] From this provisions, Morocco and Nigeria have strived to ensure no room is left for expansive interpretations of fair and equitable treatment by limiting the standard to the minimum standard under customary international law. In this sense, Morocco and Nigeria are stating that the fair and equitable treatment will not exceed the minimum standard of treatment for foreign investors.

This thesis would like to point out that a lack of predictability is a trend in the fair and equitable treatment provisions of Pakistan IIAs. This has become a challenge for a developing country like Pakistan who does not have the resources required to continuously fight accusations from foreign investors alleging a breach of fair and equitable treatment.[575] To add clarity to the fair and equitable treatment standard in

[571] Morocco–Nigeria BIT (2016) available at: http://investmentpolicyhub.unctad.org/IIA/treaty/3711 [Accessed 7 December 2017].
[572] Article 7 (2) of the Morocco – Nigeria BIT.
[573] Chrispas Nyombi, Tom Mortimer, and Narissa Ramsundar, 2018. The Morocco-Nigeria BIT: towards a new generation of intra-African BITs. International Company and Commercial Law Review. 29 (2), pp. 69-80.
[574] Article 7 (2) of the Morocco – Nigeria BIT.
[575] Tarcisio Gazzini, ' The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties (IISD, 2017) < iisd-itn-september-2017-english.pdf > accessed 14 April 2022.

order to avoid unprecedented claims from foreign investors it may be beneficial for Pakistan following the approach Morocco and Nigeria adopted.[576]

Nevertheless, Pakistan can follow this example to counteract the lack of predictability exercised by tribunals when faced with a investor state dispute. In this regard, a tribunal and a foreign investor alleging a breach of fair and equitable treatment will not have a variety of options. This approach is much clearer as it addressed the rights of the foreign investor and the rights of a host state. This is an example of another option Pakistan has in order to deal with fair and equitable treatment in its international investment agreements. Pakistan has the option to restrict the meaning of fair and equitable treatment in its international investment agreements. This can be subjected to a list of actions deemed to breach fair and equitable treatment in the relevant international investment agreement. Pakistan can achieve this in newly drafted international investment agreements as opposed to existing bilateral investment agreements or multilateral agreements. Therefore, it is a realistic choice for Pakistan since it is important to have a balanced approach to the investor state relationship.

5.3.5 The Brazilian approach

Brazil has joined a number of host states in revising the fair and equitable treatment standard in its international investment agreements. Brazil has produced its own version in the form of the Cooperation and Facilitation Investment Agreement (CFIA). The aim of CFIA is "to strengthen and to enhance the bonds of friendship and the spirit of continuous cooperation between the Parties."[577] My thesis will explore CFIA with a particular emphasis on the fair and equitable treatment standard. Before my thesis examines the provision in detail it is imperative to discuss why Brazil took a new approach.

Brazil decided to set up a new agreement in order to remove some of the hurdles foreign investors experience by investing in the country. Foreign investors interested

[576] Nyombi, C., Mortimer, T. and Ramsundar, N. 2018. The Morocco-Nigeria BIT: towards a new generation of intra-African BITs. International Company and Commercial Law Review. 29 (2), pp. 69-80.

[577] JOSÉ HENRIQUE VIEIRA MARTINS**, '**Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments' (Investment Treaty News, 2017) < https://www.iisd.org/itn/en/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/#_edn1 > accessed 19 January 2022.

in investing in Brazil can face regulatory and legislative obstacles preventing facilitation of investment opportunities. Nathalie Potin expresses that:

> "Although the Brazilian model discussed above has a modern and imaginative approach with regard to conflict prevention and the promotion and facilitation of investments, it is known that prevention and reconciliation are not always possible in real life. When drafting these investment agreements, Brazil lacked a more direct and courageous approach. It is like the top is missing."[578]

Some of the barriers to investing in Brazil include labour laws resulting in high costs for foreign investors, expensive production costs, lack of skilled labour force, and underdeveloped infrastructure. These have acted as weak points for the investment portfolio of Brazil preventing foreign investors from investing in the country.

Another reason Brazil has opted for a new approach is that the country struggles to attract a healthy amount of foreign direct investment since 2011.[579] According to the World Investment Report 2020 FDI inflows increased by 20% between 2018 and 2019.[580] As a result, it has become highly important for Brazil to encourage foreign direct investment inflows and CFIA is a key mechanism in attracting foreign direct investment in to the country.

Moreover, an analysis of the bilateral investment treaty programme of Brazil reveals that Brazil has not ratified most of its bilateral investment treaties. Brazil has signed twenty-seven bilateral investment treaties and out of this number only two have been enforced namely with Mexico and Angola. It seems that the decision to forgo the signing of these treaties stemmed from opposition from congress in the Brazilian government resulting in the termination of its ratification process in the 1990s. Today, Brazil is the only member of the Group of Twenty to not have ratified a bilateral investment treaty.

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[578] JOSÉ HENRIQUE VIEIRA MARTINS**,** **'**Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments' (Investment Treaty News, 2017) < https://www.iisd.org/itn/en/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/#_edn1 > accessed 19 January 2022.
[579] UNTACD, 'World Investment Report 2021' (2021) <World Investment Report 2021: INVESTING IN SUSTAINABLE RECOVERY (unctad.org)> accessed on 27 November 2021.
[580] UNTACD, 'World Investment Report 2021' (2021) <World Investment Report 2021: INVESTING IN SUSTAINABLE RECOVERY (unctad.org)> accessed on 27 November 2021.

In terms of fair and equitable treatment, Brazil has decided to exclude fair and equitable treatment from the text of CFIA. Brazil has done this intentionally in order to prevent language which may threaten the substantive protective standards offered in its bilateral investment treaties.[581] In addition to removing fair and equitable treatment it has also removed other substantive protective standard including indirect expropriation, and full protection and security. Hence, Brazil has taken a unique approach to fair and equitable treatment without stepping on the toes of its bilateral investment treaties.

Although CFIA is an innovation in the international investment family it should be duly noted that the agreement is a recent phenomenon. This makes it difficult to state whether the agreement is in fact successful in attracting and retaining investment. However, the World Bank has been highly supportive of the government of Brazil by helping to develop various provisions of CFIA.[582] In the past, the World Bank has been successful in advising several countries on how to improve their investment portfolio. For example, Bosnia and Herzegovina, Mongolia, and Colombia have all seen a surge in attracting and retaining investments.[583] Based on this notion, Brazil can expect to see a notable results with the assistance of the World Bank in attracting and retaining investments as a result of implementing CFIA.[584]

The Brazilian approach has the potential to reduce the vagueness of fair and equitable treatment in the international investment agreements concluded by Pakistan. Currently, fair and equitable treatment appears vague in Pakistan international investment agreements. As a result, there are inconsistent interpretations and applications of fair and equitable treatment by tribunals.

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[581] Fabio Morosoni; Michelle Ratton Sanchez Badin ' The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?' (IISD, 2015) < iisd-itn-august-2015-english.pdf > accessed 14 April 2022.

[582] Nathalie M-P Potin ' The Brazilian Cooperation and Facilitation Investment Agreement: Are foreign Investors Protected?' (Kluwer Arbitration Blog, 2021) < The Brazilian Cooperation and Facilitation Investment Agreement: Are Foreign Investors Protected? - Kluwer Arbitration Blog > accessed 14 April 2022.

[583] Fabio Morosoni; Michelle Ratton Sanchez Badin ' The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?' (IISD, 2015) < iisd-itn-august-2015-english.pdf > accessed 14 April 2022.

[584] JOSÉ HENRIQUE VIEIRA MARTINS**, '**Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments' (Investment Treaty News, 2017) < https://www.iisd.org/itn/en/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/#_edn1 > accessed 19 January 2022.

5.3.6 Aspects of Pakistan's BITs Suggesting Model BIT

In this section, my thesis will propose which aspects of the BITs concluded by Pakistan suggest a Model BIT for Pakistan.

5.3.6.1 Preamble

My thesis suggests the preamble in the BITs signed by Pakistan propose the creation of a Model BIT. The main reason for this suggestion is the case of *SGS v Pakistan*, the claimant cited the preamble to the Pakistan-Italy BIT, which stipulates that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilisation of economic resources. After considering the issue, the tribunal came to the conclusion that the Pakistan-Turkey BIT does not exclude the application of the MFN to certain forms of treatment incorporated in other Pakistan BITs. The tribunal claimed that Pakistan's claim that the FET provision was purposefully left out of the Pakistan-Italy BIT was undermined by the preamble of the agreement. The preamble of Pakistan's BITs set the aim of the BITs and the interpretation of the BIT will be in light of the aim of the BIT. In this case, the preamble of the Pakistan-Italy BIT set the aim of the BIT and the tribunal interpreted the BIT in accordance with the aim of the BIT.

Thus, the propagation for a Model BIT for Pakistan is justified because the interpretation and application of FET granted by tribunals has contributed towards the vast number of ISDS cases brought against Pakistan over the years. The ISDS cases show that foreign investors are willing to accuse Pakistan of breaching FET for numerous reasons. Pakistan should defend itself against the problems posed by the current position of FET in its BITs by prompting the Government of Pakistan to take the initiative to review this provision through a Model BIT.

5.3.6.1 Fair and Equitable Treatment

As explained FET is a substantive protective standard appearing in the form of a provision in Pakistan's BITs. By including an FET provision in Pakistan's BITs, Pakistan has stipulated that as a host state foreign investors will be treated fairly and equitably. Subserviently, FET has become the most popularly invoked protective standard offering treatment to foreign investors. This provision is broad, wide, and

expansive in nature which has resulted in the different interpretations and application of FET. Pakistan's failure to addressing the nature of the provision as it appears in its BIT has caused problems for Pakistan.

Hence, in light of the numerous ISDS lawsuits that have been filed against Pakistan over the years and the interpretation and implementation of FET awarded by tribunals, the promotion of a Model BIT for Pakistan is therefore justifiable. The ISDS cases demonstrate that international investors are ready to charge Pakistan for violating FET for a variety of causes. Pakistan should encourage the Pakistani government to take the initiative to evaluate this provision through a Model BIT in order to protect itself against the issues caused by the existing position of FET in its BITs.

This finding demonstrates that there are different interpretations of FET in the BITs concluded by Pakistan. The different interpretations of the FET standard in BITs pose numerous challenges on a developing country like Pakistan. This demonstrates that to some extent BITs concluded by Pakistan fail to act as an effective framework in balancing the rights of foreign investors and host states. Simultaneously, other jurisdictions have revised the FET standard in their BITs and these are discussed in this chapter. The lesson that Pakistan can learn from the actions of other jurisdiction is how to remedy the key problems with FET. Hence, in numerous decisions tribunals have had to deliberate on the idea of fair and equitable treatment as it has been up for dispute. Although governments should treat foreign investors and their investments equally, without prejudice, and in compliance with the law tribunals have varied definitions of fair and equal treatment, which causes uneven results and ambiguity.

According to this finding, treating foreign investors fairly and equally entails safeguarding investors' investments. However, the vague nature of FET makes the application of FET unclear. The laws shouldn't be arbitrary or retroactive, and that investors should be able to depend on the laws, policies, and regulations in effect at the time of their investment. Another view is that in order to ensure fair and equal treatment, host states must have a solid and predictable legal system that enables investors to confidently plan their investments. This entails offering efficient means of enforcement, access to justice, and security from political danger. Striking a balance between investors' legal rights and host states sovereign authority to regulate in investments is a difficulty for everyone overall.

This finding shows that there are many FET interpretations in the BITs signed by Pakistan. For a developing nation like Pakistan, the various interpretations of the FET standard in BITs provide a host of difficulties. This indicates to some extent how Pakistan's BIT agreements fall short of serving as a framework that effectively balances the interests of international investors and host countries. The FET standard in other jurisdictions' BITs has also been updated, and these revisions are covered in this chapter. Pakistan may learn how to address the main issues with FET from the acts of other jurisdictions.

This finding examines how the autonomy of the host state is greatly impacted by the wide interpretations of fair and equitable treatment. To encourage an autonomous climate, it is essential that the autonomy of the host state is not threated due to the wide interpretations afforded to fair and equitable treatment. An autonomous approach to dealing with foreign investors will foster confidence and trust within the global investor community, which in turn boosts investments in the host nation. These investments will frequently result in greater possibilities, and advancements, all of which have a favourable effect on the economy of the host state.

This outcome demonstrates that there are several FET interpretations in the BITs that Pakistan has signed. The different interpretations of the FET standard in BITs present a variety of challenges for a developing country like Pakistan. This demonstrates, at least in part, how Pakistan's BIT agreements fall short of providing a framework that successfully balances the interests of foreign investors and host nations. These solutions are discussed in my thesis. The FET standard in other jurisdictions' BITs has also been revised concurrently. By observing how other nations have handled their FET-related difficulties, Pakistan may be able to learn how to do the same to resolve its issues.

This finding establishes that the BITs that Pakistan has signed contain FET provisions that have been interpreted in different ways. For Pakistan, the various interpretations of the FET standard provide difficulties. This shows, at least in part, how Pakistan's BIT agreements fail to offer a framework that adequately balances the interests of international investors and the host country. In my thesis, these remedies are discussed in detail. Concurrently, the FET standard in the BITs of other countries has been updated. Pakistan may be able to learn how to overcome its problems. The idea

of fair equal treatment has a political, social and economic impact on Pakistan. The focus of the international investment community has been to ensure that a host state is not biased against international investors by ensuring that they are treated fairly and equitable. This has posed several difficulties for the host state due to the rising effect of the interpretation and application of equitable equality treatment these areas. Due to the protectionist measures, public policy considerations, and the desire to defend the interests of its foreign investors the host state is frequently subjected to ISDS cases.

5.5 Conclusion

Since 2000, Pakistan has struggled to tackle disputes arising from BITs. Numerous cases have been filed against the country by foreign investors. These cases were filed under the pretence that there was a violation of one of the provisions in the agreements. Often, it is a violation of fair and equitable treatment. It was the aim of this chapter to make suggestions to help Pakistan address the challenges with the FET standard in Pakistan IIAs. The different approaches the countries have adopted can guide Pakistan on how to approach the FET standard in their own IIAs. These countries have considered their own needs in making the necessary changes in relation to the FET standard which is why my thesis presents the different approaches to Pakistan so that Pakistan can make a decision that meets their needs as a developing country. The next Chapter evaluates these reform options.

Chapter 6: Evaluation of Recommendations

6.1 Introduction

The previous chapter examined the findings and explored potential solutions for Pakistan taking lessons from other jurisdictions. This chapter evaluates the recommendations for reform. It includes a discussion of whether the removal of fair and equitable treatment will work in Pakistan, whether fair and equitable treatment can affect Pakistan's attractiveness for FDI, the bargaining power when negotiating BITs, whether Pakistan should rely on individuals rather than teams or institutions for negotiating BITs; and whether Shariah Law as a form of equity or fairness can help to deliver the desired change. This will give an insight into the policies, and actions required to assist Pakistan in reaching a consistent and remedial position in relation to fair and equitable treatment.

In addition to this, this chapter investigates if Pakistan is willing to cooperate and standardise its stance towards the FET provision. This is necessary as the interests of foreign investors and Pakistan differ. Thus, despite the benefits proposed by the revisions of the FET standard in Pakistan IIAs, it is important to question if the solutions proposed in the previous chapter are in fact feasible for both parties. In essence, even though the measures adopted by countries, such as India, Brazil, Nigeria, and Morocco seem to have functioned relatively it is questionable as to whether emulating certain features of their approaches still needs to be unanswered. Hence, the purpose of this chapter is to assess whether the feasibility of transitioning the features of their approaches to FET will work for both parties.

6.2 Findings from an analysis of reform activity in other jurisdictions

This section explores the findings from an analysis of the reform activity in other jurisdictions. From an analysis of other jurisdictions, my thesis argues that Pakistan can forge a new Model BIT. An example of this is the Model BIT drafted by India which assisted India in renegotiating BITs already in existence with approximately 73

countries.[585] Also, it was perceived that the Model BIT favoured the countries of foreign investors where India acted as a capital importing state.[586] From the point of view of the host state, it is understandable that this may favour the host state who has experienced an unprecedented number of ISDS cases and has made the decision to end the limitless investor treaty arbitrations.[587] However, host states cannot escape the implications of devising such agreements which negatively affect investment opportunities for host states as this contradicts the original intent of drafting a model BIT which is to envisage the promotion of investments. Hence, the drafting of a model BIT has to be devised logically to balance the commercial interests of foreign investors and the autonomy of Pakistan.

Furthermore, the activities of other jurisdictions reveal that the majority of developing countries feel BITs threaten their regulatory space. These countries have decided to scrap their BIT programmes as they feel they shrink their policy space by making BITs that favour the interests and focus on mainly protecting the investments of foreign investors. As a result, these countries have become part of the investment family engaged in reforming their BIT regime, which includes a revision of the FET standard in their IIAs. Some of the countries involved in the reform of their BITs have been examined in Chapter 6, including Morocco, Brazil, India, and South Africa. Pakistan also feels the same way therefore is intent on revising its BIT programme by terminating or renegotiating its existing BITs.[588] According to the Pakistan Board of Investment "[t]he BoI will develop a model text with the assistance of Law & Justice Division, and that model BIT will replace the existing BIT template to possible extent while all new BITs will be negotiated on new template."[589] Thus, the Board of Investment has devised a strategy aimed at reforming the existing BIT programme of Pakistan to expand their regulatory space.

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[585] Prabash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Discussion' (2017) Journal of International Law & Business 38(1) https://scholarlycommons.law.northwestern.edu/njilb/vol38/iss1/1 accessed 14 April 2020.
[586] Martin Soderman, 'India's 2016 Model Bilateral Investment Treaty' (Stockholms Universitet, 2020) <https://www.diva-portal.org> accessed 14 April 2020.
[587] Josef Ostransky and Facundo Aznar, 'Investment Treaties and National Governance in India: Rearrangements, Empowerment, and Discipline' (Cambridge University Press, 2021) <https://www.cambridge.org> accessed 14 April 2022.
[588] Zafar Bhutta, 'Pakistan to terminate 23 bilateral investment treaties' *Business & Human Rights Resource Centre* (London, 4 August 2021) < https://www.business-humanrights.org/en/latest-news/pakistan-to-terminate-23-bilateral-investment-treaties/> accessed 15 April 2022.
[589] *Ibid*.

Moreover, the jurisdictions discussed in the previous chapter suggest their approach to FET is almost a cry for help to put an end to further ISDS cases tearing the economic environment of their countries down. To achieve this objective, jurisdictions have resorted to modernise the FET standard in their respective IIAs. Morocco and Nigeria, for example, have produced their own BIT in such a manner that fosters the economic, social and environmental aspects of the regions.[590] Their treaty continues to offer protection to foreign investors however it does so in a manner that does not compromise the regulatory space of the countries.[591] Likewise, Brazil has adopted a pioneering approach to the issue as it is more focused on facilitating investments as opposed to protecting investments in the form of the Cooperation and Facilitation Investment Agreement. In the words of Hees and Moraes this agreement differs in the following manner from the orthodox BITs:

> "The traditional BIT approach has been to confer rights—such as the right to fair and equitable treatment—that ultimately enable investors to seek redress against the host state in cases of alleged breach. In contrast, the CFIA's investment facilitation provisions are fundamentally about streamlining the domestic regulatory context in which investors must operate. The BITs were conceived as a means of compensating for institutional shortcomings in the protection of investments in host states, while the Brazilian model focuses precisely on rectifying those shortcomings."[592]

This differs from a traditional BIT which offers fair and equitable treatment as redress to foreign investors where the host state breaches the respective BIT.[593] Thus, these jurisdictions have addressed the shortcomings in their existing BITs which have

[590] Tarcisio Gazzini, 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties (IISD, 2017) < iisd-itn-september-2017-english.pdf > accessed 14 April 2022.
[591] Chrispas Nyombi, Tom Mortimer, and Narissa Ramsundar, 'The Morocco-Nigeria BIT: towards a new generation of intra-African BITs. International Company and Commercial Law Review' (2018) International Company and Commercial Law Review 29 (2) < https://repository.canterbury.ac.uk/item/887ww/the-morocco-nigeria-bit-towards-a-new-generation-of-intra-african-bits> accessed 15 April 2022.
[592] Henrique Choer Moraes, and Felipe Hees, 'Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements (2018) American Journal of International Law <https://ssrn.com/abstract=3394717 or http://dx.doi.org/10.2139/ssrn.3394717> accessed 14 April 2022.
[593] United Nations, 'World Investment Report 2021' (*UNCTAD*, 2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.

allowed foreign investors to bring cases against host states alleging a breach of fair and equitable treatment.

6.2.1 Can removal of FET work in Pakistan

This section presents a case for and against the removal of FET in Pakistan IIAs based on the discussions in my previous chapters.[594] Presenting both sides of the argument is important for Pakistan as it ultimately influences the investment portfolio of the country. For this reason, it is significant to examine both sides of the spectrum to give realistic solutions to Pakistan.

The first issue with removing FET from Pakistan IIAs is that it will remove the role FET plays in guaranteeing the protection of the investments of foreign investors. My thesis has pointed out in Chapter 4 that out of the 53 Pakistan BITs only 5 Pakistan BITs do not contain an FET provision.[595] The fact that the majority of Pakistan IIAs contain an FET provision demonstrates that FET is a key provision for Pakistan and foreign investors. This is because Pakistan is providing an assurance to foreign investors that their investments will be protected in a fair and equitable manner. Therefore, it is not in the best interests of Pakistan to completely remove FET from its IIAs.

Another reason removal of FET will not work for Pakistan is the fact that the political situation of Pakistan is a cause of concern for foreign investors. Pakistan has experienced decades of political instability since its independence in 1947 building a reputation for having a weak political culture in the country.[596] For this reason, foreign investors require some sort of assurance that their investments will be protected during political grievances.[597] *Bayindir* is an example of a case where a sudden change of government becoming a serious problem for foreign investors causing them to sue Pakistan for breaches, including a violation of FET. The tribunal concluded that it is expected that a sudden change of government can create an unstable political

[594] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investments* (3rd edn, Cambridge University Press 2010).
[595] See Chapter 4 for a detailed discussion on the FET standard in Pakistan IIAs.
[596] Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016).
[597] United Nations, 'World Investment Report 2021' (*UNCTAD*, 2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.

environment which is what happened in Pakistan. On this basis, the facts of the case did not support the notion that the Pakistan government's actions in hindsight breached the legitimate expectations of the claimant. This did not therefore breach the FET obligation which was invoked by the claimant in the case. Hence, removing FET from the text of IIAs will potentially discourage foreign investors from engaging with Pakistan due to the unpredictable nature of the provision.

On the other hand, removing FET from Pakistan IIAs will eradicate the controversies surrounding the standard. As mentioned in my previous chapters, FET is a vague provision in Pakistan IIAs permitting tribunals to give expansive interpretations. Schill justifies this in the following quote:

> "Fair and equitable treatment does not have a consolidated and conventional core meaning as such nor is there a definition of the standard that can be applied easily. So far it is only settled that fair and equitable treatment constitutes a standard that is independent from national legal order and is not limited to restricting bad faith conduct of host States. Apart from this very minimal concept, however, its exact normative content is contested, hardly substantiated by State practice, and impossible to narrow down by traditional means of interpretative syllogism."[598]

Schill states that no attempt has been made to define FET in IIAs resulting in wide interpretations of FET. This is, also, true for Pakistan who has failed to define FET in any of its IIAs up until now. This, in turn, quickly becomes a problem for the host state as well as the foreign investor as the meaning of FET is blurred due to a lack of definition in the relevant IIAs.[599] Therefore, the fact that FET has not been defined by Pakistan in its IIAs will potentially put Pakistan in a vulnerable position exposing the country to unprecedented lawsuits from foreign investors.

A further problem with FET in Pakistan IIAs is that the absence of a specific organisation in Pakistan dedicated to negotiating IIAs ceases to exist. In Chapter 4, my thesis explained that the signing of IIAs was considered one of the doable when a

[598] Stephan Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law* (first published 2010, Oxford 2011) 159.
[599]United Nations, 'World Investment Report 2021' (*UNCTAD*, 2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.

Prime Minister went abroad.[600] Eventually, Pakistan witnessed its first lawsuit in 2001 shaking the investment community in Pakistan.[601] Despite this trauma, to date, the only organisation which negotiates Pakistan IIAs is the Board of Investment. Even a decline in the signing of BITs with other countries Pakistan has still failed to set up an organisation designed to negotiate IIAs on behalf of Pakistan. Therefore, in the absence of an organisation and with the removal of FET Pakistan will find itself unprepared for further lawsuits in the near future.

From a political point of view, Pakistan has an unstable political situation which does not fit well with foreign investors.[602] The political environment of Pakistan is undoubtedly a risk to any foreign investor acting as a deterrent for potential investment opportunities. Glenn Barkie explains that:

> "The government is responsible for the rule-setting of many factors that encourage or discourage FDI. Having trust in the host country's government may be a given in some cases (for example, a US company investing in Germany); however, in some less-developed countries, government instability – and in turn a lack of strong FDI policymaking – can be a turn off,"[603]

Glenn makes a significant assessment of the implication political instability has on foreign investors with a particular investment destination in mind. This quote can be equally applied to my thesis which stresses that one of the main obstacles to investing in Pakistan is the political risks attached to the country. Simultaneously, in Chapter 5 my thesis explains two of the main recipients of FDI namely, the mining industry and construction industry, which have been affected by political uncertainties. Hence, the political environment of a developing country like Pakistan is to some extent a deal breaker for foreign investors.

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[600] See Chapter 4 for a full discussion on the signing of IIAs.
[601] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (3rd edn, Hart Publishing 2016) 190.
[602] United Nations, 'World Investment Report 2021' (*UNCTAD*, 2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.
[603] Viola Caon, 'How important is political stability to attracting FDI? - Investment Monitor' (Investment Monitor, 2020) <https://www.investmentmonitor.ai/analysis/fdi-drivers-and-political-stability> accessed 04 January 2022.

However, even if Pakistan removes the FET from its IIAS the loopholes in international investment law still enable foreign investors to invoke FET one way or another.[604] One of the ways in which this occurs is through the most favoured nation clause. This was discussed in detail in Chapter 4 within the context of the different interpretations of FET. In this chapter my thesis, examined the case of *Bayindir* where FET was invoked through the most favoured nation clause. In this case, the tribunal held a reference to FET in the preamble of the Pakistan – Turkey BIT (1995) allowed the most favoured nation clause to be imported.[605] The tribunal was clear that even though Pakistan did not include FET within the text of the BIT suggesting Pakistan had no intention of obligating FET the tribunal still permitted the claimant to invoke FET. In light of this, Pakistan needs to understand that if the tribunal made this decision in the past then there is a high chance that the tribunal may follow a similar ruling if faced by another investor state dispute concerning Pakistan in the future. Hence, excluding FET from the text of a Pakistan BIT does not necessarily protect Pakistan from ISDS cases in the near future.

Another possibility of removing FET from Pakistan IIAs indicates that parties to an agreement have to follow the minimum standard under customary international law. This will occur despite host states removing FET from the text of their BIT.[606] However, this is not as straightforward as it seems because this will all depend on whether a foreign investor is able to invoke the minimum standard before a tribunal subject to the ISDS mechanism in the relevant BIT. An example of this is the India Singapore Comprehensive Economic Cooperation Agreement which is restricted to disputes "concerning an alleged breach of an obligation of the former under this Chapter".[607] Therefore, any claims which fall outside of the jurisdiction of the tribunal will prevent a foreign investor from bringing a claim. On the other hand, the New Zealand-Thailand Closer Economic Partnership Agreement's encompasses all disputes "with respect to a covered investment".[608] This clause is wide enough to incorporate a wide variety of

[604] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (3rd edn, Hart Publishing 2016) 200.
[605] *Ibid*, 220.
[606] United Nations, 'World Investment Report 2021' (*UNCTAD*, 2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.
[607] India-Singapore Comprehensive Economic Cooperation Agreement (signed 29 June 2005, entered into force 1 August 2005) art 6.21.
[608] New Zealand-Thailand Closer Economic Partnership Agreement (signed 5 April 2004, entered into force 1 July 2005) art 9.16.

disputes including the minimum standard of treatment. Therefore, even though Pakistan removes FET from the text of any of its treaties foreign investors can invoke the minimum standard of treatment under customary international law.

6.2.2 Effect on Pakistan's attractiveness to FDI

Foreign direct investment is defined as "an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate)."[609] Economic growth is defined as "an increase in the capacity of an economy to produce goods and services, compared from one period of time to another."[610] In this section, my thesis will examine whether fair and equitable treatment has an effect on attracting foreign direct investment inflows for Pakistan since FDI is an important source of income for Pakistan.

Firstly, the role fair and equitable treatment plays in attracting foreign direct investment in Pakistan is unclear because the conclusion as to whether foreign direct investment is beneficial for Pakistan is also vague. On the one hand, some scholars, such as Moran and Salisu agree that foreign direct investment helps to develop and the economy of a country. On the other hand, some scholars disagree, including Atan, Dunning and Blomstrom arguing that foreign direct investment only helps a small section of the financial market and damages the domestic investment of a country.[611] As a result of this perception, scholars argue that IIAs can strengthen the economy of a country by encouraging cooperation between host states through the provisions of various IIAs. In the view of Ortino the purpose of a BIT is:

> " to ensure the protection of foreign investment(object of the BIT) in order to intensify economic cooperation, encourage/promote international capital flows and increase the prosperity of both contracting parties(purpose of the BIT).

[609] Najabat Ali, 'Impact of Foreign Direct Investment on the Economic Growth of Pakistan' (2017) 7(4) American Journal of Economics < http://article.sapub.org/10.5923.j.economics.20170704.01.html#:~:text=The%20study%20uses%20correlation%20and,attract%20more%20FDI%20in%20Pakistan> accessed 17 April 2022.
[610] *Ibid*.
[611] Vudayagiri Balasubramanyam, M Salisu and David Sapsford, 'Foreign Direct Investment as an Engine of Growth' (1999) 8(1) Journal of International Trade and Economic Development 27, 30.

> Besides, he highlights the growing understanding on considering modern investment instruments as a vital tool to achieve sustainable development of the host State. With regard to concept of development he suggests that it should be considered wider method which covers "economic, social, political and legal considerations."[612]

He places emphasis on the importance of distinguishing between objective and the purpose of a BIT citing that "…the object and purpose of a BIT cannot merely be the protection of foreign investment, as some tribunals have assumed."[613] In his work he referred to the work of Professor Salacuse stating that "an investment agreement between a developed and a developing country is founded on a grand bargain: a promise of protection of capital in return for the prospect of more capital in the future."[614] Professor Salacuse examined the first BIT signed between Pakistan and Germany in 1959 and a BIT signed after the 2000s.[615] He reported that some significant changes have occurred over the years, such as the inclusion of the fair and equitable treatment clause in IIAs. However, based on his research he reported that not much has changed since the signing of the first BIT apart from the changes just mentioned. Hence, fair and equitable treatment may have had a positive impact on FDI since host states started including the standard in their IIAs.

The role of fair and equitable treatment can be understood by examining the development of Pakistan since the first FET clause was included in Pakistan IIAs. The first time Pakistan incorporated fair and equitable treatment into the text of its IIAs was in the Pakistan – Sweden BIT (1981). During this period, Pakistan was simply an agricultural economy which revolutionised into a semi-industrial economy over the years.[616] Today, Pakistan offers a variety of incentives to its foreign investors, has one of the largest BIT programmes in the world, made the banking sector stronger and

[612] Federico Ortino, 'The Investment Treaty System as Judicial Review' (2013) 24(3) American Review of International Arbitration 437-468, 400.
[613] *Ibid*.
[614] *Ibid*.
[615] Vudayagiri Balasubramanyam, M Salisu and David Sapsford, 'Foreign Direct Investment as an Engine of Growth' (1999) 8(1) Journal of International Trade and Economic Development 27, 29.
[616]United Nations, 'World Investment Report 2021' (UNCTAD, 2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.

developed the infrastructure of the economy.[617] Due to these reforms, both developing countries and developed countries have invested in different sectors of the country.

The table represents the different types of countries that have made the decision to invest in Pakistan due to the incentives. Both developing countries and developed countries have taken an interests in the investment opportunities Pakistan has to offer.

Sector	**2017-18**	**2018-19**	**2019-20**	**2020-21**	**Jul-Aug FY22 (P)**
Oil & Gas	372.0	349.8	311.4	242.8	35.5
Financial Business	400.3	286.5	273.8	235.5	39.1
Textiles	49.7	76.8	37.7	6.9	6.7
Trade	143.0	76.3	32.7	142.2	8.1
Construction	40.4	70.2	20.7	30.9	(4.5)
Power	1,179.5	(323.9)	764.3	906.1	85.8
Chemicals	5.4	48.9	103.1	5.5	(4.7)
Transport	163.5	56.9	40.1	(73.3)	(15.5)
Communication (IT&Telecom)	113.5	(55.7)	622.5	99.8	46.0
Others	375.7	739.2	482.3	251.0	6.6
Total	**2,780.3**	**1,362.4**	**2,561.2**	**1,847.4**	**203.1**

[617] Najabat Ali, 'Impact of Foreign Direct Investment on the Economic Growth of Pakistan' (2017) 7(4) American Journal of Economics < http://article.sapub.org/10.5923.j.economics.20170704.01.html#:~:text=The%20study%20uses%20correlation%20and,attract%20more%20FDI%20in%20Pakistan> accessed 17 April 2022.

Table: The sectors favoured by foreign investors[618]

The table shows the sectors favoured by foreign investors when it comes to investing in Pakistan.[619] The table also shows the areas where Pakistan is likely to focus its attention on to ensure FDI inflows are not affected. Due to these incentives, countries feel assured that their decision to invest in Pakistan will be a major incentive for these countries.[620] Therefore, an examination of the development of fair and equitable treatment demonstrates that it may have an effect on encouraging foreign direct investment in Pakistan.

Having mentioned the incentives for foreign investors, it is important to point out that even though Pakistan offers opportunities the country also poses risks for foreign investors. The political instability, high debt, and terrorism in the region will weaken any potential investment opportunities for foreign investors in Pakistan. An example of this is when the army of Pakistan seized the site and evacuated the personnel in the case of *Bayandir* following orders from the Government of Pakistan. As such, foreign investors need assurances in the event that their investment is negatively impacted that they will be treated fairly and equitably and this assurance is offered through the FET clause. FET can protect foreign investors from a wide range of situations which threaten the very existence of investments of foreign investors in developing countries. This acts as an incentive for foreign investors because the purpose of FET is to protect the investments of foreign investors. As a result, this guarantees that Pakistan will protect the investments of foreign investors which may be a contributing factor pertaining to FDI.

However, recent data reveals that Pakistan compared to its neighbouring countries has attracted less FDI in comparison. Developing countries, such as Bangladesh, India, and Sri Lanka have attracted FDI which surpasses the current FDI inflows of

[618] --, 'Foreign Investment' (Board of Investment, 2022) < https://invest.gov.pk/statistics > accessed 11 January 2022.
[619] Najabat Ali, 'Impact of Foreign Direct Investment on the Economic Growth of Pakistan' (2017) 7(4) American Journal of Economics < http://article.sapub.org/10.5923.j.economics.20170704.01.html#:~:text=The%20study%20uses%20correlation%20and,attract%20more%20FDI%20in%20Pakistan> accessed 17 April 2022.
[620] United Nations, 'World Investment Report 2021' (UNCTAD, 2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.

Pakistan.[621] One of the reasons foreign investors are visiting other developing countries is the lack of consistent government policies.[622] As one analyst points out regarding the investment regime of Pakistan:

> "But the problem is that Pakistan is not seen as a place where rule of law and agreements are respected. We have great potential to woo FDI; but we need to learn to respect our commitments, pursue consistent policies and keep politics out of business."[623]

The situation presented by the analysts suggests other factors, such as the inconsistent government policies, are deterring foreign investors from keeping their investments in Pakistan.[624] With this deficit in mind it is reasonable to assume fair and equitable treatment is restricted in relations to attracting and sustaining foreign direct investment in Pakistan as the analysis implies that FET alone is not adequate enough to attract and sustain steady FDI inflows.

FDI clearly has a positive impact on a developing country as it promotes economic growth with long lasting effects on a country. For Pakistan foreign direct investment is an important source of income which promotes the growth and development of the country. Although, Pakistan has seen a decline in the levels of foreign direct investment over the years there are a number of factors as to why there is a stagnation in foreign direct investment inflows in Pakistan including political instability, corruption, and terrorist activities.[625] These issues can act as obstacles for foreign investors discouraging potential investment opportunities in the long run which has eventually become a huge problem for Pakistan.[626] Foreign investors will face different barriers investing in a developing country like Pakistan. When they invest they desire some sort of protection for their investments and fair and equitable treatment is the main

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[621] United Nations, 'World Investment Report 2021' (UNCTAD, 2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.
[622] Lauge Poulsen, 'An interview with Lauge Poulsen, author of Bounded Rationality and Economic Diplomacy' (IISD, 2016) < https://www.iisd.org/itn/en/2016/05/16/an-interview-with-lauge-poulsen-author-of-bounded-rationality-and-economic-diplomacy/ > accessed 02 January 2022.
[623] Nasir Jamal, 'Falling Further Behind' (Dawn, 2021) < https://www.dawn.com/news/1639563 > accessed 08 January 2022.
[624] --, 'Foreign Investment' (Board of Investment, 2022) < https://invest.gov.pk/statistics > accessed 11 January 2022.
[625] Asif Shahzad, 'Pakistan in talks with Tethyan Copper to resolve $5.8 billion dispute – sources' (Reuters, 2020) < https://www.reuters.com/article/pakistan-mining-tethyan-idUSKBN27S2N7 > accessed 01 January 2022.
[626] United Nations, 'World Investment Report 2021' (UNCTAD, 2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.

protection offered by Pakistan in its IIAs.[627] For this reason promising fair and equitable treatment to foreign investors is protection for the property of foreign investors. Fair and equitable has a direct link to attracting foreign direct investment in Pakistan.

6.2.3 Bargaining power when negotiating BITs

Pakistan has joined the host states who have initiated reform in terminating and renegotiating BITs, especially the fair and equitable treatment provision in their BITs. Nevertheless, behind the scenes is an important factor which needs to be addressed in section Chapter 7 of my thesis in line with the objective of my research topic. This aspect is the bargaining power involved in the investment treaty reform of BITs where one party exerts power over the other. In the following section my thesis will demonstrate there is an imbalance of bargaining power between Pakistan and the foreign investor in the Pakistan BITs that have been signed so far.[628] My thesis will examine whether Pakistan has more power over the other party in negotiating BITs and whether there is a need to balance the bargaining power of both parties. Furthermore, my thesis will analyse whether terminating or renegotiating BITs has any implications for Pakistan. Also, my thesis will examine if Pakistan has taken any steps towards revising their BIT programme using their bargaining power to move forward in order to expand their policy space. In addition, my thesis will consider whether other countries have used their bargaining power effectively to increase their

Countries around the world are seeking new ways to revise their investment treaties as a means of attracting more FDI. One of the main reasons as to why host states are debating on how best to approach the matter is due to the rise of ISDS cases. Pakistan is not an exception to this however Pakistan continues to keep BITs even though there is no proof BITs bring or increase FDI. In the words of Poulsen,

> "common assumptions about the role of [bilateral investment treaties (BITs)] in attracting foreign investment are unsupported by a considerable amount of quantitative and qualitative evidence. For the

[627] Lauge Poulsen, 'An interview with Lauge Poulsen, author of Bounded Rationality and Economic Diplomacy' (IISD, 2016) < https://www.iisd.org/itn/en/2016/05/16/an-interview-with-lauge-poulsen-author-of-bounded-rationality-and-economic-diplomacy/ > accessed 02 January 2022.
[628] --, 'Foreign Investment' (Board of Investment, 2022) < https://invest.gov.pk/statistics > accessed 11 January 2022.

> vast majority of investors, BITs do not appear to be important – directly or indirectly – when determining where, and how much, to invest abroad". [629]

The bargaining power involved in negotiating BITs is sufficient to prompt some host states to revise their BITs while others like Pakistan continue to keep them. My thesis argues that developed countries have more of an influence on the negotiation process of BITs than developing countries do.[630] To support this argument there have been several studies conducted by authors which support the argument that one party has more power over the other party when negotiating IIAs.[631] This means that Pakistan is in a compromising position succumbing to the terms of developed countries during the negotiation process of BITs.[632] Hence, although all the parties privy to BITs should have equal bargaining powers during the negotiation stage in reality this is not the case as one party exerts more power over the other in negotiating IIAs.

Furthermore, my thesis would like to stress that Pakistan was never in a position to bargain the terms of their IIAs effectively during the negotiation process with developed countries.[633] This is due to the fact that as a developing country Pakistan entered into IIAs at a time when there was a pressing need to bring investment into their countries to boost their economy. For Pakistan signing BITs with developed and developing countries during the 1980s and 1990s quickly became a custom for the country. Over the years Pakistan BITs grew in popularity acting as solutions for foreign investors keen on investing in Pakistan. The circumstances of the country during this period prevented the use of regulatory power from Pakistan's end. Hence, Pakistan has no given any thought to the negotiation process therefore any efforts to negotiate the terms of Pakistan IIAs have always been halted to a great extent.

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[629] Lauge Poulsen, 'An interview with Lauge Poulsen, author of Bounded Rationality and Economic Diplomacy' (IISD, 2016) < https://www.iisd.org/itn/en/2016/05/16/an-interview-with-lauge-poulsen-author-of-bounded-rationality-and-economic-diplomacy/ > accessed 02 January 2022.
[630] United Nations, 'World Investment Report 2021' (UNCTAD, 2021) <World Investment Report 2021: Investing in Sustainable Recovery (unctad.org)> accessed on 27 November 2021.
[631] --, 'Foreign Investment' (Board of Investment, 2022) < https://invest.gov.pk/statistics > accessed 11 January 2022.
[632] Asif Shahzad, 'Pakistan in talks with Tethyan Copper to resolve $5.8 billion dispute – sources' (Reuters, 2020) < https://www.reuters.com/article/pakistan-mining-tethyan-idUSKBN27S2N7 > accessed 01 January 2022.
[633] Lauge Poulsen, 'An interview with Lauge Poulsen, author of Bounded Rationality and Economic Diplomacy' (IISD, 2016) < https://www.iisd.org/itn/en/2016/05/16/an-interview-with-lauge-poulsen-author-of-bounded-rationality-and-economic-diplomacy/ > accessed 02 January 2022.

Pakistan will only ever negotiate or terminate its IIAs the day it acknowledges the consequences IIAs have on their country.[634] It is worth mentioning here the economic and legal consequences experienced by Pakistan as a host state should have been enough to encourage them to renegotiate the IIAs. Poulsen and Aisbett observed that most states are not familiar with the advantages and disadvantages of BITs until states face lawsuits causing them to become aware of the costs and benefits of signing BITs.[635] The position regarding BITs is clearly explained by Makhdoom Ali khan:

> "I am not against BITs as such; I'm simply against the approach Pakistan has taken in the past, which is to passively sign these treaties, with no real negotiations, or sense of the risks involved. If Pakistan is going to seriously negotiate BITs, it needs to set aside an appropriate budget, so that the bureaucracy is well staffed and informed on these matters. Unfortunately, the Government of Pakistan has never considered BITs an important enough issue for this. But look at the legal costs in the three cases against us so far; I'm sure they exceed US$10 million as a very conservative estimate. For less than a fraction of that amount you can set up a department, hire lawyers—perhaps even get some assistance from outside Pakistan—and start looking at this process properly. But I don't think the will is there because the need is not felt. But come a day where we are faced with a similar situation as Argentina is now, this may change."[636]

However, the decline in the number of BITs signed over the years would suggest states have become aware of the costs and benefits of signing BITs.[637] At the same time, the increase in ISDS cases suggests states have made a move towards a reform of their BITs either by renegotiating, terminating or replacing them with other IIAs. Unfortunately, Pakistan has failed to renegotiate, terminate or replace any of their IIAs

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[634] Najabat Ali, 'Impact of Foreign Direct Investment on the Economic Growth of Pakistan' (2017) 7(4) American Journal of Economics < http://article.sapub.org/10.5923.j.economics.20170704.01.html#:~:text=The%20study%20uses%20correlation%20and,attract%20more%20FDI%20in%20Pakistan> accessed 17 April 2022.

[635] Lauge N. Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning', (2013) 65(2) Cambridge University Press < https://www.cambridge.org/core/journals/world-politics/article/when-the-claim-hits-bilateral-investment-treaties-and-bounded-rational-learning/9D9FC16B750A42FA2040E91677271C85> accessed 17 April 2022.

[636] *Ibid*.

[637] United Nations, 'Pakistan' (Investment Dispute Settlement Navigator, 2022) < https://investmentpolicy.unctad.org/investment-dispute-settlement/country/160/pakistan > accessed 19 January 2022.

despite the number of ISDS cases brought against Pakistan even though there has been a decline in the number of BITs signed since the 1960s.[638] Hence, although there is an imbalance of bargaining power in relation to BITs Pakistan and foreign investors have concluded Pakistan has not done anything.

The rise in cases against Pakistan and the reduction in the signing of BITs between Pakistan and other countries has not encouraged Pakistan to terminate, renegotiate or modified any of its BITs used by foreign investors to bring a claim accusing Pakistan of breaching FET. The Turkey-Pakistan BIT of 1995 is an example of an IIA continuing to haunt Pakistan till this day. The BIT first came to the attention of ICSID in 2001 when Bayindir accused Pakistan of breaching this BIT even though Bayindir lost to Pakistan it has not prevented Bayindir from filing another case under the same BIT.[639] This will not particularly sit well with Pakistan as it is still contesting the $5.9 billion awarded to Australian company Tethyan Copper in *Tethyan Copper v Pakistan*. The ICSID tribunal ruled in favour of the claimant and ordered Pakistan to pay 5.9 billion dollars for breaches in the Australian – Pakistan BIT.[640] The following table represents all the cases brought against Pakistan including the BITs cited by the investors and the relevant FET provision in each BIT:

Case	BIT	FET	Outcome
SGS v Pakistan (2001)	Pakistan – Switzerland BIT (1995)	Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party 10	Settled

[638] Najabat Ali, 'Impact of Foreign Direct Investment on the Economic Growth of Pakistan' (2017) 7(4) American Journal of Economics < http://article.sapub.org/10.5923.j.economics.20170704.01.html#:~:text=The%20study%20uses%20correlation%20and,attract%20more%20FDI%20in%20Pakistan> accessed 17 April 2022.

[639] --, 'Turkish contractor Bayindir lodges a new claim against Pakistan, 12 years after an ICSID tribunal rejected an earlier BIT claim between the parties' (Investment Arbitration Reporter, 2021) < https://www.iareporter.com/articles/turkish-contractor-bayindir-lodges-a-new-claim-against-pakistan-12-years-after-an-icsid-tribunal-rejected-an-earlier-bit-claim-between-the-parties/> accessed 14 April 2022.

[640] Asif Shahzad, 'Pakistan in talks with Tethyan Copper to resolve $5.8 billion dispute – sources' (Reuters, 2020) < https://www.reuters.com/article/pakistan-mining-tethyan-idUSKBN27S2N7 > accessed 01 January 2022.

		investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of the most favoured. narion, if this laner treatment is more favourable.	
Impregilo v Pakistan (2002)	Italy – Pakistan BIT (1997)	Both Contracting Parties shall at times ensure fair and equitable treatment of the investments of investors of the other Contracting Party. Both contracting parties shall ensure that the management, maintenance, enjoyment, transformation, cessation, and liquidation of investments effected in their territory by investors of the other Contracting party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.	Discontinued
Impregilo v Pakistan (2002)	Italy – Pakistan BIT (1997)	Both Contracting Parties shall at times ensure fair and equitable treatment of the investments of investors of the other Contracting Party. Both contracting parties shall ensure that the management, maintenance, enjoyment, transformation, cessation, and liquidation of investments effected in their territory by investors of the	Settled

		other Contracting party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.	
Bayindir v Pakistan (2003)	Turkey-Pakistan BIT (1995)	Each party shall accord to these investments once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country whichever is the most favourable. Each party shall encourage participation of its investors, in trade promotional events such as fairs, exhibitions, mission and seminars organized in both the countries.	Decided in favour of state
Tethyan Copper v Pakistan (2012)	Australian – Pakistan BIT (1998)	Each Party shall ensure fair and equitable treatment in its own territory to investments.	Decided in favour of investor
Karkey Kardeniz v Pakistan (2013)	Pakistan - Turkey BIT (1995)	Each party shall accord to these investments once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country whichever is the most favourable.	Decided in favour of investor

		Each party shall encourage participation of its investors, in trade promotional events such as fairs, exhibitions, mission and seminars organized in both the countries.	

Table 10: Cases brought against Pakistan[641]

From the table, it is clear that despite the number of cases brought under specific BITs Pakistan has decided to keep them. The termination or renegotiation of BITs is largely affected by the bargaining power of the parties.[642] The stronger party which is usually the developed country is a much better economic position than the other party.[643] The above table is proof that foreign investors from developed countries accused Pakistan of breaching FET. Accordingly, the Board of Investment of Pakistan has decided to denounce its BIT programme in 2021 after years of lawsuits. The country believes their BIT programme is shrinking their policy space in relation to international litigation.

Pakistan has made a move towards its BIT programme in 2021 agreeing to renegotiate some of its BITs. An official from the Board of Investment has declared that Pakistan will devise a template which will act as a basis for future BIT negotiation. The secretary for the Board of Investment, Fareena Mazhra, attended the International Investment Agreement' Conference of the World Investment Forum and reported that she received a positive response to the move from people at the conference.[644] So far Pakistan has 53 BITs in place with both developing and developed countries; 32 BIT are currently in force; five have been terminated; and sixteen have not been enforced. UNCTAD has agreed to guide Pakistan in preparing the template for the new BIT alongside experts in the field to ensure the agreement is conditioned to address

[641] United Nations, 'Pakistan' (Investment Dispute Settlement Navigator, 2022) < https://investmentpolicy.unctad.org/investment-dispute-settlement/country/160/pakistan > accessed 19 January 2022.
[642] Andrew Walter, 'British Investment Treaties in South Asia: Current Status and Future Trends' (International Development Center of Japan, January 2000) <https://personal.lse.ac.uk/wyattwal/images/British.pdf> accessed 6 April 2021.
[643] *Ibid*.
[644] Amin Ahmed, 'Pakistan to renegotiate all bilateral investment treaties' (Dawn, 2021) < https://www.dawn.com/news/1653312 > accessed 10 January 2022.

contemporary problems and solutions such as sustainable development.[645] Fareena Mazhar spoke in relation to the current situation regarding BITs that "[p]resently, governments around the world are facing pressing and controversial questions relating to their BITs and are re-thinking their approaches to those agreements as BITs have not been as instrumental in attracting the much-needed FDI as a result unilateral terminations are taking place,".[646] However, from an economical point of view it may be costly for Pakistan to terminate or renegotiate BITs with other parties. The cost of terminating or renegotiating BITs can be an expensive task for Pakistan as it is already facing an economic slump placing it at a disadvantage in comparison to other host states.[647] This means that Pakistan will have to consider the economic impact of denouncing their BIT programme to avoid incurring further costs which could place Pakistan at further economic disadvantage. Hence, this is another drawback for Pakistan pointing towards the imbalance in bargaining power which exists between the parties. This creates a further problem with terminating and renegotiating BITs is the time and effort that is involved.

6.2.4 Reliance teams or institutions for negotiating BITs

This section provides an examination as to whether individuals or institutions should negotiate BITs on behalf of Pakistan. An examination of this is essential for my thesis because it will help to find remedies to facilitate Pakistan as a developing country. Within this overarching examination, my thesis will analyse the role institutions or individuals can play in negotiating BITs on behalf of Pakistan. As mentioned, the Board of Investment of Pakistan (BOI) is responsible for developing and negotiating BITs on behalf of Pakistan.

Currently, the Board of Investment is responsible for negotiating BITs on behalf of Pakistan. The BOI was established to "with broad based responsibilities of promotion of investment in all sectors of economy, facilitation of local and foreign investors for speedy materialization of their projects, enhancement of Pakistan 's international

[645] Board of Investment, 'Invest Pakistan' ('Pakistan at a glance', 7 September 2021) <https://invest.gov.pk/pakistan-at-a-glance> accessed 7 September 2021.
[646] Amin Ahmed, 'Pakistan to renegotiate all bilateral investment treaties' (Dawn, 2021) < https://www.dawn.com/news/1653312 > accessed 10 January 2022.
[647] Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolter Kluwer, 2009) < https://law-store.wolterskluwer.com/s/product/law-and-practice-of-investment-treaties-standards-treatment/01t0f00000J3avwAAB> accessed 11 January 2022.

competitiveness and contribution to economic and social development."[648] The BOI of Pakistan has years of experience negotiating BITs on behalf of Pakistan which means the BOI is generally efficient at negotiating BITs. The BOI will be familiar with different subjects which underpin the scores of BITs concluded by Pakistan such as, taxation, transport, aviation, and extradition.[649] As mentioned, Pakistan has concluded 53 BITs thus far covering different areas of international investment law aimed at the protection of foreign investments.[650] Due to this expertise, the cost and time involved in negotiating BITs is reduced as the BOI is prepared for each negotiation that occurs between Pakistan and other countries.[651] Hence, institutions are better at working together to negotiate BITs for the beneficial of a developing country like Pakistan.

Furthermore, an institution can help Pakistan join the score of countries developing Model BITs to reduce further ISDS cases. A host state may produce a Model BIT as demonstrated in the previous chapter as there are benefits for the host state and to block the ISDS cases faced by countries unequipped to make payments to foreign investors. Countries, such as China, United Kingdom, India, South Korea, and Germany have produced model BITs due to cost effective nature, development of protection of investments and the convenience of the Model BIT. Institutions can test the results of their model prior to engaging in any investment relations with other countries.

The Model BIT according to UNCTAD can assist a host state during the negotiation process allowing the government of a host state to test the waters before entering into bilateral relations with other countries. For example, the Pakistan Board of Investment and an institution on behalf of another country may join together to develop a Model BIT.[652] While other organisations provide assistant by reviewing the contents of the BIT and comment on the draft Model BIT. Therefore, an institution can encourage consensus between the governments of host countries prior to the engagement of

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[648] Board of Investment, 'Invest Pakistan' (Pakistan at a glance, 7 September 2021) <https://invest.gov.pk/pakistan-at-a-glance> accessed 7 September 2021.
[649] *Ibid*.
[650] Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolter Kluwer, 2009) < https://law-store.wolterskluwer.com/s/product/law-and-practice-of-investment-treaties-standards-treatment/01t0f00000J3avwAAB> accessed 11 January 2022.
[651] Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (3rd edn, Hart Publishing 2016).
[652] Board of Investment, 'Invest Pakistan' ('Pakistan at a glance', 7 September 2021) <https://invest.gov.pk/pakistan-at-a-glance> accessed 7 September 2021.

other bodies reviewing and commenting on the Model BIT. Institutions may enhance the bargaining power during the negotiation phase between the parties. Pakistan can initiate any discussion in relation to fair and equitable treatment provision from the onset. Thus, Pakistan can be more effective in the negotiation process if an institution expresses its preferred outcome on behalf of the country instead of an individual negotiating on behalf of Pakistan.

An institution can accelerate the negotiation process through the economic diversification and global integration of a host state. For example, an institution has the resources to negotiate on behalf of a host state as it acts as a focal point for foreign investors, both foreign and domestic, and host states.[653] As such, institutions can ensure hasty decisions are avoided because hasty negotiations can be problematic for host states. An example of this occurred in 1992 in relation to Turkey who concluded four BITs during a visit to Turkmenistan cover a five day period.[654] The General Directorate of Incentives and Foreign Investment (GDFI) of Turkey commented at the speed at which the BITs were concluded during Turkey's visit:

> "There was no direct discussion with the foreign affairs office in Turkmenistan. The draft BIT was not directly sent to the relevant Turkmen ministry, but instead to the Turkish embassy in Moscow in March 1992. There were no negotiations around the proposed text, and no initialised text was sent to the GDFI for translation. There are no travaux préparatoires. For these reasons the GDFI did not prepare a Turkish version of the BIT prior to signature and there was no Turkmen language version prepared either. The BIT was available for signature when the Turkish Prime Minister visited Turkmenistan. … Two versions were signed: in English and Russian. The Russian text was prepared by officials of the Turkic Republics in their offices in Moscow. There had been no discussion concerning the Russian text between the representatives of Turkey and Turkmenistan."[655]

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[653] Justine N. Stefanelli, 'Asian-African Legal Consultative Committee: Model Bilateral Agreements on Promotion and Protection of Investments,' (Cambridge University Press, 1984) < https://www.cambridge.org/core/journals/international-legal-materials/article/abs/asianafrican-legal-consultative-committee-model-bilateral-agreements-on-promotion-and-protection-of-investments/A11A0089E8DCFCADD6F1DA7A1407F4FB> accessed 15 January 2022.
[654] *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6.
[655] *Ibid*, 277.

The tribunal remarked on the BIT in the case of *Cap v Turkmenistan*[656] stating that the agreement contained grammatical mistakes, differences in the language, and ambiguous of "a grammatical or linguistic analysis cannot resolve."[657] The tribunal concluded on the BIT that "the lack of clarity in the text" resulted in inconsistent arbitral decisions "probably due to the fact that the treaty was not practically negotiated."[658] Hence, negotiations are fundamental for the development and negotiation of BITs and institutions are effective at undertaking the activities relevant for the successful negotiation of BITs in line with international investment law.

Institutions have more experience of negotiating BITs compared to an individual as they are familiar with the dynamics of the countries with whom a host state has concluded an IIA.[659] Even though Pakistan does not have a dedicated institution other than BOI it does have 53 BITs in force at present with both developed and developing countries. However, the absence of key provisions from the Pakistan IIAs reflecting the modern international investment regime has prevented Pakistan from progressing. According to UNCTAD host states should include provisions safeguarding the right to regulate, including for sustainable development objectives; refine the definition of investment, include exceptions to the free transfer of funds obligation and limit access to ISDS; clarify what does and does not constitute an indirect expropriation; and seek to ensure responsible investment (e.g. a CSR clause or a not lowering of standards clause). Institutions can inform their respective country to update the provisions in their IIAs to reflect modern treaty practice in line with international investment law. Hence, it has become increasingly important for Pakistan to address the exclusion of key factors essential to the economic progress of Pakistan.

6.2.5 Shariah Law as a form of equity. Can it be a driver for change?

Pakistan is an Islamic Republic which means Islam is the official religion of the country. The legal system of Pakistan has to comply with the teachings of Islam in all matters, including investment law. Islam teaches its followers to act fairly and justly in business

[656] *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6.
[657] *Ibid*, 193.
[658] *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6.
[659] Board of Investment, 'Invest Pakistan' ('Pakistan at a glance', 7 September 2021) <https://invest.gov.pk/pakistan-at-a-glance> accessed 7 September 2021.

transactions thus obligates individuals to follow the principles governing business conduct.[660] This prescription permeates every part of a business transaction that takes place dictated by the notions of halal (permitted) and haram (prohibited).[661] Therefore, the promise Pakistan makes to a foreign investor to act fairly and equitably is in fact enshrined in Sharia which is and Islamic legal system.[662] Thus, in this section my thesis will examine Shariah law.

For this reason, it is important that my thesis examines the role of sharia law in applying the principles of equity and fairness. In this section my thesis will examine whether sharia law can be a force for change. An examination of sharia law is significant to my thesis because my thesis will demonstrate that sharia law does have an influence on fair and equitable treatment of foreign investors.[663] My thesis will, also, examine whether sharia law can protect foreign investors from unfair and inequitable treatment. But first, in this section my thesis will give a brief background of sharia law within the context of Pakistan.

Fairness and equity are key concepts in Islam and their origins can be traced back to the Quran and the teachings of Prophet Muhammad. Subsequently, when Pakistan became an independent state the constitution of Pakistan declared Pakistan an Islamic republic and made Islam its state religion. Article 1 of the Pakistan constitution states Pakistan is “the Islamic Republic of Pakistan” while Article 2 states Islam is the official religion of Pakistan.[664] Furthermore, sharia law was declared the Supreme law in Pakistan through the Enforcement of Sharia Act 1991. Section 4 of the Enforcement of Shariah Act 1991 specifically states that the laws should be interpreted in accordance with shariah law:

> **“Laws to be interpreted in the light of Shari’ah**
>
> For the purpose of this Act—
> (a)

[660] Enforcement of Shariah Act 1991.
[661] Michael Boven, ‘2020 Investment Climate Statements: Pakistan’ (US Department of State, 2020) < Pakistan - United States Department of State > accessed 14 April 2022.
[662] Board of Investment, ‘Invest Pakistan’ (‘Pakistan at a glance’, 7 September 2021) <https://invest.gov.pk/pakistan-at-a-glance> accessed 7 September 2021.
[663] *Ibid*.
[664] Enforcement of Shariah Act 1991.

while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court ; and

(b)

where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the Court."[665]

The Enforcement of Shariah Act 1991 and the Constitution of Pakistan imply that any foreign investor interested in investing in Pakistan will have to comply with shariah law.[666] Pakistan, also, established the Federal Shariat Court in 1980 with the primary aim of ascertaining "whether laws passed by parliament are congruent with the precepts of Islam."[667] Shariah law can protect foreign investors as the entire system is based on the principles of equity. As mentioned, equity and fairness can be traced back to the time of the Prophet Muhammad. Today, these principles continue to be an intrinsic part of the legal system in Pakistan.[668] Thus, all laws have to follow sharia law without contradicting the Sunnah and the Quran and sharia law will be applied in conflicts involving foreign investors and Pakistan.

On the other hand, given the fact that the bulk of citizens of Pakistan belong to the Islamic faith foreign investors from different faiths may feel threatened to engage in investment transactions with Pakistan which may not necessarily sit well with foreign investors. For this reason, foreign investors may feel that they could potentially succumb to bias and discriminatory behaviour due to their beliefs not being in line with the beliefs of Pakistan. A recent example of the type of treatment exposing foreign investors to mistreatment from a religious perspective is illustrated by the killing of Priyantha Diyawadanage. Diyawadanage was a manager of a factory in Sialkot and subjected to a mob killing after being accused of blasphemy. He was accused of blasphemy after he had taken posters with the Prophet Muhammad's name down because the building was to be cleaned. The killing sparked protests in Pakistan and

[665] Section 4 of the Enforcement of Shariah Act 1991.
[666] Michael Boven, '2020 Investment Climate Statements: Pakistan' (US Department of State, 2020) < Pakistan - United States Department of State > accessed 14 April 2022.
[667] Enforcement of Shariah Act 1991, s 3.
[668] Michael Boven, '2020 Investment Climate Statements: Pakistan' (US Department of State, 2020) < Pakistan - United States Department of State > accessed 14 April 2022.

Sri Lanka demanding justice for Diyawadanage with the wife of Diyawadanage rejected the claim that her husband acted blasphemous stating that “[h]e was very much aware of the living conditions in Pakistan. It is a Muslim country. He knew what he should not do there and that's how he managed to work there for eleven years."[669] The Prime Minister of Pakistan vowed to "all those responsible will be punished with the full severity of the law" and conveyed the nation's “anger and shame to the people of Sri Lanka."[670] Human rights organisations, also, commented on the incident stating that minorities are often targeted in Pakistan.[671] My thesis therefore argues the FET provisions in Pakistan IIAs provides assurances to foreign investors that their investments will be protected and disputes will be decided according to fairness and equity in line with sharia law.

However, sharia law has increased the religious fanaticism in the country potentially threatening the security of foreign investments. In Pakistan, discrimination based on religion in Pakistan exists till this day.[672] An example of this discrimination can be witnessed with reference to the pandemic. In some areas of Pakistan, Covid-19 has been referred to as the “Shia virus” accusing Hazara Shias of bringing the virus to these areas.[673] Vishal Anand, founder of the Hindu Youth Council reports that “[w]hen they saw our CNIC, they refused to give the ration bags, saying its not for Hindus”.[674] In a similar incident, Christians were denied rations unless they embraced Islam by reciting the declaration of the Islamic faith. According to Chaudhry “there have been reports of such incidents taking place where minorities, specifically Christians and Hindus, are facing discrimination. At most places where relief is being provided by private foundations and trusts or religious welfare organizations, they often do not give relief to non-Muslims, stating that this fund is from *zakat* [charitable donations as a

669 -- ‘Pakistan: Killing of Sri Lankan accused of blasphemy sparks protests’ (BBC, 2021) < https://www.bbc.co.uk/news/59501368 > accessed 19 January 2022.
670 Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016).
671 Martins Paparinskis, The International Minimum Standard and Fair and Equitable Treatment (Oxford University Press, 2013) 64.
672 Jaffer Mirza, ‘Pakistan’s Hazara Shia minority blamed for spread of Covid-19’ (institute of Development Studies, 2020) < https://www.ids.ac.uk/opinions/pakistans-hazara-shia-minority-blamed-for-spread-of-covid-19/ > accessed 15 January 2022.
673 *Ibid*.
674 BBC, ‘Pakistan: Killing of Sri Lankan accused of blasphemy sparks protests’ (BBC, 2021) < https://www.bbc.co.uk/news/59501368 > accessed 19 January 2022.

religious duty in Islam] so thus only Muslims qualify for it."[675] Religious clerics have also been accused of enforcing their rights on organisations aimed at supporting groups facing discrimination in Pakistan. Naumana Suleman, leader of the Minority Rights Group International, declared that "the food was organized by the local mosque through announcements to help poor people in need, but later the ration was distributed to the Muslims only."[676] Christians and Hindus have been denied aid unless they convert to Islam, and Hazara Shias were the first to go on leave in Balochistan. Aman commented on the racial profiling of Hazara Shias commenting on how this group may continue to face discrimination even after the virus subsides fearing that Hazara Shias "will be seen as aliens because everyone will think that they were the ones who brought COVID-19 to the province. The discrimination and prejudice will continue for years to come."[677] The plight of these incidents on the investment landscape of Pakistan cannot be ignored since foreign investors will consider the social injustices that have plagued Pakistan. Hence, FET provides the protection foreign investors desire to prevent themselves from being in a vulnerable position where their investments can be damaged due to religious injustices in the country.

In addition, some of the sharia principles have been accused of being outdated prompting some scholars to argue that sharia law may not necessarily be the ideal approach to resolving conflicts between foreign investors and Pakistan. The contention is that a key problem with sharia law is the rigid and inflexible interpretations given by scholars. Younes describes these interpretations as "unit-based" pointing out that "hermeneutical innovation has made 'medieval Islamic pragmatics' not completely free from the fetters of rigidity that characterise parts of the Islamic legal theory."[678] He further states that such interpretations "perpetuate an unmitigated version of fiqh, ignoring wittingly or otherwise – some legal doctrines such as al-maslahah al-murslah (public interest), al-urf (custom), and al-istihsan (juristic preference) which have contributed to investing Islamic law with universality."[679] Younes emphasises on the

[675] Jaffer Mirza, 'Pakistan's Hazara Shia minority blamed for spread of Covid-19' (institute of development studies, 2020) < https://www.ids.ac.uk/opinions/pakistans-hazara-shia-minority-blamed-for-spread-of-covid-19/ > accessed 15 January 2022.
[676] *Ibid*.
[677] *Ibid*.
[678] Soualhi Younes, 'Islamic Legal Hermeneutics: The Context and Adequacy of Interpretation in Modern Islamic Discourse' (2002) 41(4) <https://www.jstor.org/stable/i20837229> accessed 15January 2022.
[679] Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016).

role scholars play in giving meaning to Islamic texts which result in rigid interpretations given by scholars that prevent sharia law from resolving modern conflicts. Hence, the rigid and inflexible interpretations of Islamic texts stagnate the amicable application of sharia law to investor-state disputes.

The negative perceptions of sharia law have shaped the observations foreign investors have made of Pakistan. These perceptions have had an adverse effect on the political, social and economic aspects of Pakistan. For example, nine Chinese engineers were killed in Pakistan whilst working on the Dasu Hydroelectric Power project in Pakistan's Khyber Pakhtunkhwa province.[680] Unfortunately, there is speculation that numerous terrorist groups are responsible for the attack however no one has taken responsibility for the attack.[681] This incident is an issue for Pakistan because China is the main contributor of FDI and terrorist incidences such as these will threaten the very security of Chinese nationals. The implication of this is that it can impede on the growth of foreign direct investment.

6.3 The role of politics in addressing the complexities of fair and equitable treatment

This section examines whether politics can shape fair and equitable treatment. This is because investor state disputes have involved tribunals deliberating on the political situation of a country. For this reason, it is imperative to stress that the political situation of a country is undoubtedly an important factor to consider in relation to fair and equitable treatment. The aim of this is to present a contemporary and informative picture of the existing position of fair and equitable treatment in relation to Pakistan by discussing the stance tribunals have taken towards the political situation of a country in making a decision in investor state disputes.

As will be demonstrated the fair and equitable treatment has been discussed within the context of the political situation of a host state. This has shaped the decision of a

[680] Umar Bacha, '9 Chinese Engineers among 12 killed in "attack" near Dasu hydropower plant' Dawn (Pakistan, 14 July 2021).
[681] *Ibid*.

tribunal in ruling in favour of the host state or the foreign investor. In *TECMED*[682] the tribunal concluded that the actions of the host state were politically motivated. As a result, the tribunal ruled that the conduct of the host state "conflicted with what a reasonable and unbiased observer would consider fair and equitable...".[683] This is an example of a case where the tribunal considered politics in deliberation their decision on whether Mexico was indeed in breach of the fair and equitable treatment standard. Based on the facts of this case an investor state dispute the tribunal may consider the political situation of the country and use this information to make a decision when considering whether the fair and equitable treatment standard has been breached.

The tribunal may consider politics in a case to ensure it fosters a stable framework considered to be an essential requirement of the fair and equitable treatment standard.[684] This was the case in *OPEC v. Ecuador*[685] where the tribunal ruled ".... fair and equitable treatment is desirable in order to maintain a stable framework for investment and maximum utilization of economic resources ....".[686] The tribunal concluded “stability of the legal and business framework is thus an essential element of fair and equitable treatment…”.[687] This case demonstrates that the tribunal has taken a serviceable approach to fair and equitable treatment. Essentially, the tribunal is asserting in order to achieve a balance between the national interests of Pakistan and the commercial interests of foreign investors it is important to have a stable framework. My thesis would like to stress that this does not address the existing problems with FET in Pakistan BITs nor formulate efficient methods to revive FET in these BITs in order to strike a balance between the foreign investor and the host state. In fact it puts a Pakistan in an unstable position with regards to fair and equitable treatment because it expands the application of fair and equitable treatment by allowing tribunals to take politics into consideration when making a decision. Further to this is not a resolution for Pakistan that would help deter foreign investors from making claims worth millions of USD and to revise the FET provisions in Pakistan

[682] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2.
[683] *Ibid*.
[684] Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016).
[685] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11.
[686] *Ibid, 91.*
[687] *Ibid*.

BITs. Thus, it is essential that Pakistan addresses the complexities of its political situation to ensure reform of the Pakistan BITs that contain FET provisions align with the stance tribunals have taken towards politics consulting the decisions in investor state disputes.

6.4 Model BIT Advocated for Pakistan

My PhD research focuses on examining and proposing improvements to Pakistan's strategy in the area of international investment agreements. In particular, my thesis is of the view that a model bilateral investment treaty comparable to India's should be adopted in the context of Pakistan. However, my thesis recognises challenges and difficulties associated with this. In this context, it is necessary to adapt provisions to suit the unique circumstances of Pakistan, while dealing with political and diplomatic constraints. Ultimately, the objective is to strengthen Pakistan's investment framework through the use of successful elements from India's approach.

India's approach to developing its BIT model is characterised by a sensitive balance between protecting the nation's interests and inviting foreign investment. In particular, given the need to protect Pakistan's sovereignty, regulatory autonomy, and public welfare, this balance is crucial for Pakistan as well, while at the same time promoting foreign investment for economic growth and development.[688] The adoption of measures ensuring that investment agreements prioritise national interests, such as the inclusion of clauses that allow regulatory flexibility to address evolving economic priorities without unduly affecting investor rights, would be necessary to adapt India's approach.[689]

The inclusion of provisions addressing current issues, such as sustainable development, labour rights and environmental protection, is recognised as a model BIT in India. It is essential to incorporate these clauses within investment treaties, given the growing emphasis on environmental sustainability and Social

[688] Eric Newumayer and Laura Spess, 'The Impact of Bilateral Investment Treaties on FDI Inflows: The Role of International Dispute Settlement Provisions' [2005] WD 1567-1585, 1575.
[689] Lauge Poulsen, 'An interview with Lauge Poulsen, author of Bounded Rationality and Economic Diplomacy' (IISD, 2016) < https://www.iisd.org/itn/en/2016/05/16/an-interview-with-lauge-poulsen-author-of-bounded-rationality-and-economic-diplomacy/ > accessed 02 January 2022.

Responsibility.[690] By including provisions requiring investors to comply with environmental and labour standards, thereby promoting responsible investment practices as well as mitigating negative social and environmental impacts, Pakistan could benefit from imitating India's progressive attitude towards the negotiation of investment treaties.[691]

The BIT model in India has a strong dispute settlement mechanism that focuses on transparency and consistency in order to ensure fair and equitable procedures for both investors and host states. This aspect is of particular importance to Pakistan, which aims at attracting foreign investment and ensuring the resolution of investor disputes in an effective and equitable manner.[692] If Pakistan adopts such mechanisms, it can strengthen investor confidence and mitigate the risks arising from investment disputes. Some of the elements that need to be considered are provisions on arbitration, transparency in proceedings and compliance with the principles laid down by law.[693]

While the Indian model BIT offers valuable inputs and frameworks, it is important to note that what works for India does not directly translate into Pakistan's unique economic, legal or developmental circumstances. Pakistan needs a set of challenges, priorities and legislative frameworks that should be taken into consideration when assessing the adoption of any international model.[694] It is therefore necessary to analyse Pakistan's specific requirements and conditions thoroughly so that the BIT model of India can be adapted according to Pakistani needs and circumstances.[695] Factors such as the investment climate, sector priorities or enforcement capacity may need to be taken into account by Pakistan in adapting its provisions on investor protection, dispute resolution and regulatory autonomy.

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690 Kevin P. Gallagher, 'The Evolution of Bilateral Investment Treaties: A Developing Country Perspective' (2009) 33(1) Journal of World Investment & Trade https://journals.sagepub.com/doi/pdf/10.1177/2378023120969343 accessed 10 March 2024.
691 *Ibid*.
692 International Centre for Settlement of Investment Disputes, 'ICSID Review' (2020) Foreign Investment Law Journal < https://academic.oup.com/icsidreview/issue/35/1-2 > accessed 21 March 2024.
693 APG, 'Mutual Evaluation of Pakistan' (APG, July 2022) < https://www.fatf-gafi.org/content/dam/fatf-gafi/fsrb-fur/APG-Pakistan-FUR-2022.pdf.coredownload.inline.pdf > accessed 22 March 2024.
694 Statista, 'Security – Pakistan' (November 2023) < https://www.statista.com/outlook/dmo/smart-home/security/pakistan#revenue > accessed 19 March 2024.
695 U.S. Department of Commerce, 'Market Challenges - Pakistan' (International Trade Administration, 12 January 2024) < https://www.trade.gov/country-commercial-guides/pakistan-market-challenges > accessed 25 March 2024.

Following its participation in a number of bilateral and multilateral investment agreements, Pakistan is already subject to the Treaty obligations. In order to prevent conflicts and ensure coherence in Pakistan's International Investment Policy, any adaptation of India's BIT model would need to comply with such existing commitments.[696] To determine whether the proposed introduction of an Indian model BIT would be compatible with Pakistan's obligations, a complete review of Pakistan's Treaty commitments should include any relevant provisions concerning investor protection, dispute resolution mechanisms and promotion of investments.[697] In addition, consideration should be given to the possible implications of adopting new provisions concerning Pakistan's commitm0ents under its existing agreements as well 0as their impact on her overall investment policy framework.[698]

While the Indian Model BIT provides valuable insights and frameworks, its direct application in Pakistan must be approached with care and caution. To ensure the effectiveness and coherence of Pakistan's international investment policy, it is important that contextualisation is carefully addressed to take into account Pakistan's unique circumstances and in line with existing treaty obligations. Pakistan can take advantage of these lessons by judicially applying these restrictions learned from Indian BIT models, adapting them to their development aspirations and legal framework.

My thesis proposes that the corrective Pakistan should adopt is a Model Bilateral Investment Treat. This will act as an agreement in international law between two nations that are designed to encourage and safeguard foreign investment. The Model BIT will include topics including fair and equitable treatment, investor protection,

[696] Tania Voon, and Dean Merriman, 'Incoming: How International Investment Law Constrains Foreign Investment Screening' (2022) 24(1) < https://brill.com/view/journals/jwit/24/1/article-p75_3.xml?language=en > accessed 27 March 2024.
[697] Manuel Perez-Rocha, 'Ousted Pakistani Leader was Challenging Investment Treaties That Give Corporations Excessive Power' (Inequality, 14 April 2022) < https://inequality.org/research/pakistan-khan-investment-treaties/ > accessed 27 March 2024.
[698] Muhammad Farhan Qureshi, 'Pakistan Legal System, Whether Judicial System Is Challenging For Foreign Investor In The Context Of China And Pakistan Economic Corridor' (2022) European-American Journals < https://eajournals.org/gjplr/vol-8-issue-2-march-2020/pakistan-legal-system-whether-judicial-system-is-challenging-for-foreign-investor-in-the-context-of-china-and-pakistan-economic-corridor/# > accessed 28 March 2024.

expropriation, compensation, and dispute settlement.[699] Model BITs are manuals of principles that serve as a guide for BIT talks between nations. Pakistan can work alongside The International Centre for Settlement of Investment Disputes (ICSID), the Organisation for Economic Co-operation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD) for guidance on creating a Model BIT.[700] Hence, the Model BITs will serve as a baseline for investors and offer a standardised approach to foreign investment protection.

The Model BIT will have the benefit of offering a standardised and open method for BIT negotiation. This strategy minimises the risk of ambiguity and confusion by ensuring that the fair and equitable treatment will act as a safeguard as the provision will be standardised across various agreements. The costs related to the negotiation of new BITs can also be decreased by employing a Model BIT.[701] This is due to the fact that the Model BIT offers a solid framework on which to base the particular agreement, eliminating the need to draught provisions and clauses from scratch.[702] The Model BIT will serve as a compromise between two nations, serving as a model for the actual treaty that will be signed and ensuring that all sides are happy with

One of the challenges facing Pakistan is the influence on the government to control foreign investment. Many BITs have measures that potentially restrict the host state's ability to control foreign investments due to the standard of treatment, Most-Favourable Nation clauses, and investor-state dispute settlement rules.[703] These policies have the potential to give foreign investors substantial influence and have the potential to discourage governments from enforcing regulations on foreign investors

[699] Arpan Banerjee , and Simon Weber, 'The 2019 Morocco Model BIT: Moving Forwards, Backwards or Roundabout in Circles?' Foreign Investment Law Journal 36(3) <https://doi.org/10.1093/icsidreview/siab021> accessed 1 April 2023.
[700] Supachai Panitchpakdi, 'Fair and Equitable Treatment' Series on Issues in International Investment Agreements II' (UNCTAD, 2007) < https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf > accessed 1 April 2023.
[701] Rudolf Dolzer and Christoph Schreuer*, Principles of International Investment Law, (2d edn. 2008) 145.*
[702] Filip Balcerzak, and Horthel Poland 'Fair and Equitable Treatment Embodies the Rule of Law, Whereas 'Tax' Is Not Always a Tax' Foreign Investment Law Journal 38(1) <https://doi.org/10.1093/icsidreview/siac024> accessed 1 April 2023.
[703] Grant Hanessian and Kabir Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?*'* Foreign Investment Law Journal 32(1) <https://doi.org/10.1093/icsidreview/siw020> accessed 1 April 2023.

in order to save the environment and local populations.[704] Furthermore, there is worry that model BITs create an unequal playing field because foreign investors have considerable legal and economic authority in comparison to smaller countries, which might result in exploitation and inequality in the investment sector.

In conclusion, even while model BITs seek to promote global investment, they create a number of difficulties that can be restrictive for Pakistan. To guarantee that foreign investment benefits all parties involved and is carried out in a sustainable and equitable manner, governments and policymakers should strike a balance between the economic advantages of foreign investment and other social and environmental obligations. To make sure that the current BIT system is open, accountable, and efficient, legislators must keep looking into ways to change it.

6.5 Human Rights Framework

A country's economic growth and development depends heavily on foreign investment. However, actions could also have a detrimental effect on human rights therefore the role of human rights is becoming more relevant in investment disputes.[705] In light of this, it is crucial that human rights are upheld and encouraged in relation to foreign investment. Hence, a human rights framework serves as a crucial instrument to strike a balance between investors' interests and the human rights of others who could be impacted by their actions.

Under the human rights framework, investors must ensure that their operations do not violate the human rights of their citizens. Host states could include adopting measures to protect workers' rights, prevent environmental damage and keep workers from engaging in practices that encourage corruption and discrimination.[706] In addition, investors must be held accountable for any adverse impact they have on the human

[704] Mark A. Clodfelter, 'The Adaptation of States to the Changing World of Investment Protection through Model BITs' ICSID Review - Foreign Investment Law Journal 24(1) <https://doi.org/10.1093/icsidreview/24.1.165> accessed 1 April 2023.

[705] Fabio Giuseppe Santacroce, 'The Applicability of Human Rights Law in International Investment Disputes' ICSID Review - Foreign Investment Law Journal 34(1) <https://doi.org/10.1093/icsidreview/siz005> accessed 1 April 2023.

[706] Crina Baltag, 'Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?' ICSID Review - Foreign Investment Law Journal (2023) <https://doi.org/10.1093/icsidreview/siac031> accessed 1 April 2023.

rights of their citizens.[707] Governments must do their part to enforce human rights obligations on investors and to ensure that those who violate these obligations are held accountable. Overall, a human rights framework is crucial to promoting sustainable economic development that respects fundamental rights and individual dignity.

A human rights framework to hold foreign investors accountable is essential to ensure that investors prioritise human rights and do not engage in exploitative or harmful conduct.[708] The framework holds investors accountable for any violations they cause, including labour abuses, disregard for environmental standards, and discrimination.[709] It acts as a mechanism to ensure that investors are obligated to comply with ethical, social and environmental standards and provide remedies for any wrongdoing. This approach encourages investors to prioritize the well-being and rights of workers, communities and the environment, ultimately leading to more sustainable and equitable economic development.

6.5 Sustainable Development

The sustainable development framework is an important aspect that foreign investors and host states need to consider when entering investment relations. The Sustainable Development Framework focuses on promoting economic growth while protecting the environment and the welfare of local people.[710] Investors should assess the projects' environmental and social impacts and ensure that it is consistent with the host country's sustainable development goals.[711] To achieve this, it is important to work

[707] Ana Maria Daza-Clark, 'The Protection of Foreign Investment in Times of Armed Conflict' ICSID Review - Foreign Investment Law Journal 36(1) <https://doi.org/10.1093/icsidreview/siaa050> accessed 1 April 2023.
[708] Campbell McLachlan, 'Is There an Evolving Customary International Law on Investment?' ICSID Review - Foreign Investment Law Journal 31(2) <https://doi.org/10.1093/icsidreview/31.2.257> accessed 1 April 2023.
[709] Jorge E. Viñuales, 'Investor Diligence in Investment Arbitration: Sources and Arguments' ICSID Review - Foreign Investment Law Journal 32(2) <https://doi.org/10.1093/icsidreview/32.2.346> accessed 1 April 2023.
[710] Maxi Scherer and others, 'Environmental Counterclaims in Investment Treaty Arbitration' ICSID Review - Foreign Investment Law Journal 36(2) <https://doi.org/10.1093/icsidreview/36.2.413> accessed 1 April 2023.
[711] Eric De Brabandere, 'The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform' ICSID Review - Foreign Investment Law Journal 36(2) <https://doi.org/10.1093/icsidreview/36.2.319> accessed 1 April 2023.

with local communities and stakeholders to ensure that projects improve the lives of local residents and comply with host country environmental regulations.

The sustainable development framework is an important aspect that foreign investors need to consider when investing abroad. The Sustainable Development Framework focuses on promoting economic growth while protecting the environment and the well-being of local people.[712] Investors should assess the project's environmental and social impacts and ensure that it is consistent with the host country's sustainable development goals. To achieve this, it is important to work with local communities and stakeholders to ensure that projects improve the lives of local residents and comply with environmental regulations in the host country.

The sustainable development frameworks is crucial for foreign investors and host states looking to make significant investment relationships. Sustainable development promotes economic growth while protecting the natural environment and enhancing the well-being of local communities.[713] Achieving the Sustainable Development Goals requires investors to work with local communities and stakeholders and to comply with host country environmental regulations. Sustainability practices drive long-term growth, profitability, economic, social and environmental outcomes and are becoming increasingly important for businesses to maintain their social legitimacy.

[712] Howard Mann and others, 'IISD Model International Agreement on Investment for Sustainable Development' ICSID Review - Foreign Investment Law Journal 20(1) < https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf > accessed 2 April 2023.

[713] Hamed El-Kady and Mustaqeem De Gama, 'The Reform of the International Investment Regime: An African Perspective' ICSID Review - Foreign Investment Law Journal 34(2) < https://www.researchgate.net/publication/345389469_The_Reform_of_the_International_Investment_Regime_An_African_Perspective > accessed 5 April 2023.

Chapter 7: Conclusion

My thesis discovered that the fair and equitable treatment standard in international investment agreements presents several risks and uncertainties for Pakistan. The main problem with fair and equitable treatment is the wide interpretation and application of the standard in investor-state disputes. Due to this, foreign investors can relish the flexible nature of the standard making it the most invoked standard in investor-state disputes. The main explanation for this issue, as mentioned in Chapter 1, is that Pakistan has not put stringent measures in place to face the implications foreign investors have had on Pakistan as a result of a claim alleging a violation of fair and equitable treatment. Another reason why this has occurred is the lack of suitable mechanisms not employed to make foreign investors accountable for their actions within the context of international investment law. This situation has resulted in an awakening for Pakistan calling for a reform to assist the country to develop the standard in international investment agreements.

In this conclusion, my thesis aims to connect the theme of my thesis. More specifically, my thesis has set out to make some conclusive remarks and potential areas for conducting research in this area. At the beginning of my thesis in chapter one my thesis asked four questions which are as follows:

1. What are the different interpretations of the FET standard in BITs?

2. What challenges do the various interpretations of FET have on a developing country like Pakistan?

3. To what extent do the BITs concluded by Pakistan act as an effective framework in balancing the rights of foreign investors and host states?

4. Have other jurisdictions revised the FET standard in their BITs? If so, what actions have these jurisdictions taken?

5. What lessons can Pakistan learn from the actions of other jurisdictions on how to remedy the key problems with FET?

An answer to all of these questions has been provided in the different chapters of my thesis. Overall, my thesis concludes that the fair and equitable treatment provision in Pakistan IIAs should be revised in a manner that balances the rights of the foreign investor and protects the regulatory space of the host state within the context of

Pakistan. In addition to this, my thesis has found evidence that suggests the motivation for my proposition is due to the imbalance in the investor-state relationship between foreign investors and Pakistan resulting in several investor-state dispute cases before respective dispute resolution mechanisms.

A) The different interpretations of the FET standard in BITs

In answering this question, chapter 4 examined the provision as it appears in the international investment agreements concluded by Pakistan. My thesis found there are three interpretations of the standard in these agreements. First of all, some of the agreements do not include fairness and equity. My thesis explained that the decision to exclude FET in these agreements was done purposely and this could cause problems in investor-state disputes. The exclusion of FET from international investment agreements creates uncertainty in its application as it is not clear whether these treaties guarantee FET to foreign investors. However, the position of Pakistan in deciding to exclude fair and equitable treatment suggests that host states are reluctant to subject their regulatory measures to review.

Some of the agreements link fair and equitable treatment to customary international law. This is an unqualified version of FET which does no more than state the obligation of a host State to accord fair and equitable treatment to protected investments. In this chapter, my thesis displayed the list of agreements that offer fair and equitable treatment key to examining the impact fair and equitable treatment has on Pakistan in the position of a host state. This chapter demonstrated that it is important for my thesis to examine the current position of FET in IIAs to prove that FET is a problematic standard.

Some of the agreements connect fair and equitable treatment to other substantive protective standards. In this chapter, my thesis provided a list of the substantive protective standards that Pakistan had included in the text of their international investment agreements. My thesis demonstrated that is a common practice for Pakistan to link substantive content to FET in international investment agreements. This content is in place to ensure the interpretation of FET is clear and predictable for arbitral tribunals.

This section reached these conclusions by undertaking an examination of each international investment agreement. The various interpretations of fair and equitable treatment show that the flexible nature of the standard opens doors for tribunals to make different decisions leading to unjust, expansive, and inconsistent decisions. These discussions were advanced in Chapter 5 using case studies as examples to take the theoretical discussion further.

B) The challenges various interpretations of FET have on Pakistan

The regular utilisation of fair and equitable treatment against Pakistan implies that Pakistan is at risk of being subjected to lawsuits placing an economic burden on the country. The unpredictable and vague interpretation of fair and equitable treatment by tribunals places Pakistan as a developing country at a considerable threat of being sued for large amounts of money. In chapters 5, 6, and 7 my thesis demonstrated the economic implications Pakistan faces when foreign investors invoke fair and equitable treatment against a host developing state. This places a great deal of pressure on Pakistan preventing the country from acting pressure free in dealing with foreign investors.

Another challenge the different interpretations of fair and equitable treatment have on Pakistan is political. There is inadequate support for Pakistan in dealing with the disputes Pakistan faces concerning political instability. The political situation of the country and the results impose risks on the investment of Pakistan. The only time a tribunal considered the political situation of Pakistan was in the case of Bayinder placing sufficient focus on the political instability of the country.

Chapter 1 gave an overview of my study by incorporating an introduction, aims, questions, the rationale for the research, the contribution my study has made, and the scope of my thesis. This chapter was able to justify the argument for re-examining the FET provision in the IIAs concluded by Pakistan and for stressing the need to balance the rights of foreign investors and the autonomy of Pakistan as a host state. As such, disputes and disagreements will remain a feature of this relationship between host states and investors. Despite this, Pakistan remains one of the largest signatories of bilateral investment treaties in South Asia. The main reason pertains to Pakistan’s efforts in a bid to boost the development of the region to pave the way for foreign direct

investment. This is made possible by the broad and wide provisions in international investment agreements deployed to attract investment from foreign investors. Pakistan offers copious rights through its agreements to foreign investors, including fair and equitable treatment, the most favoured nation, and full protection and security. FET is the most invoked substantive protection standard available to foreign investors in investor-state disputes. Data from The World Investment Report of 2021 is able to give a current view of the position of FET in IIAs. Firstly, foreign investors relying on IIAs in the 1990s and earlier frequently invoked breach of FET in 30 public health-related ISDS cases. Secondly, more countries actively participated in the reforming of the FET standard in IIAs concluded in 2020. Thirdly, an increasing number of countries revised the FET standard to safeguard regulatory space and accelerate sustainable development. From the report, it is clear that FET is still the most invoked standard in investor-state disputes and this has encouraged host states to adopt a resilient approach to the standard.

This chapter resorted to examining the work of notable authors who had written on the issues about the FET standard in IIAs. This section would, also, like to stress that developing countries bear the brunt of the problems caused by the expansive interpretations given to FET by tribunals and arbitrators. This will enable an understanding of why my thesis proposes that there is a pressing need to revise the FET provision in Pakistan IIAs. For this reason, my thesis finds it imperative to present a contemporary view of the FET standard in IIAs. Foreign investors were catapulted as strangers and subject to expropriation as they were devoid of any legal rights in host states. This was a difficult and uncertain period for investors. As a result of this treatment, foreign investors became the centrefold of scholarly debate. These debates concentrated on the extent to which foreign investors should be granted rights and be permitted to exercise these rights in host states. This chapter is evidence that the history of international investment law is the result of contemporary conversations on the fair and equitable treatment standard in IIAs. Thus, my proposition for a reconceptualisation of FET in Pakistan IIAs is bolstered by the determination to revise and balance the regulatory space of the host state and the foreign investor in the settlement of investor-state disputes in Pakistan. Furthermore, this is supported by the need to encourage more development in Pakistan via the creation of IIAs and

organisations that complement the investment environment of Pakistan towards more sustainable development initiatives.

Chapter 3 of my thesis presented the methods which will be utilised to undertake the research. My thesis employs qualitative research throughout to undertake an exploration of the research questions. Furthermore, this chapter discusses legal positivism, doctrinal analysis, and Marxism in the context of my research topic. The fundamental aim of this chapter was to prove that these methodologies were employed as means of supporting the argument of my thesis that the tribunals give priority to foreign investors as opposed to the interests of the host state. These methodologies intended to provide justification for choosing the topic to demonstrate that Pakistan has had to face a number of challenges that have not been addressed in the international investment community. This chapter guarantees that the results are rational, it is paramount that the methodology embraced in my thesis supplements the research question and progresses the argument made by this thesis. The aim of this section is to present the methodology that will be utilized with the sole purpose of directing this thesis. This is imperative to empower a valuation of the structure adopted throughout and any underpinnings employed which will enable an insight into the points of view and presumptions presented in this thesis.

Chapter 4 commenced by providing a historical account of the FET standard in relation to Pakistan. This chapter gave a historical background of FET to show that the provision came into existence because of numerous IIAs that were not successfully ratified. It was the advent of BITs, which popularised FET in host states. This chapter, also, provides a theoretical discussion of FET to demonstrate the different interpretations of the FET standard in relation to Pakistan. Furthermore, this chapter examines the different policies aggregating FET in Pakistan IIAs. This chapter presented the origins of the standard and the historical development of the standard in multilateral agreements and bilateral investment agreements. This chapter demonstrated the standard was the result of multilateral agreements which paved its way into bilateral agreements where it proliferated over the years. Also, FET became an important feature of Pakistan IIAs. This chapter further emphasised the fact that the different interpretations of the FET standard demonstrated that there was a wide range of disparities that existed amongst host states and Pakistan was not an exception to these disparities. Furthermore, the fair and equitable treatment provision

in bilateral investment treaties had an effect on the economy of Pakistan. This is evidenced by cases brought against the country, from SGS v Pakistan to Bayindir v Pakistan.

In this chapter, my thesis proposed that the revision of the fair and equitable treatment provisions in Pakistan IIAs is the result of the examination deployed to reflect on the historical problems in relation to the promotion and protection of the investments of foreign investors. These problems come from the friendship treaties establishing close ties, the doctrine of diplomatic protection; and the present regime pertaining to the different international investment agreements. This also incorporates the various forms involved in finding a suitable means of providing protection for foreign investments and the resolution of disputes stemming from the same source. These are all part of the ongoing conversation that will keep on dominating and resonating pertaining to the area of international investment law. The decisions that are made in relation to investment are threats that are assumed by foreign investor because their aim is to make a return on their investments. Even though these are lucrative results of investing in countries, host states that derives a benefit from these investments must also take into account the implication of their decisions in relation to the citizens as well as the foreign investor.

This chapter argues that the different interpretations granted by tribunals extend the meaning of FET giving an in-depth perspective of the challenges faced by Pakistan as a result of the FET standard. My thesis argued that these challenges were not adequately addressed by tribunals often making decisions that favoured the foreign investor instead of Pakistan. The fundamental aim of this chapter is to examine the provision of fair and equitable treatment in Pakistan's bilateral investment treaties. The purpose of this is to identify inconsistencies, gaps, and vague interpretations formulated under fair and equitable treatment in these treaties. Thereafter, the paper will present the situation of countries, such as India, facing a similar problem to Pakistan and exhibit the steps taken by these countries to resolve the issues created by fair and equitable treatment in their bilateral investment treaties.

Chapter 5 discussed the scope of my research to exhibit the areas that will be considered in my study. Since the aim of my thesis is to examine FET in the context of Pakistan my thesis has decided to select Pakistan for this study and to explore the

FET provision with reference to case studies. This will be achieved by examining how the FET provision is defined by studying the construction industry and the mining industry. The main reason for choosing to study these industries was to demonstrate that FET standard in Pakistan provisions is problematic for the people that live in Pakistan as well as foreign investors and Pakistan. This was essential due to the fact that Pakistan attracts FDI from both developed countries and developing countries. Since the IIAs of Pakistan contain investment provisions there is nothing stopping a foreign investor from a developed country or a developing country from bringing a claim citing a breach of FET. In other words, investor-state disputes can arise from the mere mention or inclusion of FET in Pakistan IIAs which corroborates with Pakistan's own experience.

My thesis proposes that very limited research examines the issues FET has on the economic, political, and social activities of Pakistan. Furthermore, studies examining the problems arising from FET and the impact the standard has on Pakistan are virtually non-existent. Also, literature on FET and foreign investment in Pakistan is seldom discussed in the academic world. An examination of FET in Pakistan IIAs will adequately address the social, political, and economic anomalies in Pakistan. My thesis also has the scope to examine the FET provisions in Pakistan IIAs in order to investigate the rights IIAs offer to Pakistan as a host state and to foreign investors. This is a significant contribution to my study because FET has been accused of failing to strike a balance between the host state and the foreign investor. For this reason, there is scope to cover a range of issues pertaining to the FET standard in Pakistan IIAs. Therefore, the thesis aims to explore the full extent to which FET can foster a healthy investment environment whereby the interests of foreign investors and host states are balanced. Overall, my thesis aims to make a significant contribution in this area by examining the issues with FET and by making recommendations for reform in this area.

This chapter argued that Pakistan included fair and equitable treatment in its investment treaty program by passively signing these agreements. As a result, it was important to analyse this in detail as it reveal the events that enabled foreign investors to become comfortable with invoking FET. Proof that the issue with FET is inherent in the investment treaty network of Pakistan was supported by the interview with the former Attorney General of Pakistan, Makhdoom Ali Khan. In his interview with the

International Institute of Sustainable Development (IISD) the former advisor to Pakistan stated that the country signed BITs without meeting any consequences for a long period of time. He was contacted by the Secretary of Law at the time as he was unaware of a BIT and the terms and conditions of the agreement. Thereafter, Khan contacted the Ministry of Industries, which were responsible for BITs at the time, informing him that whenever a Prime Minister or President went abroad the foreign 2ministers would advise the Ministry to sign BITs as they were “one of the doables”. These treaties were signed for the purpose of subordinating diplomatic relations and portraying Pakistan positively in the media. Thus, it is important to analyse the FET provision in the IIAs signed by Pakistan.

My thesis will demonstrate in subsequent chapters that Pakistan has played a significant role in shaping international investment law. As mentioned earlier, the Government of Pakistan was one of the first countries to enter into a BIT with Germany. After the first BIT, Pakistan signed BIT after BIT built a healthy investment portfolio despite the social, economic, and political barriers it faced. However, Pakistan became oblivious to the contents and the niceties of the agreement until it faced its first lawsuit in *Bayinder v Pakistan* in 2001. Even this lawsuit did not prevent Pakistan from signing BITs in a negligent manner without understanding the risks and this raises questions as to the validity of the agreements concluded by Pakistan thus far.

Furthermore, FET has been interpreted in such a manner that it often favours foreign investors over the host state. Some scholars argue that IIAs are created to serve the interests of foreign investors because the role of capital-importing countries is to provide maximum support to their investors. To execute this onus, capital-importing states require diligence, competence, and proficiency to bargain and gesticulate these treaties which is something a developing country will lack. Hence, it is imperative for my thesis that my research is able to gain the Pakistan perspective on FET to understand what Pakistan had in mind when drafting its IIAs.

It should also be noted that becoming a signatory to IIAs without engaging in serious discussions with the other signatories has had dire consequences on Pakistan and foreign investors. This has provided a legal platform for foreign investors to bring forth treaty claims against Pakistan citing a breach of various obligations conferred by BITs. As a result, these claims have prompted questions surrounding the sovereignty of

Pakistan. This may depict Pakistan as an undesirable host in front of the international investment community because foreign investor is subjected to uncomfortable conditions or left stranded amidst major projects. Therefore, this thesis is putting its best efforts forward to devise a new framework to discuss, negotiate and execute the FET provision in Pakistan IIAs.

Chapter 6 this chapter provided evidence contained in my thesis to support the conclusion that my thesis has made arguing that Pakistan will experience growth economically through the revision of the fair and equitable treatment provision in Pakistan IIAs. The way in which this will be resolved is through the elimination of the factors that underpin the exposure of Pakistan to investor-state resolution mechanisms arbitration and the consolidation of Pakistan's investments and the economic environment of the region. On the other hand, due to a lack of evidence to thoroughly support the argument that a revision of fair and equitable treatment will not completely eradicate the crises of fair and equitable treatment provisions in Pakistan IIAs. Furthermore, the scope of my thesis extends to the jurisdictions of other countries. My thesis will investigate how India, Morocco, Nigeria, Canada, and Brazil have dealt with the uncertainties and risks of including FET in their IIAs. Also, these countries have progressed in terms of dealing with the controversial nature of having FET in their IIAs. My research will provide a background to the approaches adopted by these host states to resolve the issues with FET.

Even though there is evidence that this may assist in remedying specific controversial characteristics of fair and equitable treatment there is still a possible danger that the reforms proposed may fail to strike a balance between the powers of the host state and the rights of foreign investors. As a result, the overarching aim of rebalancing the investor-state disputes may not be necessarily achieved as planned. Hence, my thesis advanced two further reform options. These are:

1. Revision of the current application of fair and equitable treatment provisions in IIAs; and

2. Engaging with more innovative practices aimed at utilising fair and equitable treatment within the context of Pakistan.

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