Annotation of the Ph.D. dissertation of Bagdat Kuzhatov

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Importance and relevance of the research topic. The importance of investments in the energy sector cannot be sufficiently emphasized, as they constitute a substantial proportion of foreign investments worldwide. This proportion is expected to increase to meet rising energy demands in the near future [1]. Increasing demands and strategic importance per se make the energy sector susceptible to strict state regulation. On the one hand, this is due to the private interests of investors to generate profit in a safe regulatory climate, and on the other hand, the public interests of host states to have sufficient policy space to regulate this strategic sector without prejudice to its citizens. These two competing public and private interests have been at the center of the theoretical debate right in IIL, from the time when the first petroleum resources in the Middle East, Latin America, and Central America were developed. Outright nationalizations and later indirect expropriation disputes in the energy sector have well demonstrated this tension. Eventually, however, once some consensus was finally reached about what constituted a fair and reasonable balance in expropriation disputes in IIL, particularly regarding the amount of compensation, the dispute focus shifted from expropriation to FET. Restricting the findings of expropriation by tribunals instead thus led to finding liability based on FET [2]. Pleading a breach of FET appeared as an attractive alternative [3]. The constant development of legal interpretation has imbued FET with new meanings, and the growth of international law instruments has opened new areas of conflict between public and private interests, particularly, between two doctrinal concepts FET and the right to regulate (exercise of sovereignty). This conflict is especially evident in the framework of the ECT, which in turn, requires substantive theoretical research and solution from three perspectives.

Firstly, the lack of consensus about the normative content of the FET (not only under the ECT but also more generally) remains an obstacle to realizing by ECT Contracting Parties' state policy for public purposes. Shortcomings arising from the FET's theoretical origin, doctrinal concept and normative content led to the determination of the FET's content by tribunals. FET does not have an integrated and ordinary meaning. *Travaux preparatoires* of IIAs, including the ECT, are silent on the purpose of the FET.

Ambiguity and controversy about the normative content and essence of the FET have given rise to various international law theories which attempt to give meaning to the FET. Interpretation of the FET has been based on CIL, GPL, the rule of law and treaty standards. This has led to differing interpretations, inconsistent application and

scope creep of the FET under the ECT that challenges the public policy objectives and the regulatory rights of its ECT Contracting Parties. This issue is also closely interlinked with, and mirrors, the legitimacy crisis in the ISDS system [4]. Currently, there is no solution yet in IIL theory to this issue and it requires comprehensive theoretical study.

Secondly, based on this doctrinal issue in IIL, there is a clash between the regulatory measures of ECT Contracting Parties aimed at public interests, including the promotion of clean energy transition, the protection of the environment, and sustainable development, on the one hand, and current investment protection obligations of ECT Contracting Parties under FET of Article 10 (1) of the ECT, on the other hand.

The current FET wording in the ECT reflects the political and economic circumstances when the ECT was negotiated in the 1990s. The inclusion of investment protection standards such as the FET was especially due to the instability in the regulatory environment of the former Soviet Union States [5; 6]. Such protections were important for EU investors who were going to invest billions of dollars in the petroleum sector of the CIS such as Kazakhstan, Azerbaijan, Uzbekistan, Kyrgyzstan and Russia [5, p. 252]. As a result, the current ECT incorporated pro-investor provisions that accorded the highest level of protection to the rights of investors from regulatory measures.

Onward shifts in global energy policy have caused redirection of national policy goals by some EU ECT Contracting Parties towards sustainable development[1] [6, p. 1]. Particularly, the conversion from traditional fuels to RES has been the key driving force for the realization of regulatory actions by some EU ECT Contracting Parties. Several EU countries, for example, the Czech Republic, Italy, and Spain have offered complex tariff and financing schemes to incentivize investment in the RES sector. Later, these EU countries revised their RES incentive schemes. Other EU ECT Contracting Parties, such as Germany and the Netherlands, have started shutting down existing coal plants to reduce GHG emissions.

This development, in turn, has created a new generation of FET disputes. These do not merely concern a refusal to grant or upgrade a mining license, but also constitute a challenge to the legitimate rights of ECT Contracting Parties to implement RES tariff schemes and protection of the environment in order to meet international obligations such as the Paris Agreement[2]. The current ISDS creates a conflict in international law–creating treaties that aim to reduce GHG, for example, the Paris Agreement, while burdening States that attempt to make progress with multi-million awards[3] [7; 8].

[1] The term "sustainable development" in this dissertation includes a broad range of considerations such as economic development, social well-being, social development, climate change, environmental protection, public health, human rights, and the rights of indigenous people.

[2] Paris Agreement is an international agreement on climate change signed on 22 April 2016 between 195 countries.

[3] For States any claim of investors in arbitration imposes significant financial costs despite the win or lose outcomes of the dispute since even a single arbitration award can place "burdensome" on the State's treasury [8; 254, p. 1].

Practice shows[4] that emerging legitimate regulatory measures of ECT Contracting Parties are easily captured under the FET as alleged breaches of investment protection obligations [9].

The FET is now the most invoked and breached[5] substantive investment standard of protection under the ECT [6, p. 1; 9]. This situation has sparked the risk of the withdrawal[6] of several ECT Contracting Parties from the ECT [10; 11; 12]. The rise of investment claims related to RES measures against the EU ECT Contracting Parties under the ECT arbitration is a subject of serious critique [6, p. 1; 13]. The critique is partly directed towards a perceived lack of balance between legitimate regulatory rights and investment protection under the FET, which - as noted - is the emerging political and economic instrument of transition away from fossil fuels [6, p. 1]. In this sense, this is a theoretical debate about the transition from the *lex petrolea* to the *lex renewabilia*[7] [14]. The present FET under the ECT has failed to meet these challenges. Therefore, the ECT Contracting Parties need a more balanced FET approach to preserve their rights to regulate. A feasible solution must be found.

Thirdly, there is an ongoing modernization of the current ECT [15]. ECT Contracting Parties have identified key topics for revision, of which the FET is a central one. The chosen research topic, therefore, is critical and especially relevant in light of ongoing modernization reforms.

Research aim and objectives. The main aim of this dissertation is to propose scientifically sound ways in which the FET clause under ECT needs to be crafted to ensure the protection of both State and investor interests. Accordingly, the dissertation addresses the following research question: "How does the new FET under the ECT need to be crafted to ensure ECT Contracting Parties and investor interests are protected?"

This dissertation undertakes the following objectives:

1. to identify reasons for the balance issue under Article 10 (1) of the ECT in light of specifics of the energy sector, development of various ISDS doctrinal concepts and new regulatory measures of ECT Contracting Parties;
2. to identify the theoretical underpinning of the FET;
3. to propose a new construction of FET and codify delicts of the FET under Article 10 (1) of the ECT;
4. to propose new approaches to doctrinal concepts of the right to regulate provisions which will ensure the protection of both ECT Contracting Parties and investor interests;
5. to test the proposed new approaches and FET wording in light of the emerging regulatory rights of the ECT Contracting Parties.

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[4] Over the last seven years, at least 91 such investor claims have been submitted to international arbitration under the ECT in connection with States' measures designed to promote transition into renewable energy sources [8].

[5] FET breach amounts to about 65% of 43 awards.

[6] Italy's withdrawal and intention of withdrawal by Spain, Germany, France, the Netherlands and Slovenia.

[7] The term is fashioned along the lines of *lex petrolea* and used due to the development of international regulatory mechanisms for renewable energy [11, p.380].

Research object. Public relations arising from the application of the IIL norms in international investment arbitration in relation to FET under Article 10 (1) of the ECT.

Research subject. History, evolution, and practice of IIL and its application in international investment arbitration in relation to the FET under Article 10 (1) of the ECT, and a range of legal norms and issues arising from the application of FET under Article 10 (1) of the ECT to foreign investors and investment in the energy sector, as well as modernization of the same provision, in light of new challenges facing ECT Contracting Parties, particularly the need to protect investments while moving towards more sustainable ways of generating energy.

Theoretical basis of research topic and literature review. The main theoretical basis of this research dissertation and literature review may be divided into three groups.

The first group is theoretical writings on the origin and understanding of the FET in IIL. The vague FET norm in IIAs has led to a plethora of international studies and research. A number of leading academics specialized in IIL such as Dolzer R., Schreuer C., Sabahi B., Rubins N.D., Wallace D., Brower C.H., Weiler T., Schwebel S.M., Sornarajah M., Paulsson J., Salacuse J.W., Schill S.W., Vandevelde K.J., Vasciannie S., Ortino F., Reinisch A., Yannaca-Small K., Dumberry P., Paparinskis M., Klager R., Muchlinski P., Tudor I., Newcombe A. and Paradell L., have significantly contributed to the development of understanding of the theoretical basis of the FET and its interpretation in practice. Most of these academics have been members of arbitral tribunals or representing counsels for parties, therefore they contributed their views on the FET not only from a theoretical point of view but also from a practical one.

Currently, notwithstanding the number of international studies and research, there is no consensus among academics on the origin, doctrinal concept and intention of States, not only under the ECT but generally in IIL. Currently, the ISDS community, particularly academics and commentators, has proactively engaged in a search for a consensus on the doctrinal concept of the FET and further interpretation of the norm, proposing different hypotheses and views. These include discussion around the first origin and intent of the States in the 1948 Havana Charter, justiciability clauses of 18th and 20th-century commercial and mixed claims treaty practice, FCNs, relations of the FET with the MST, the rule of law, GPL and treaty standards. Each of these discussions has found a place in this dissertation. The author further contributes to these discussions and outlines the core findings.

The second group is composed of theoretical writings on the specifics of the FET under Article 10 (1) of the ECT and the energy sector. Particularly, the current FET under Article 10 (1) of the ECT has peculiarities in comparison to FET norms under other IIAs. A number of academics specialized in energy investment disputes such as Walde T., Cameron P., Scherer M., Coop G., Ribeiro R., Cima E., Roe T., Happold M., Leal-Arcas R., Gallagher N., Brabandere E., Gazzini T., Mejia-Lemos D. and Baltag C. have made a significant contribution to the discussion of the specifics of the energy disputes and the interpretation of the ECT provisions, including the current FET wording under Article 10 (1) of the ECT.

Generally, at this time there is little commentary on the new FET under the revised ECT as well as on the balance between emerging regulatory rights of the ECT Contracting Parties for legitimate public purposes and investment protection under the FET. The author considered these writings and developed his own understanding and interpretation of the FET under Article 10 (1) of the ECT, further proposing a new FET.

The third group is theoretical writings on and the *travaux preparatoires* on modern IIAs, including IIAs, entered into by the EU. The author relies on several academics' papers such as Bungenberg M., Reinisch A., and Titi C.. Most academics posit the view that the EU made good progress on the limitation of the scope of FET norms in modern EU IIAs such as the CETA and the EU-Singapore Investment Protection Agreement. The EU has emerged as a driver for revised substantive protection obligations. At the time of writing this dissertation, the EU is playing a key role in negotiating revisions to the ECT. Therefore, the dissertation relies on the EU documents and writings on the revision of FET provisions and the incorporation of the right to regulate clauses.

Among Russian and CIS region academics, recently Levashova Y. in her book elaborated analysis on the FET topic in detail under different IIAs [16]. Some scholars Badmayeva N., Borgoyakov A., and Labin D. wrote about general FET problems in IIL. Other academics such as Bogatyrov A., Doronin N., Boguslavsky M., Farkhudinov I., Solovyova A., Kotov A., Mamai A., Yulov D., Ayupov A., Tulayeva M., Evteeva M., Pacherman G. generally wrote about the regulation of foreign investment in the Russian Federation and IIL matters. However, they have not analyzed and touched on the topic of the dissertation specifically.

Among Kazakhstani academics, Suleimenov M. took part in ECT negotiations in the early 1990s and contributed to the chapter "The Energy Charter Agreement and the development of Kazakhstan legislation" in the book of Walde T. "The Energy Charter Treaty: An East-West Gateway for Investment and Trade", where he analyzed the correspondence of Kazakhstan legislation to ECT and the possible effects of the adoption of ECT to Kazakhstan law [17]. Suleimenov M. wrote a number of writings on international commercial and investment arbitration matters from a Kazakhstan law perspective and he was appointed as a Kazakh law expert in a number of international investment arbitrations.

Other Kazakh academics such as Zimanov S., Basin Y., Mukhitdinov N., Yelubayev Zh., Maulenov K., Didenko A., Ilyasova K., Safinov K., Moroz S., Zhanaidarov I., Nogaibai Z., and Kaziyeva G. wrote a number of writings on subsoil use and regulation of foreign investment in Kazakhstan and many of them have been also Kazakh law experts in a number of international investment arbitrations.

Generally, in Kazakhstan, there is a lack of academic research on this research topic. The following academics conducted doctoral research on generally the topics of international economic law, international trade law, international energy law and international commercial arbitration: Maulenov K. "Государственное управление и правовое регулирование в сфере иностранных инвестиций в Республике

Казахстан" (State administration and legal regulation in the field of foreign investment in the Republic of Kazakhstan); Bitenov G. "Regulating Trade in Petroleum under WTO Regime: Trade Rules vs Reality of Petroleum Industry"; Taimova M. "Гарантии иностранным инвесторам по законодательству Республики Казахстан" (Guarantees to foreign investors under the legislation of the Republic of Kazakhstan); Ahmadieva G. "Правовое регулирование внешнеэкономических контрактов в Республике Казахстан" (Legal regulation of foreign economic contracts in the Republic of Kazakhstan); Kulzhabayeva Zh. "Клаузула о наиболее благоприятствуемой нации" (Most favoured nation clause); Sarina S. "Разрешение споров международным коммерческим арбитражем" (Dispute Resolution by International Commercial Arbitration); Irzhanov A., "Порядок разрешения межгосударственных экономических споров" (Procedure for resolving interstate economic disputes); Shokenov K. "Правовое регулирование иностранных инвестиций в месторождения нефти и газа" (Legal regulation of foreign investments in oil and gas fields).

Normative basis of the research topic. The normative basis of the research topic was based on the ECT and various IIAs, including BIT and FTA with investment protection provisions.

Practical basis of the research topic. The practical basis of the research was based on the decisions of international arbitral tribunals: ICSID, ad hoc tribunals constituted under the UNCITRAL rules and SCC arbitration. The practical basis of the dissertation is important because the vague FET provisions were largely uncovered by tribunals in ISDS. Arbitration practice under NAFTA, the ECT, and other IIAs, including a large number of awards and dissenting opinions, have contributed to interpretation of the FET and are the valuable practical basis of the dissertation.

The author supports the research with practical examples from his experience because the author has many years of work experience in the O&G sector of Kazakhstan, including representing the Government of Kazakhstan in international investment and commercial arbitrations and negotiations.

Research methods. In pursuing the research objective, this dissertation employed four research methods: historical-legal, comparative-legal, legal analysis (descriptive) and legal modeling.

First, the historical-legal method helped to identify key historical, political, and economic factors that influence the protection of investors in the energy sector. The results of the analysis have demonstrated the development of investment protection rules in IIL and, more specifically, the FET standard within the context of the IIAs, including the ECT. Further applying this method, the dissertation elaborated analysis of the origin, doctrinal concept and normative content of the FET.

Second, a comparative method has been used to analyze FET norms in different IIAs and decisions of tribunals. Utilization of the comparison method was essential. It provided an overview of other IIAs and decisions of tribunals trying to address similar concerns about the FET and legitimate regulatory measures and how those FET provisions and the right to regulate are likely to be interpreted by tribunals and

commentators, which helped determine their possible application in the ECT framework.

Third, a legal analysis (descriptive) method has been used to collect and systematize many tribunal decisions, *travaux preparatoires* documents, and academic studies. Employing a legal analysis (descriptive) method, relevant protocols, annexes, decisions, understandings of, and statements about FET under the ECT were considered for this research. References were made to *travaux preparatoires* of the ECT and its negotiating history. Documents generated after the negotiation and ratification of the ECT have also been analyzed as they helped understand the FET under Article 10 (1) of the ECT.

Fourth, a legal modeling method was employed to test various public policy regulatory measures under the new proposed FET.

In addition to the above methods, the dissertation has employed the general rule of interpretation under Articles 31-32 of the VCLT to analyze the ECT text and to test the proposed formulation of the FET. The ECT has six authentic versions of the ECT: English, French, German, Italian, Russian, and Spanish [18, article 50]. Article 33 of the VCLT guides the interpretation of treaties authenticated in multiple languages [19]. Given the author's linguistic proficiency, the English and Russian versions were used for analyzing and interpreting the ECT provisions.

Scientific novelty of the dissertation and its contribution to science. The dissertation is the first full doctoral research in Kazakhstan with an in-depth and critical analysis of sources, doctrinal concepts and normative content of FET under Article 10 (1) of the ECT and the right to regulate norms.

The scientific novelty of the dissertation is determined by proposing new approaches to the application of doctrinal concepts of the FET and the right to regulate norms in order to reconcile them under the new ECT.

The dissertation makes a feasible step in reconciling a balance between two competing doctrinal concepts under the new ECT, particularly:

– determination and substantiation of the normative content of FET based on the doctrinal concept that the FET is a self-contained treaty obligation, in this way by separating FET from other sources/doctrinal concepts such as CIL, GPL, the rule of law;

– determination and provision of new sense to the normative content of the right to regulate norms;

– determination and substantiation of the new approach in the application of two concepts, i.e., the right to regulate is the centerpiece permission, not a defense norm, therefore, the right to regulate norms should limit the scope of FET.

Therefore, the dissertation contributes to:

– current academic debate around the origins and doctrinal concepts of the FET and the right to regulate;

– contemporary academic discussion around the normative content and delicts of FET and the right to regulate under the ECT;

– application of two doctrinal concepts in practice in relation to emerging regulatory measures of ECT Contracting Parties;

– development of IIL norms in relation to the FET and the right to regulate provisions.

In the opinion of the author proposed new approaches better safeguards the legitimate regulatory measures of the ECT Contracting Parties. The proposed norms are hypothetically tested under various regulatory measures and well demonstrate the protection of regulatory rights. These proposed approaches as a sample could be tested under other IIAs.

Provisions submitted for defense.

1. The absence of doctrinal concept, ordinary meaning and normative content of FET, expansive application of the vague FET norms under Article 10 (1) of the ECT by tribunals in light of arbitration practice (precedents), interpretation and recognition of declaratory sentence of Article 10 (1) of the ECT as a FET delict created a strict obligation for ECT Contracting Parties to provide a stable regulatory framework and protect the legitimate expectations of investors in the stability of the national legislation. Such application of FET led to multi-million arbitral awards under ECT which raise a fundamental doctrinal issue in IIL regarding the liability of States for bona fide public purpose measures. Therefore, there is a need for specific measures such as the identification of the doctrinal concept of FET, codification, revision of treaty text and revision of approaches to the right to regulate and FET concepts in order to ensure a balance between regulatory rights and investment protection.

2. To reconcile a balance between two competing concepts, the dissertation substantiates that the doctrinal concept of FET should be considered from the perspective of a self-contained treaty obligation agreed between contracting state parties. This is substantiated by the fact that the development of FET as a *lex specialis* rule was created by BITs and FCNs and the incorporation of FET in IIAs was associated with the elimination of the uncertainty around MST. The FET concept should be without the link to any other doctrinal concepts/sources such as CIL, MST, GPL and the rule of law. The self-contained treaty obligation concept reduces the risk of expansion in interpretation.

3. Based on the doctrinal concept of a self-contained treaty obligation the dissertation codifies FET delicts and proposes a new construction of FET under ECT. The new construction of FET should truly reflect the meaning of FET such as a denial of justice, arbitrariness or unreasonableness, discrimination and abusive treatment. The rationale behind this proposal is that an ECT Contracting Party may be held liable only for breaches of a limited above set of delicts. This proposed new construction of FET increases the certainty and predictability for the ECT Contracting Parties and investors in the application of FET norms.

The concepts of stability obligation and protection of legitimate expectations should be taken out of FET delicts and if needed, such obligation and protection may be agreed upon or granted during individual contractual negotiations between the host state and the investor or in national legislation.

4. To reconcile a balance between two competing concepts, the dissertation proposes to integrate into the ECT the applicable right to regulate norms for public purposes. The current ECT lacks the practicable right to regulate norms. After analyzing different concepts such as "general exceptions", "carve-outs" and "emerging right to regulate", the dissertation proposes a "strict" right to regulate norms in the ECT preamble and in a separate article of the ECT, which effectively safeguards the public policy measures.

The proposed preamble wording is as follows:

preamble wording:

"*RECOGNIZING the right of the Contracting Parties to regulate within their territories in order meet public policy objectives, including but not limited to the protection of the environment, public health, consumer rights, climate-change mitigation, energy security".*

the right to regulate as a separate article:

"For greater certainty, the bona fide exercise [footnote] of Contracting Parties' right to regulate within their territories to achieve public policy objectives, including but not limited to the protection of the environment, public health, consumer rights, climate-change mitigation, energy security should not be treated as a breach of the fair and equitable treatment obligation"

"*Footnote wording: the determination of whether there is bona fide exercise requires a case-by-case and fact-based consideration*"

5. The dissertation proposes a new approach to the application of proposed two competing norms: FET and the right to regulate. By hypothetically testing various public policy measures under the proposed norms, the dissertation proposes to apply the right to regulate clause as a permission norm, i.e., the centerpiece clause of the new ECT, not a defense norm. Therefore, the right to regulate norms should limit the scope of FET. In this manner, FET delicts may be only invoked by investors when the host state improperly exercises regulatory measures. The results of the testing demonstrate the effectiveness of the proposed formulation in balancing the rights of States and investors.

Theoretical importance of the research. The dissertation proposes an alternative view to a number of theoretical discussions around the FET norms and doctrinal concepts and the future construction of a balance between the right to regulate and investment protection under the FET norms. The conducted research dissertation could be useful guidance material for academics covering the theoretical bases of the FET.

Practical importance of the research. The research dissertation could be useful guidance material for:

1. practicing lawyers wanting to better understand the scope of the FET and its application to regulatory measures;
2. government bodies, especially Kazakh Government, wanting to understand the relationship between regulatory measures and how they interact with the FET in practice;

3. ECT Contracting Parties, especially Kazakh Government, for further improvement of ECT text in light of modernization reforms;
4. States, especially Kazakhstan, to take into account if they wish to incorporate the FET in future IIAs;
5. investors to take into account relevant regulatory measures and the scope of the FET for due diligence purposes.

Approbation of the results of the research. The findings of the research are reflected in the following articles and conferences:

1. Article "The Energy Charter Treaty reform: Why and how to reach a consensus on fair and equitable treatment?" Energy Policy, Volume 163, April 2022 (1 quartile Scopus);
2. Article "Regulatory Space as a Factor of Change of International Investment Treaty Regime", KazNU Al-Farabi Law Bulletin, No.2 (98) 2021, 15 June 2021;
3. Article "The standard of fair and equitable treatment in the new environment" ENU Gumilyov Law Bulletin, No.1 (134)/2021, 26 March 2021;
4. Article "Проблемы Стандарта Справедливого и Одинакового Режима в Договоре к Энергетической Хартии", Bulletin Institute of Legislation and Legal Information of the RoK, No.2 (65)-2021, 30 June 2021;
5. The International Conference is the topic for "Energy Charter Treaty Framework: What is a Matter of Concern for Contracting Parties?" Russian Federation, 15 May 2020.

Research design. The dissertation is structured as follows. Chapter 1 analyses the development of the investment protection rules under international law under three periods: the pre-ECT period, the ECT period, and at present when the current revision of ECT provisions is taking place. The pre - ECT period covers the early evolution of diplomatic protection, the emergence of MST, *lex petrolea*, and BITs. The ECT period focuses on political, historical, and economic aspects of the ECT and investment protection. The current modernization period covers ongoing shifts in the IIA system and sustainable development, as well as new regulatory measures based on the two-case studies EU and Kazakhstan. The results of Chapter 1 are used in Chapter 3.

Then, Chapter 2 is the central research part that includes a review and analysis of issues of doctrinal approaches to normative content and sources of FET and the issues of the current formulation of FET under the ECT. It covers the determination of the normative content of FET and interpretation under the ECT. This part is mainly based on the analysis of academic studies and arbitration practice, which are essential to formulate new proposals for a modernized FET language under the ECT which is discussed in Chapter 3.

Chapter 3 is the important part of the dissertation which outlines the new construction of FET wording under ECT, applicable delicts and the right to regulate provisions. This Chapter also examines the applicability of the new FET and the right to regulate clause to emerging regulatory measures. This Chapter hypothetically tests

various regulatory measures under the proposed formulations in order to assess the effectiveness of the proposals.

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