

WRITTEN FEEDBACK
to the dissertation of Kuzhatov Bagdat Gizzatovich
for the topic “Revision of balance between regulatory rights and investment protection under fair and equitable treatment: The Energy Charter Treaty framework” 8D04201 – “Law”

№	Criteria	Compliance with the criteria (you must mark one of the answer options)	Substantiation of the position of the official reviewer
1.	The topic of the dissertation (as of the date of its approval) corresponds to the directions of development of science and / or state programs	<p>1.1 Compliance with priority areas for the development of science or government programs:</p> <p>1) The dissertation was completed within the framework of a project or target program financed from the state budget (indicate the name and number of the project or program)</p> <p>2) The dissertation was completed within the framework of another state program (indicate the name of the program)</p> <p>3) <u>The dissertation corresponds to the priority direction of the development of science, approved by the Higher Scientific and Technical Commission under the Government of the Republic of Kazakhstan (indicate the direction)</u></p>	<p>2) the dissertation corresponds to the priority direction of the development of science for 2021-2023, approved by the Higher Scientific and Technical Commission under the Government of the Republic of Kazakhstan (April 29, 2020). Direction: Research in the social and humanitarian sciences.</p> <p>3) the dissertation also meets the main tasks of the legal policy of the Republic of Kazakhstan until 2030 approved by the Decree of the president of the Republic of Kazakhstan dated October 15, 2021 No. 674 On approval of the Concept of legal policy of the Republic of Kazakhstan until 2030. This document indicated that: <i>“In the course of planning and at subsequent stages of concluding international treaties, it is important to proceed from the national interests of the Republic of Kazakhstan, carefully assess their sectoral expediency, and predict possible socio-economic and political consequences. The qualitative study of the conclusion of international treaties directly affects the level of protection of the interests of the state in the international arena.”</i></p> <p>Therefore, Kazakhstan as a member of the Energy Charter Treaty (hereinafter - ECT) is participating in the</p>



		<p>modernization reforms of the ECT. The dissertation makes a contribution to the protection of rights and interests of States under fair and equitable treatment (hereinafter - FET) provisions of the ECT, therefore, proposes to defend national interests (e.g., energy security, environmental matters) from the scope of claims of foreign investors against Kazakhstan.</p>
2.	<p>Significance for science</p> <p>The work <u>makes</u> / does not make a significant contribution to science, and <u>its importance is well disclosed</u> / not disclosed</p>	<p>This dissertation work is first doctoral research work written in Kazakhstan which thoroughly analyzes the FET clause in ECT and ECT context generally. The dissertation <u>has a significant contribution</u> to the development of international investment law, international energy law, modern investment treaty regime. Its importance is <u>well disclosed</u> in the dissertation in light of shifts in modern investment regime. A number of States started revising their earlier signed treaties trying to balance investment protection and national interests. Author made well theoretical analysis of doctrinal concepts of FET and the right to regulate provisions and put forward sustainable proposals towards finding a balance between these two theoretical concepts.</p>
3.	<p>The principle of independence</p> <p>Self-reliance level: 1) <u>High</u>; 2) Medium; 3) Low; 4) There is no independence</p>	<p>The principle of independence of writing is <u>high</u>. As dissertation shows, author deeply analyzed over 100 decisions of arbitration tribunals, travaux preparatoires and papers of well-known international academics and made own conclusions and interpretation on problematic doctrinal issues of the FET and the right to regulate.</p>
4.	<p>The principle of internal unity</p> <p>4.1 Rationale for the relevance of the dissertation: <u>1) Justified</u>; 2) Partially justified; 3) Not substantiated.</p>	<p>Relevance of the chosen topic <u>is well justified</u> in the dissertation. Author raised a fundamental problem in international investment law theory and international investment arbitration practice. The liability of States</p>



		<p>international investment arbitration for bona fide measures aimed at public purposes is a significant issue that was not find a response in international investment law.</p>
	<p>4.2 The content of the dissertation reflects the topic of the dissertation: 1) Reflects: 2) Partially reflects; 3) Does not reflect</p>	<p>The dissertation consists of 3 Chapters and a number of sub-chapters which <u>well reflects and discloses</u> the dissertation topic.</p>
	<p>4.3. The purpose and objectives correspond to the topic of the dissertation: 1) comply: 2) partially correspond; 3) do not match</p>	<p>The purpose and objectives <u>correspond/comply to/with the topic of the dissertation</u>. Research question complies with the dissertation topic. To answer the Research question the dissertation set 5 objectives which further put forward 5 provisions for submissions.</p>
	<p>4.4 All sections and provisions of the dissertation are logically interconnected: 1) are fully interconnected: 2) the relationship is partial; 3) there is no relationship</p>	<p>All Chapters and sub-chapters are <u>fully and logically interconnected</u>.</p>
	<p>4.5 New solutions proposed by the author (principles, methods) are argued and evaluated in comparison with known solutions: 1) there is a critical analysis: 2) partial analysis; 3) the analysis is not one's own opinions, but quotes from other authors</p>	<p>There is a <u>critical analysis</u>. Author critically analyzed over 100 decisions of arbitration tribunals, travaux préparatoires and papers of well-known international academics and made own conclusions and interpretation on problematic doctrinal issues of the FET and the right to regulate.</p>
<p>5. The principle of scientific novelty</p>	<p>5.1 Are scientific results and provisions new? 1) completely new: 2) partially new (25-75% are new); 3) not new (less than 25% are new)</p>	<p>Scientific results and statements are <u>completely new</u>. I believe that proposed provisions and results allow to look at the problem from different angle and solve uncertainties in theory and in practice.</p>

	<p>5.2 Are the conclusions of the dissertation new? 1) completely new; 2) partially new (25-75% are new); 3) not new (less than 25% are new)</p> <p>5.3 Technical, technological, economic or management decisions are new and justified: 1) completely new; 2) partially new (25-75% are new); 3) not new (less than 25% are new)</p>	<p>I believe that the conclusions of the dissertation are completely new.</p> <p>Technical, technological, economic or management decisions are new and justified and completely new.</p>
6.	<p>Substantiation of the main conclusions (for qualitative research and arts and humanities courses)</p> <p>All key findings are based/not based on scientifically sound evidence, or reasonably well-founded (for qualitative research and arts and humanities courses)</p>	<p>All key findings are based on scientifically sound evidence and reasonably well-founded. Author used solid theoretical evidence and arguments from arbitration practice in his findings. In Chapter 3 author tests the proposed FET and right regulate provisions under different regulatory measures of ECT Contracting Parties using modelling method.</p>
7.	<p>Basic provisions for defense</p> <p>The following questions need to be answered for each position separately: 7.1 Is the position proven? 1) proven; 2) rather proven; 3) rather unproven; 4) not proven 7.2 Is it trivial? 1) yes; 2) no 7.3 Is it new? 1) yes; 2) no 7.4 Level to apply: 1) narrow; 2) medium;</p>	<p>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 III 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</p>



	<p>3) wide 7.5 Is it proven in the article? 1) yes; 2) no</p>	<p>regulate and FET concepts in order to ensure a balance between regulatory rights and investment protection.</p> <p>Is the position proven? 1) proven; Is it trivial? 2) no Is it new? 1) yes; Level to apply: 3) wide Is it proven in the article? 1) yes; This provision is proven in the article “Проблемы Стандарта Справедливого и Одинакового Режима в Договоре к Энергетической Хартии”, Вулlein Institute of Legislation and Legal Information of the Rok, No.2 (65)-2021, 30 June 2021.</p> <p>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 <i>lex specialis</i> 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.</p>
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		<p>negotiations between the host state and the investor or in national legislation.</p> <p>Is the position proven?</p> <p>1) proven; Is it trivial? 2) no Is it new? 1) yes; Level to apply: 3) wide</p> <p>Is it proven in the article? 1) yes;</p> <p>This provision is proven in the 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).</p> <p>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.</p> <p>The proposed preamble wording is as follows: preamble wording: <i>"RECOGNIZING the right of the Contracting Parties to regulate within their territories in order meet public policy objectives, including</i></p>
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		<p><i>but not limited to the protection of the environment, public health, consumer rights, climate-change mitigation, energy security".</i></p> <p><i>the right to regulate as a separate article:</i></p> <p><i>"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"</i></p> <p><i>"Footnote wording: the determination of whether there is bona fide exercise requires a case-by-case and fact-based consideration"</i></p> <p>Is the position proven? 1) proven; Is it trivial? 2) no Is it new? 1) yes; Level to apply: 3) wide Is it proven in the article? 1) yes; This provision is proven in the 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).</p>
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			<p>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.</p> <p>Is the position proven? 1) proven; Is it trivial? 2) no Is it new? 1) yes; Level to apply: 3) wide Is it proven in the article? 2) no;</p>
8.	<p>The principle of certainty Reliability of sources and information provided</p>	<p>8.1 Choice of methodology - justified or methodology described in sufficient detail 1) yes; 2) no</p> <p>8.2 The results of the dissertation work were obtained using modern methods of scientific research and methods of processing and interpreting data using computer technologies: 1) yes;</p>	<p>The choice of methodology is well justified. The author applied four methods: historical-legal, comparative-legal, legal analysis (descriptive) and legal modeling.</p> <p>The results of the dissertation work were obtained using modern methods of scientific research and methods of processing.</p>



	<p>2) no</p> <p>8.3 Theoretical conclusions, models, identified relationships and patterns are proven and confirmed by experimental research (for areas of training in pedagogical sciences, the results are proven on the basis of a pedagogical experiment):</p> <p>1) yes; 2) no</p>	
	<p>8.4 Important statements are supported / partially confirmed / not supported by references to relevant and reliable scientific literature</p>	<p>Important statements are well supported by references to reliable scientific literature, including the literature of well-known international and national academics, as well as decisions of arbitration tribunals and separate opinions of arbitrators.</p>
	<p>8.5 Used literature sources are sufficient / not sufficient for a literature review</p>	<p>Used literature sources are sufficient. Literature sources contain 438 references.</p>
<p>9</p>	<p>Principle of practical value</p>	<p>The dissertation has a theoretical value. Author raised a number of fundamental theoretical problems and solid proposals to these problems.</p>
	<p>9.1 The dissertation has a theoretical value:</p> <p>1) yes; 2) no</p>	<p>The dissertation is of practical importance and there is a high probability of applying the results obtained in practice.</p>
	<p>9.2 The dissertation is of practical importance and there is a high probability of applying the results obtained in practice:</p> <p>1) yes; 2) no</p>	<p>The dissertation is of practical importance and there is a high probability of applying the results obtained in practice.</p>
	<p>9.3 Are the suggestions for practice new?</p> <p>1) completely new; 2) partially new (25-75% are new); 3) not new (less than 25% are new)</p>	<p>In Chapter 3, the author made a strong contribution to practice. Author by applying legal modelling tested different regulatory measures under the proposed formulations and theory how they possibly could work in practice. The results of testing demonstrated effectiveness of the proposed formulations and suggestions in practice.</p>
		<p>Suggestions are completely new.</p>



10. Quality of writing and design	Quality of academic writing: 1) high ; 2) average; 3) below average; 4) low.	Quality of academic writing is high and the dissertation is written in academic style.
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Conclusion:

Taking into account the above comments and substantiation, I strongly believe that the dissertation of Kuzhatov Bagdat Gizzatovich on the topic "Revision of balance between regulatory rights and investment protection under fair and equitable treatment: The Energy Charter Treaty framework" is highly relevant and important, as well as the provisions submitted for defense have a scientific value.

His insightful proposals for revision of the FET and his demonstration of how they would have applied both in past cases and from his own experience representing the Republic of Kazakhstan in international arbitration disputes.

The proposals are extremely well developed and present what I believe are appropriate solutions to the inherent conflict between investment protection and the right to regulate in the ECT framework.

To conclude, B.G. Kuzhatov truly deserves a Ph.D. degree in 8D04201 – "Law".

Reviewer:

Doctor of Law, Professor of the Department of Economics and Business
of the International University of Information Technologies



K.S. Maulenov

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Международный институт экономики, права, информатики и технологий
International University of Information Technologies