

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) 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)</p>	<p>The dissertation corresponds:</p> <p>1) The dissertation was not completed within the framework of a project or target program financed from the state budget;</p> <p>2) To the main objectives of the legal policy of the Republic of Kazakhstan until 2030 which was 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.”</p> <p>Specifically, the concept includes that:</p> <p>Section 1: “In the light of Kazakhstan's active participation in integration processes, the primary task of legal support for foreign policy and foreign economic activity is the high-quality protection of national interests when concluding international treaties.”</p> <p>Section 6: “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.”</p> <p>- Strategy of Kazakhstan – 2050: A New Political Course.</p> <p>- The main strategies of Development plan of Ministry of Justice of the Republic of Kazakhstan for 2023-2027 approved 30 December 2022 №1087</p>

			<p>Order of Minister of Justice of the Republic of Kazakhstan. Goal 1.1, “legal support of Kazakhstan’s activities in the international arena in order to protect its national interests.”</p> <p>- Concept for the transition of the Republic of Kazakhstan to a “green economy.”</p> <p>3) 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 on 29 April 2020 on direction “Research in the social and humanitarian sciences.”</p> <p>In this line, the Republic of Kazakhstan as a Contracting Party to the Energy Charter Treaty (hereinafter - ECT) is participating in the modernization reforms of the ECT. Author contributes to the protection of rights and interests of States under fair and equitable treatment (hereinafter - FET) provisions of the ECT by proposing the right to regulate provisions. Under the proposed formulation, author excludes regulatory measures aimed at defending national interests such as energy security, protection of consumer rights, environmental matters, climate change from the scope of FET.</p>
2.	Significance to science	The work makes / does not make a significant contribution to science, and its importance is well disclosed / not disclosed	<p>The dissertation makes a valuable contribution to the development of international investment law, treaty law, also international energy law in light of shift from traditional fossil fuels to renewable sustainable development. Significance is well disclosed in the dissertation.</p> <p>Author proposed new approaches to the theoretical understanding of the FET and the right to regulate provisions for the purposes of finding balance between these two conflicting doctrinal concepts. It worth highlighting the author’s contribution to the clarification of the theoretical</p>

			underpinnings of these two doctrinal concepts.
3.	The principle of independence	Self-reliance level: 1) <u>High</u> ; 2) Medium; 3) Low; 4) There is no independence	The principle of independence of writing is <u>high</u> . Author provided a self-analysis of hundreds awards of investment arbitration tribunals, travaux preparatoires materials of the ECT and US treaties and books, articles of well-known international academics. Author made self-conclusions and interpretation on each interpretation problems related to FET under Article 10 (1) of the ECT.
4.	The principle of internal unity	4.1 Rationale for the relevance of the dissertation: 1) <u>Justified</u> ; 2) Partially justified; 3) Not substantiated.	Relevance of the chosen topic is <u>completely justified</u> in the dissertation. Author raised a fundamental balance problem between regulatory right and investment protection in the ECT context and generally in international investment law theory and international investment arbitration practice.
		4.2 The content of the dissertation reflects the topic of the dissertation: 1) <u>Reflects</u> ; 2) Partially reflects; 3) Does not reflect	The dissertation consists of 3 Chapters and several sub-chapters which <u>completely reflects and uncovers</u> the dissertation topic.
		4.3. The purpose and objectives correspond to the topic of the dissertation: 1) <u>comply</u> ; 2) partially correspond; 3) do not match	The purpose and objectives of the dissertation <u>fully comply with the topic of the dissertation</u> . In particular, the research question “How does the new FET under the ECT need to be crafted to ensure ECT Contracting Parties and investor interests are protected?” well reflects the dissertation topic. The dissertation consists five objectives which further advances five provisions for submissions.
		4.4 All sections and provisions of the dissertation are logically interconnected: 1) <u>are fully interconnected</u> ; 2) the relationship is partial; 3) there is no relationship	All Chapters and sub-chapters are <u>fully and logically interconnected</u> .
		4.5 New solutions proposed by the author (principles, methods) are argued and evaluated in comparison with known solutions:	There is a <u>critical analysis</u> . Author provided a self-analysis of hundreds awards of investment arbitration tribunals, travaux preparatoires

		<p>1) <u>there is a critical analysis;</u> 2) partial analysis; 3) the analysis is not one's own opinions, but quotes from other authors</p>	<p>materials of the ECT and US treaties and books, articles of well-known international academics. Author made self-conclusions and interpretation on each interpretation problems related to FET under Article 10 (1) of the ECT.</p>
5.	The principle of scientific novelty	<p>5.1 Are scientific results and provisions new? 1) <u>completely new;</u> 2) partially new (25-75% are new); 3) not new (less than 25% are new)</p>	<p>Scientific results and provisions submitted for defense are <u>completely new</u>. Proposed provisions and outcomes facilitate to resolve ambiguities in theory and practice of the international investment law.</p>
		<p>5.2 Are the conclusions of the dissertation new? 1) <u>completely new;</u> 2) partially new (25-75% are new); 3) not new (less than 25% are new)</p>	<p>The findings and conclusions of the dissertation are <u>completely new</u>.</p>
		<p>5.3 Technical, technological, economic or management decisions are new and justified: 1) <u>completely new;</u> 2) partially new (25-75% are new); 3) not new (less than 25% are new)</p>	<p>Technical, technological, economic or management decisions are new and justified and <u>completely new</u>.</p>
6.	Substantiation of the main conclusions	<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. In his key findings, author employed very strong theoretical evidence and arguments from the decisions of arbitration tribunal. Author also tested the findings and conclusions using modelling method.</p>
7.	The main provisions submitted for defense	<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</p>

		<p>3) wide 7.5 Is it proven in the article? 1) yes; 2) no</p>	<p>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.</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;</p> <p>This provision is proven in the 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.</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</p>
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			<p>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;</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. 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 but not limited to the protection of the environment, public health, consumer rights, climate-change mitigation, energy security”.</i> <i>the right to regulate as a separate article:</i> <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,</i></p>
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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”

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).

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.

Is the position proven?

1) proven;

			<p>Is it trivial? 2) no</p> <p>Is it new? 1) yes;</p> <p>Level to apply: 3) wide</p> <p>Is it proven in the article? 2) no;</p>
8.	The principle of certainty. Reliability of sources and information provided	8.1 Choice of methodology - justified or methodology described in sufficient detail 1) <u>yes</u> ; 2) no	The choice of methodology is well <u>justified</u> . Author employed four methods such as historical-legal, comparative-legal, legal analysis (descriptive) and legal modeling.
		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) <u>yes</u> ; 2) no	The results of the dissertation work were obtained using <u>modern methods of scientific research</u> and methods of processing.
		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): 1) <u>yes</u> ; 2) no	-
		8.4 Important statements are <u>supported</u> / partially confirmed / not supported by references to relevant and reliable scientific literature	Important statements are <u>significantly supported</u> by references to reliable scientific literature of prominent international and national academics, as well as travaux preparatoires materials, decisions of arbitral tribunals and separate opinions of arbitrators.
		8.5 <u>Used literature sources are sufficient</u> / not sufficient for a literature review	<u>Used literature sources are sufficient</u> . Literature sources contain 438 references.
9	The principle of practical value	9.1 The dissertation has a theoretical value: 1) <u>yes</u> ; 2) no	The dissertation has a <u>theoretical value</u> . Author elevated several main theoretical-scientific problems in International Investment Law and feasible and practicable solution to these problems.

		<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) <u>yes</u>; 2) no</p>	<p>The dissertation has <u>practical importance</u> and there is a <u>high probability of applying the results obtained in practice</u>.</p> <p>In Chapter 3, Author made a solid contribution to practice of International Investment Law. Author demonstrated (through employing legal modelling) the application of the proposed formulations under different regulatory measures in practice.</p> <p>The outcomes of this application showed efficiency of the proposed formulations and suggestions in practice.</p>
		<p>9.3 Are the provisions for practice new?</p> <p>1) <u>completely new</u>; 2) partially new (25-75% are new); 3) not new (less than 25% are new)</p>	<p>The provisions <u>are completely new</u>.</p>
10.	The quality of writing and design	<p>Quality of academic writing:</p> <p>1) <u>high</u>; 2) average; 3) below average; 4) low.</p>	<p>The presented dissertation has a high quality of academic writing and is written in accordance with the academic style.</p>

Conclusion: Considering the above feedback and substantiation, I conclude that the Ph.D. 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” is extremely relevant and important conducted research in International Investment Law and the provisions submitted for defense have a significant scientific value.

B.G. Kuzhatov has done independent scientific research. He has applied a robust methodology, a thorough outline, and has managed to execute and address the relevant topics with a significant amount of research and analysis.

This Ph.D. dissertation deals with a very important and timely issue and contributes to the current debate on the balance between investment protection and the right to regulate in the ECT context and generally in International Investment Law.

B.G. Kuzhatov deserves a Ph.D. degree in 8D04201– “Law.”

Reviewer:

**Ph.D, Associate Professor of the Law Faculty
of the Al-Farabi Kazakh National University**



N.S. Tuyakbayeva

