TRANSNATIONAL BUSINESS LAW JOURNAL
Volume 5, Number 1, February 2024
P-ISSN: 2722-1105 E-ISSN: 2747-0210
DOI: https://doi.org/10.23920/transbuslj.v5i1.1575 Publication Date: 29 February 2024
Publisher: Transnational Business Law Depaertment, Faculty of Law Universitas Padjadjaran

THE ROLE OF TRANSPARENCY STANDARD: EFFECTIVITY IN PROVING THE BREACH OF FAIR AND EQUITABLE TREATMENT

Clara Amanda Musu[*], Purnama Trisnamansyah[**]

ABSTRACT

The existence of agreements in foreign investment does not avoid disputes that occur in foreign investment agreements so there is a dispute resolution mechanism known as investor-state dispute settlement (ISDS). One of the claims often used as the basis for ISDS claims is the Fair and Equitable Treatment (FET) principle. In practice, investors often fail to prove violations due to lacking elements in their proof. The transparency standard is one of the elements that can support investors in proving the violations. In practice, transparency standards are rarely used to prove violations of the FET principle because there are still no clear parameters regarding implementing these standards and what kind of transparency standards can be said to violate the FET principle. The purpose of this study is to determine the role of transparency standards in their position as part of the FET principle and to determine the effectiveness of transparency standards in proving violations of FET in ISDS practices. The research method used in writing this thesis is to take a normative juridical approach by studying and examining secondary data in the form of international arbitration case jurisprudence, bilateral agreements, and international customs. The data is collected through literature studies obtained from primary and secondary data, which are then analyzed qualitatively. Based on the results of this study, it can be concluded that transparency standards have a protective role for investors and host states as an instrument to resolve legal uncertainty about existing decisions and policies and as a basis for analytical considerations to distinguish between legitimate regulatory actions and takeover actions that can indirectly violate the FET principle. Nonetheless, the Tribunal did not explicitly mention the transparency standard, but it was effectively used as a basis for arguments in evidence.

Keywords: Arbitration; Fair and Equitable Treatment; Investment.

I. INTRODUCTION

Foreign investment encourages the states involved to form a policy or agreement to provide protection and legal certainty for the capital to be invested. For investors, this agreement will provide a security when conducting investment activities in the host country. This agreement with the host state will attract investors to invest in their country, indirectly increasing its economic sector. This international agreement with another country is commonly known as an International Investment Agreement ("**IIA**"). IIA is an investment agreement between countries that contains a series of regulations and commitments in regulating, providing certainty, and protecting foreign investors between the parties. IIA itself can be made by more than two countries known as Bilateral Investment Treaty ("**BIT**"). The purpose of a BIT is to provide promotion and protection of investments from one state party in the territory of another state party.[1]

[*] Faculty of Law Universitas Padjadjaran, Jalan Ir. Soekarno KM. 21 Jatinangor, Kab. Sumedang, Indonesia. email: clara19003@mail.unpad.ac.id.
[**] Faculty of Law Universitas Padjadjaran, Jalan Ir. Soekarno KM. 21 Jatinangor, Kab. Sumedang, Indonesia. email: purnama.trisnamansyah@unpad.ac.id.
[1] M. Houde dan K. Yannaca-Small, "Relationship between International Investment Agreements", *OECD Working Papers on International Investment*, OECD Publishing, No. 1, 2004, p. 3.

The existence of the agreement, however, does not avoid conflicts or disputes between the parties. Therefore, in terms of disputes that occur in international investment, there is a dispute resolution mechanism known as investor-state dispute settlement ("**ISDS**"). ISDS is a dispute resolution mechanism between the investor and the host state for violating international investment law. One of the claims that is often used as the basis for ISDS claims is the principle of Fair and Equitable Treatment ("**FET**").[2] The last few decades have seen an increase in lawsuits against host states in ISDS forums that use the FET violation standard.[3] FET is a standard that protects foreign investors from governmental or administrative actions that may be detrimental to the course of investment made in the host country. Interpretations of the FET principle are evolving based on expert opinion and supported by court and arbitration awards.[4] Numerous tribunals in investment arbitration have established different circumstances leading to a breach of FET standards. At this stage in the FET requirement's development, it makes sense to point out particular categories of dishonorable state behavior that would violate the norm. Five standard elements are used as a reference for the Tribunal in deciding the cases for the fulfillment of the FET principle, namely: investor's legitimate expectation, transparency, due process, acting in good faith, and freedom from coercion and harassment.[5] Investors then use these elements to submit a claim to prove a violation of the FET principle by the host states.

In some ISDS cases against violations of the fair and equitable treatment principle, investors claim the host state using the most popular standard, the legitimate expectation standard.[6] However, investors in some cases failed to prove the violation based on a lack of reasons and elements of proof and often based the lawsuit only on certain elements. On the other hand, other elements of the fair and equitable treatment principle can support investors in proving the violations of the standard, namely using the transparency standard. The transparency standard itself is an important element in a legal process, where investors in investing their capital depend on the transparency standard of the legal framework and processes that must be followed in relation to their investment in the host state.

In national, regional and international legal systems transparency has been given a great deal of attention as it continues to gain importance.[7] However, the problem is that parties rarely use transparency standards as the basis for arguments to prove the violations of the fair and equitable treatment principle. This is because there are still no clear criteria regarding the implementation of the transparency standard, along with what kind of transparency standard can be said to violate the fair

---

[2] United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment: Series on Issues in International Investment Agreements II*, New York and Geneva: United Nations, 2012, hlm. 10; Rudolf Dolzer, "FET: A Key Standard in Investment Treaty." *The International Lawyer*, Vol. 39, No. 1, 2005, p. 964.

[3] Sefrani, "FET Standard in International Investment Agreements." Yustisia, Vol. 7 No. 1, 2018, hlm. 4; Stephan W Schill, "FET Under Investment Treaties as an Embodiment the Rule of Law." IILJ Working Paper 2006/6, Global Administrative Law Series, NYU Law School, p. 1.

[4] Rudolf Dolzer dan Christoph Schreuer, *Principles of International Investment Law*, Oxford: Oxford University Press, 2008, p. 119

[5] Rudolf Dolzer and Christoph Schreuer, *Principle on International Investment Law*, Second Edition, Oxford University Press, 2012, p. 145.

[6] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 2003, ¶154; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 2006, ¶131, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 2007, ¶331; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 2007, ¶260; *National Grid PLC v. The Argentine Republic*, UNCITRAL, Award, 2008, ¶166; *Cube Infrastructure Fund SICAV and others v Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Liability, 2019, ¶393; *UAB E energija (Lithuania) v Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 2017, ¶835; *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7, Final Award, 2020, ¶1786*; ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 2020, ¶520.

[7] Nikolay A. Ouzounov, "Facing the Challenge: Corruption State Capture and the Role of Multinational Business", *UIC Law Review*, Vol. 37, 2004, p. 1998-1999.

and equitable treatment standard. As regards the interpretation of the obligation or even the formulation of substantive obligations, the question remains as to the extent to which the Tribunal applied this standard. The existence of this standard is quite controversial, but over time, the transparency standard has been increasingly recognized by arbitral tribunals as one of the principles in FET. With the problems that have been described, the author chooses the title "THE ROLE OF TRANSPARENCY STANDARD: EFFECTIVITY IN PROVING THE BREACH OF FAIR AND EQUITABLE TREATMENT**".**

II. RESEARCH METHODS

The authors in writing this article will use a normative juridical method that is analytically descriptive, supported by a literature study and case approach. This normative juridical approach method is a legal research method carried out by examining even literature or secondary data.[8] The research will conduct literature studies and international customs, and also be supported by theories according to scholars who have relevance to the writing topic in formulating the effectiveness of transparency standards as part of the fair and equitable treatment principle.

The author will also use the case approach method by analyzing the decisions on cases of international arbitration disputes, in formulating the success of proving violations of FET using transparency standards in ISDS. It is also assisted by examining the principles of foreign investment law and applicable international law, customary international law, and relevant international investment treaties. This method is used to explore existing concepts and theories to create a clear understanding of how they are applied in practice and legal decisions.[9] The author will collect data from literature studies obtained from secondary data in the form of legal theories regarding FET sourced from books, journals, and articles.

III. DISCUSSION AND RESULT

A. Criteria for Fulfilling Transparency in the Fair and Equitable Treatment Standard

In practice, transparency in the context of FET can be used in arbitration courts in two ways. First, transparency as an autonomous obligation that can be determined separately from the obligation of a State in respect of fair and other equal treatment. Second, by considering transparency as an element to be considered in assessing whether a State has violated the principle of FET without the possibility if punishing a State for violating transparency itself. The standard of transparency in relation to the FET principle emphasizes openness and clarity in the procedures and legal framework of the host state. The assessment of claims for the violation of transparency must be seen based on the factual circumstances of each case. In deciding on a case, the Tribunal must be able to see a balance between the rights and the obligations of the investor and the host state, which must not impose an excessive burden on the State and not exclude the rights of the investors. As for the example, in the context of state documents, states have particular policies on disclosing documents protected by their confidentiality. On the other hand, investors have the right to know all documents in relation to their investment in the host state to be able to conduct due diligence in relation to the investment they are conducting. There are still no particular specifications for state actions that can be considered transparent since the assessment of transparency provision is carried out on a case-by-case basis.

[8] Soerjono Soekanto dan Sri Mamudjo, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Jakarta: Raja Grafindo, 1995, p. 47.
[9] Dr. Junaedi Efendi, S.H.I., Prof. Dr. Johnny Ibrahim, S.H., S.E., M.M., M. Hum, *Metode Penelitian Hukum: Normatif dan Empiris*, Depok: Prenada Media Group, 2016, p. 138.

However, by referring from several ISDS cases, the arbitral tribunals stated that there are some standards or elements in assessing the transparency requirements that must be met by the host state and investor.

For instance, in order to be transparent, a general requirement of the public documents and regulations should be accessible. All information related to the investors' investment should be freely accessible so that the investors can predict the policies related to their investment that will be issued by the government later. State should ensure that the investors know the justifying regulations so that they can anticipate the manner in which they are to be applied. Transparency meant ensuring that the state informed any and all rules and regulations that will govern the investments, as well as the goals of the relevant policies and administrative practices or directives, for investors to be able to plan their investments and comply with such regulations. In Tecmed case, the Tribunal stated that an incidental statement by the government authority cannot be justified as a transparent statement. It has to be explicit, including a clear indication from the host state regarding the intention of the measures.

Moreover, changes in laws or regulations must be foreseeable to foreign investors which also must exercise due diligence in this regard. All relevant legal requirements that have been made, or intended to be made, should be capable of being readily known to all affected investors. Including the decision-making process is clear so that investors are able to know who decides and when. Host states should be able to ensure that there should be no room for doubt or uncertainty on such matters. Once the authority becomes aware of any cope of misunderstanding or confusion, it is the duty to ensure that the correct position is promptly determined and clearly stated so that the investors can proceed in accordance with all relevant laws. Lastly, transparency includes an obligation to notify any measures targeted at the investors, accompanied by clear procedures and in an appropriate manner. The minimum requirement for fair and equitable treatment requires investors to be informed in advance that the decision to take over the investment has been through consideration by the state authorities. In conducting a measure, investors should be given a reasonable opportunity to engage in a dialogue with the government in order to find an appropriate solution.

B. The Role of the Transparency Standard as Part of the Fair and Equitable Treatment

The core of investment is the balance between the rights and obligations of the host state and the investor. The balance can be expressed in the protection of the states' right to regulate and the obligation to give fair and equitable treatment towards the investors. Fair and equitable treatment serves to minimize the risks that may arise in regard to the investment. The FET principle is a fundamental clause since investment is based on the trust and security of the investors in investing their assets in a state. Trust and security are built on openness in terms of policies and rules in force at the host state. All legal activities in the host state are based on a regulatory framework, thus, the clarity of the rules can provide a sense of security to investors in terms of how the investor can carry out their investments in accordance with the rules in force. A predictable framework of rules in which investment will be carried out significantly impacts the business decisions of potential investors. A decision-making process needed a comprehensive legal framework accessible to the investors. Especially in regard to the future excessive legal regulations that can result in sanctions against investors if it is proven breached. Transparency standards play an important role for investors in conducting due diligence before making their investment decisions, which requires information regarding all requirements related to their future business and investment.

The United Nations Conference on Trade and Development (UNCTAD) issued a poll on BITs in the mid-1990s, reporting broad developments towards the clauses in the BIT, which recognized the linkage of transparency and predictability to capital raising, stating that foreign investors were more likely to invest capital in a country when they were convinced that the state was able to ensure the law

that would regulate their capital raisings.[10] The situation then related to the standard of legitimate expectation. The legitimate expectation is determined by the stability, predictability, and legal framework applied in the host state, also supported by the existence of specific treatment. The specific treatment that investors have is based on a regulatory framework. The situation then related to the standard of legitimate expectation since legitimate expectations are determined by the stability and predictability, legal framework applied in the host state, and based on the existence of specific treatment given by the state.[11] The specific treatment that the investor could expect is based on a regulatory framework. Investors base their expectations on the legal and general regulatory framework that applies when they made the investment. When investor in their due diligence could predict the legal situation in the state where the investment was made, then the investor can have a legitimate expectation. Here, transparency standard ensure that a state's legal documents are accessible towards the investor, which will improve predictability towards the investment. The accessibility of the legal documents that related to the investment makes investors assured to invest an asset in a state.

The investor can feel protected in carrying out their investment by conducting due diligence. Therefore, in the context of international investment law, expressions of transparency standards are found in various agreements, such as the North American Free Trade Agreement (NAFTA),[12] the Energy Charter Treaty (ECT),[13] and numerous bilateral investment treaties or BITs.[14] BIT has become one of the main sources in its relation between investors and the host state. BIT binds between the rights and obligations in facilitating the entry of investment in the host state. Investors in conducting the investment adhere to the BIT for its protection, and the state relies on the BIT as a measure of protection that has to be met.

The previous BIT, which only focused only on the FET clause, has now begun to include the guarantee of transparency in the BIT's framework as a part of the FET clause. For instance, Article 11(7) of the United State Model BIT used until the end of 2004 contained: "the obligation to make public all laws, regulations, administrative practices and procedures, and adjudicatory deicisions that pertain to or affect investment".[15] While the new 2004 United States Model BIT goes further by basically incorporating the complete investment chapter provisions of free trade agreements concluded by the United States since 2002. Titled "Transparency" in Article 11 explicitly introduces a detailed obligation for the parties to provide transparency and participate in the entire process that may affect the investment.[16]

Regardless of the existence of the BITs, investors should also aware that exercising an investment does not exclude the possibility of risk, both politically and economically, including the political change in the legal framework of a state. It cannot be ruled out that the state has sovereignty in regulating its country and is responsible for protecting and defending the state from difficulties. In the case of a violation of the FET principle, it is necessary to look at the situation at the time the measure was enacted by the state, and the situation of the investors at the moment the state enacted or made the decision.

Violation of the FET principles can be avoided if there is an openness in the decision-making taken by the government in the process of changing the framework to the investors. This effort can simultaneously avoid any arbitrary measure by the state, which is also one of the standards of FET that must be met. Government openness could be shown by being able to explain a rational purpose that was based on reason or fact, and not on prejudice or bias. To this extent, investors can predict what steps can be taken to secure their investments, and keep an eye on the situation behind the

[10] UNCTAD, Bilateral Investment Treaties in the Mid-1990s, 1998.
[11] Roland Klager, *Fair and Equitable Treatment in International Investment Law*, New York: Cambridge University Press, p. 163.
[12] North American Free Trade Agreement, Dec. 17, 1992, Canada-Mexico-United State, 32 I.L.M. 289.
[13] Energy Charter Treaty, Dec. 17, 1994, 33 I.L.M. 381
[14] Rudolf Dolzer amd Margrete Stevens, "Bilateral Investment Treaties", *American Journal of International Law, 90(3)*, 1995; Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries", *The International Lawyer, 24(3)*, 1990, p. 655.
[15] 2004 Model Bilateral Investment Treaty.
[16] Article 11 "*Transparency*", 2004 Model BIT, regulates about (1) contact points, (2) publication, (3) provision of information, dan (4) administrative proceedings.

changes. Thus, it results in a decision that keeps acknowledging states' interest as well as the investor's investment.

Consequently, transparency can be seen as an instrument to resolve legal uncertainties that is closely related to the burden of proof in the proceedings. In regards to procedural, legal uncertainty must not result in losses for foreign investors who are unfamiliar with the legal and political environment of the host state. Thus, it is in accordance with the due process and denial of justice standard, where there must be a clear procedure and not overlook the existing legal processes. Furthermore, transparency has proved to be very useful in the context of the issue of international investment law, namely as an analytical tool to distinguish between a legitimate regulatory action and indirect expropriation that may violate the FET principle.[17] It does not only have a role to protect the investors, transparency can also provide a greater degree of certainty to states that have to decide on the objectives of the existing policies.

Transparency standard may not solve the entire problem, however, it can provide an essential indication that when a state considers and eventually takes regulatory measures that could cause an investment to suffer losses, in any case, the process carried out must be transparent and predictable, so it allows the investors to participate in the decision-making process, protect their rights, and consider the consequences of the decision on their investment appropriately. State must show their good faith by adhering to the transparency standard and complying with other provisions concerning the impact and duration of such regulations, enforcing them in a non-discriminatory manner, and not interfering with the legitimate expectation in favour of the investment. This provision then becomes no disproportionate burden of proof toward the host state, but instead serves as proof that the measure taken was adopted in a good faith.

Transparency as a part of the FET principle can be one of the basis to ensure fair and equitable treatment. It proved that the transparency of the state is necessary in meeting the other FET's standards. Thus, the standard of transparency and the other standards of FET have a continuity that can complement and strengthen each other.

C. Effectiveness of Transparency Standard in Proving the Violation of Fair and Equitable Treatment in Investor-State Dispute Settlement Practice.

1. Metalclad Corporation v. The United Mexican States[18]

In particular, the Metalclad case is important not only for its transparency principle but also because it has been one of the most well-known cases to date in a contested NAFTA State investor process.[19] The NAFTA Free Trade Committee has provided an "interpretative note" on the scope of Article 1105, taking into account that a final NAFTA award had been referred to Canada's Supreme Court for review. In particular, the Metalclad case is important not only for its transparency principle but also because it has been one of the most well-known cases to date in a contested NAFTA State investor process. The NAFTA Free Trade Committee has provided an "interpretative note" on the scope of Article 1105, taking into account that a final NAFTA award had been referred to Canada's Supreme Court for review. Initially owned by Mexican nationals, Confinamiento Tecnico de Residuos Industriales, S.A. de C.V. ("**COTERIN**") built and operated a hazardous waste transfer station in La Pedrera, a valley within the municipality of Guadalcazar ("**Municipality**") in the State of San Luis

[17] Vicki Been and Joel C. Beauvais, "The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine", *New York University Law Review,* Vol. 78, No. 1, 2003, p. 30; Barry Appleton, "Regulatory Takings: The International Law Perspective", *New York University Law Review* Journal, Vol. 11, 2002, p. 35.

[18] Metalclad Corporation vs. The United Mexican States, ICSID Case No. ARB (AF)/97/1, Award, August 2000 (**"Metaclad, Award**").

[19] Kelly M. Mann, "United Mexican States v. Metalclad Corporation: The North American Free Trade Agreement Provides Powerful Private Right of Action to Foreign Investors*", The Urban Lawyer*, Vol. 35, No. 4, 2003, p. 697-698.

Potosi ("**State**").[20] The fact that COTERIN was initially operating under the authority of the Federal Government, while the municipality did not apply for any licence to build and operate a waste transfer station is also important.[21] However, in 1990, the government ordered the closure of the site when COTERIN without prior treatment or separation deposited 20,000 tons of waste rather than transferring the waste.[22] Not long after, the company unsuccessfully applied for a permit to the Municipality to build a hazardous landfill at the site. Eventually, in 1992, a newly elected municipal government came into office and established the original permit refusal.[23] However, in 1993, COTERIN was granted three permits to construct the landfill: a land use permit for a landfill was issued by the State, and two permits were granted for the construction and operation of a hazardous waste landfill at the site by the National Institute of Ecology, a federal environmental agency that was responsible for issuing environmental impact authorizations.[24]

At that time, disposing of and treating waste was one of Mexico's most developed priorities, but it also held great promise for more capital, revenue, and economic growth. International investors were, therefore, eager to get involved in the Mexican waste disposal industry. Consequently, by means of the Eco-Metalclad Corporation (ECO), one of its wholly-owned United States subsidiaries, Metalclad entered into a purchase option agreement with COTERIN.[25] According to that agreement, the purchase was concluded only if COTERIN had obtained a municipal permit or in case of an unambiguous finding by Mexico's court that there is no need for it. It is undisputed that the federal representatives informed Metalclad that all required permits had already been granted, with the exception of one that would be obtained within a year.[26] Despite the fact that neither of the two initial conditions had been formally satisfied, Metalclad went ahead and completed the purchase and started construction on the landfill because they relied on these assurances and thought the justification for the conditions was met. It should be noted that during the construction, Metalclad provided both state and federal officials with progress reports and allowed them to inspect the site.[27] The municipality issued a stop order due to the lack of a municipal permit after significant progress in the construction of the building at the end of 1994.[28] Even after assuring the company that "the Muncipality lacked any basis for denying the construction permit" and that it "would issue the permit as a matter of course," the federal government advised Metalclad to apply for a local permit "as a matter courtesy to local officials."[29]

In March of 1995, Metalclad finally completed the landfill's construction. It is purported that the State Coordinator for Ecology met with the Muncipality's mayor the day before the landfill's official opening, pressuring him to plan a demonstration against the location in order to disrupt the event.[30] The planned opening party was substantially disrupted by one hundred paid protestors, resulting in serious disturbances and preventing invited dignitaries from entering the facilities for

[20] Metalclad, ¶¶28-29.
[21] *Ibid.*
[22] United Mexican States v. Metalclad Corp, 2001, 89 B.C.L.R.3d 359 (Can.) (No. L002904), ¶¶5,6. ("**Metalclad, Appeal**").
[23] *Ibid.*
[24] Metalclad, Award, ¶¶29,31,35.
[25] *Ibid*, ¶30.
[26] *Ibid*, ¶33.
[27] *Ibid*, ¶39.
[28] *Ibid*, ¶40.
[29] *Ibid*, ¶41.
[30] *Ibid*, ¶46.

several hours.[31] Consequently, the landfill never opened and never has opened.[32] However, Metalclad went through several more months of negotiations, had the previous environmental impact audit reviewed and confirmed by outside experts, and kept getting federal permits and official declarations that it complied with all applicable laws.[33] Yet, the Municipality remained firm in its stance, formally rejecting Metalclad's application for a permit in December 1995, thirteen months after the initial request.[34]

The denial is noteworthy for several reasons. Not only had the federal authorities never seen considered the need for a local permit, but instead, they consistently reassured Metalclad that it had all the necessary authorization – "there was also no evidence that the Municipality ever required or issued a municipal construction permit for any other construction project in Guadalcazar…".[35] Furthermore, it should come as no surprise that "there was no evidence of an established administrative process with respect to municipal construction permits in the Municipality…".[36] Notwithstanding the lack of a regular administrative procedure alone strongly implies that the Municipality lacked the authority to control construction for environmental reasons, it is unquestionably insufficient justification for the delay of a full year in the rejection of the application.[37] This conclusion also does not mitigate the fact that Metalclad was not invited to or informed about the Town Council meeting where its application was considered and ultimately rejected.[38] Subsequently, Metalclad finally initiated arbitration proceedings against the Mexican government under Chapter 11 of NAFTA.

Metalclad began the construction of the landfill relying on the representations of the federal government.[39] The contradictory of government's statement regarding the necessity of a local permit, the Tribunal held that "the absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA."[40] Moreover, the Tribunal also criticized the lack of opportunity for the representative of Metalclad to address the Town Hall meeting and the immaterial reasons for the permit's denial.[41] The Tribunal therefore concluded that Mexico had failed to provide a transparent and predictable framework for Metalclad's business planning and investment.[42] In these circumstances, it is clear that the investor of a Party expecting fair and equitable treatment under NAFTA does not have an orderly process or timeliness in its response.

Thus, in interpreting the applicable standard of fair and equitable treatment, the Metalclad case gave transparency a very outstanding role. As a result, the Tribunal based at least some of its decisions on the lack of predictability and clarity surrounding the requirements for obtaining an additional permit. Conclusively, the Tribunal concluded that Mexico had disregarded its duty under NAFTA's article 1105(1) to treat all parties fairly and equally in conformity with international law.

---

[31] *Ibid*.
[32] Metalclad, Appeal, ¶11.
[33] Metalclad, Award, ¶¶47,48,57; Todd Weiler, *Good Faith and Regulatory Transparency: The Story of* Metalclad v. Mexico, *in* International Investment Law and Arbitration 701, 710 (Todd Weiler ed., 2005).
[34] Metalclad, Award, ¶¶47-50.
[35] *Ibid*, ¶52.
[36] *Ibid*.
[37] *Ibid*, ¶50.
[38] *Ibid*, ¶54.
[39] *Ibid*, ¶89.
[40] *Ibid*, ¶88.
[41] *Ibid*, ¶¶91-93.
[42] *Ibid*, ¶99.

2. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States[43]

Similar to Metalclad, where a dispute arose in the context of hazardous waste locations in Mexico, in 2003, there was a case between Mexico and Tecmed. In this case, Tecmed had been operating the site for one year before the Mexican government refused to reissue its license, citing violations by Tecmed. Tecmed in its operations allegedly violated several provisions in the applicable licenses and regulations regarding the operation of the landfill and the transportation of waste to and from other facilities in Mexico. This situation led community groups to oppose the continued operation of the landfill. They also argued that the location of the landfill was too close to the population center of Hermosillo, which is less than 25 kilometres from the city center, as stipulated in the Mexican regulations in force after the landfill was built. Based on this situation, Tecmed, municipal authorities, and the federal state in 1997 explored the option of relocating the landfill, and Tecmed committed to providing the necessary funds for this move. The INE granted Tecmed's application to renew the licence for a further period of November 1998 after its first year in landfill operations. However, in November 1998 INE rejected Tecmed's request for a second renewal and ordered it to close down its establishment. Here, Tecmed alleged that the refusal to reissue the license was not motivated by clear legal considerations but by administrative changes following the 1997 elections in the municipality where the waste landfill was located.[44] Specifically, the Mexican authorities acted in a contradictory manner in assuring Tecmed that they could operate the landfill until the relocation and that the new land would be granted along with the permission to operate the new landfill, when in the end, Mexico itself denied the license renewal.

Consistent action by the host country here should be demonstrated by not arbitrarily withdrawing decisions on licenses that have been issued by the government. Contradictory, ambiguous and uncertain actions in the administrative process then prevent investors from taking action against the permanent loss of their license, which is key to their investment activities. The Mexican government does not meet the transparency standard given that its actions lack sufficient clarity and an explicit and clear warning that the license required for operation will be revoked.

In such a case, the investor expects that in accordance with the functions assigned to those instruments, the host country will apply the legal instruments governing his or her actions and investments. If Mexican law exists to protect and allow for the change of an indefinite license to one that must be renewed annually, then this regulation is not implemented transparently, as the regulation does not clearly state that the required license is valid for an indefinite period of time. The ability of an investor to evaluate the treatment and protection afforded him or her by a host country, as well as its compliance with the principle of fairness and equal treatment, will be affected if he or she fails to comply with that pattern of behaviour for foreign investors or their investments. The Mexican government does not meet the transparency standard given that its actions lack sufficient clarity and an explicit and clear warning that the necessary operating license will be revoked.

The obligation to provide fair and equitable treatment in BITs must be carried out based on the principle of good faith established by international law.[45] The treatment of foreign investment shall be provided by the Parties without prejudice to the basic expectations of investors. Foreign investors naturally expect host countries to act in a consistent, ambiguity-free, and completely transparent manner in relation to foreign investment, so that investors can prepare in advance any and all policies

[43] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, May 2003. (**"Tecmed**").
[44] *Ibid*, ¶42.
[45] *Ibid*, ¶154.

and legislation that will govern their investment, as well as policy objectives and relevant administrative practices or directives, so that investors can plan their investment and comply with the regulations.[46]

The Tribunal proceeded to declare that the actions taken by the Mexican authorities in this particular case did not provide "an explicit, transparent and clear warning" that the license that was required would be revoked.[47] As a result, the investor was unable to take action to prevent losing his permit due to "contradictions and lack of transparency".[48] The Tecmed case was judged to be stronger and clearer in terms of due process and good faith rather than the Metalclad's decision, however, it still had a similar approach to the interpretation of the fair and equitable treatment obligation. This case reaffirmed that a predictable transparency component that includes clear reasons justifying a policy is at the core of effective investment protection.

3. Emilio Agustín Maffezini v The Kingdom of Spain[49]

In 1989 Emilio Agustín Maffezini ("**Maffezini**"), an Argentine national, decided to start the production of various chemical products in Galicia, Spain, by founding and investing in a company called Emilio A. Maffezini S. A. ("**EAMSA**").[50] Maffezini owns 70% of the share capital of EAMSA, and the remaining 30% is owned by Sociedad para el Desarrolo Industrial de Galicia ("**SODIGA**") which is a Spanish public entity. SODIGA also provided a loan of 40 million Spanish Pesetas to the newly established company, at a preferential interest rate, which would apply for at least the first year.[51] The Spanish Ministry of Finance and Xunta de Galicia subsequently requested and approved various subsidies.

In its early developmental stage, EAMSA encountered financial difficulties and needed additional loans and subsidies. Efforts were made, such as approving a capital increase, requesting a new loan, and eventually requesting additional subsidies, but these efforts did not yield any results. Maffezini made a transfer of 30 million Spanish Pesetas from his personal account to EAMSA. This transfer was ordered by SODIGA's representative at EAMSA, acting under the general authority of Maffezini.[52] EASMA's difficulties have continued until Maffezini shut down all construction activities and fired all employees, as well as attempted to acquire the assets of EAMSA from SODIGO.[53] Maffezini appealed to the ICSID arbitration panel after the failure of the transaction, alleging that EAMSA transferred 30 million Peseta without having obtained a special authorisation from SODIGO and claiming that its incorrect advice had been the reason for the project's failure.

In this case, the violation of the FET principle focused on the unclear facts surrounding the transfer of money from Mr. Maffezini's personal account to EAMSA. SODIGA representatives did not consult with Mr. Maffezini as the account holder, and only asked the President of SODIGA for permission to make the transfer. There was a lack of transparency in the fact that the transaction of substantial funds was not done openly, which in general, in the case of a loan of funds should be done with an agreement in the form of a loan agreement between the lender and the recipient. The Tribunal

[46] *Ibid*.
[47] *Ibid*, ¶160.
[48] *Ibid*, ¶162.
[49] Emilio Agustíin Maffezini v The Kingdom of Spain, ICSID Case No. ARB/97/7, Award, November 2000 ("**Maffezini**").
[50] *Ibid*, ¶39.
[51] *Ibid*.
[52] *Ibid*, ¶75.
[53] *Ibid*, ¶43.

concluded that the commitment of Spain to ensure fair and equitable treatment for investors under Article 4(i) of the BIT is incompatible with a lack of transparency in relation to the loan transaction.[54]

While the tribunal in Maffezini did not elaborate on what precisely constitutes a "lack of transparency", the decision in this case at least serves as another indicator that the connection between non-transparency action by states and the obligation to provide fair and equitable treatment is increasingly recognized internationally. In this case, transparency was again used to ensure that investors have the right to know what policies are in place, as well as the reasons for them.

4. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador[55]

Occidental Exploration and Production Company ("**OEPC**") is a United States investor that provides oil exploration services to Petroecuador, a state-owned company responsible for planning, organizing and operating oil exploration and exploitation in Ecuador. During the 1980s and 1990s, OEPC regularly paid the value-added tax ("**VAT**") on local acquisitions, and it was reimbursed by Petroecuador. However, in 1999, the two companies changed their contractual agreement, transforming OEPC into an equity participant in charge of paying VAT and then retrieving any associated refunds. At the time of the negotiations for the new contract, however, Ecuador's tax regulations were changing.

Consequently, in an attempt to protect the company from unfavourable changes, OEPC included a clause requiring future amendments to "reestablish the economy" of the original agreement and beforehand inquired with Ecuador's tax authority, Servicio de Rentas Internas ("**SRI**"), regarding whether the import of goods under the new contract would result in VAT liability.[56] The SRI acknowledged that OEPC was obliged to pay VAT, but did not refer to the possibility of a refund. OEPC, on the other hand, had requested and obtained an initial refund of VAT from SRI as soon as a new contract was concluded. [57]At the end of the day, however, the tax authority reversed its position and claimed that OEPC was not entitled to additional refunds under the relevant Ecuadorian tax law, since it had already been reimbursed through its contractual equity participation with Petroecuador.[58] OEPC then resorted to arbitration under the US-Ecuador BIT.

In its claim for fair and equitable treatment, the Tribunal refers to the preamble of the BIT, which states that such treatment is desirable for the purpose of maintaining a stable and efficient use of economic resources, and concludes that the stability of the legal system and the business framework is an essential element of fair and equitable treatment.[59] Furthermore, the OEPC's reply to the consultation was found by the Tribunal to be unsatisfactory and vague, emphasizing that Ecuador's tax laws had been amended without clarity as to their meaning and scope, and its practices and arrangements were also inconsistent with these changes.[60] The Tribunal explained that the non-transparent amendment of the SRI and the application of the tax law did not provide the stability mandated by the obligation to provide fair and equitable treatment, thus the tribunal ruled that Ecuador violated the fair and equitable treatment provision in the BIT.[61]

---

[54] *Ibid*, ¶83.
[55] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, October 2012 ("***Occidental***").
[56] *Ibid*, ¶¶102-105.
[57] *Ibid*, ¶¶ 103-108.
[58] *Ibid*, ¶¶ 32-34.
[59] *Ibid*, ¶183.
[60] *Ibid*, ¶184.
[61] *Ibid*, ¶¶185-187.

It was observed that "regulatory uncertainty" resulting from government decisions is generally considered acceptable as one of the violations of the fair and equitable treatment principle. This has led some to interpret the terms used by the tribunal to suggest that changes in the regulatory framework during the investment period may indeed violate the fair and equitable treatment, regardless of the intentions of the government itself. While the structure and wording of the award may leave room for wide interpretation, especially in light of the emphasis on clarity and precedent provided by the Tribunal, what needs to be underlined here is that the obligation to provide fair and equitable treatment requires a stable and open attitude from the government. This concept of stability is demonstrated by the absence of arbitrariness and changes that cannot be predicted in advance, especially by investors who will be affected by these changes or the measures. Predictability when linked to stability can indicate that a legal framework that remains transparent and predictable to investors will remain stable even with amendments towards the rules, as far as the proper application of the respective rules is concerned.

It should be underlined that the obligation not to change the legal environment in the realm of investment should not be understood as a prohibition to make changes to all laws relating to investment. Rather, it should be construed as a requirement that the business environment must be able to maintain the obligation to be transparent and predictable, especially in terms of rules that will intersect with investment activities carried out by investors. Thus, the Occidental award is one such case that supports the proposition that the obligation to comply with fair and equitable treatment principles should be interpreted with a view to transparency standards.

Based on the above cases, there is a development in the application of transparency standards from year to year as evidence of violations of the FET principle in resolving investment disputes between investors and host countries. One case after another becomes a reference for the court in interpreting the violation of the FET principle, even with different dispute backgrounds. The development of transparency standards has proven to be effective in measuring fair and equal treatment. The more specific the transparency compliance standards used, the easier it will be to determine whether or not there has been a violation of the FET principle.

IV. CONCLUSIONS

Based on the following explanation, it can be concluded that in order to act in a transparent manner: (1) state must give a notice towards the investor by disclosing any and all rules that will govern its investment, (2) the notice given should be stated explicitly and clear, and (3) it should be capable of being readily known by all the affected investors, so there is no room for uncertainty or confusion.

Transparency standard is the basis of investment activities, especially in terms of fulfilling the obligation to provide and obtain fair and equal treatment. In its position, the transparency standard plays a role starting from the moment the investor determines to invest in a country, in the implementation of investment activities, until it becomes the basis of a claim if there will be a dispute in the future. Transparency standards have a protective role for investors and host states as an instrument to resolve legal uncertainty about existing decisions and policies and as a basis for analytical considerations to distinguish between legitimate regulatory actions and takeover actions that can indirectly violate the FET principle.

Nonetheless, the transparency standard is not explicitly mentioned in all of the opinions rendered by the Tribunal in investment disputes between investors and the state; its use often evolves with new interpretations of the case. Elements of the transparency standard have proven effective as a

basis for evidentiary arguments in the proceedings. Using the transparency standard can strengthen a claim for a host state's violation of the fair and equitable treatment principle.

REFERENCE

Books

Dr. Junaedi Efendi, S.H.I., Prof. Dr. Johnny Ibrahim, S.H., S.E., M.M., M.Hum, *Metode Penelitian Hukum: Normatif dan Empiris*, Depok: Prenada Media Group, 2016

United Nations Conference on Trade and Development (UNCTAD), Bilateral Investment Treaties in the Mid-1990s, New York: United Nations, 1998.

United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment: Series on Issues in International Investment Agreements II*, New York and Geneva: United Nations, 2012.

Roland Klager, *Fair and Equitable Treatment in International Investment Law*, New York: Cambridge University Press.

Rudolf Dolzer dan Christoph Schreuer, *Principles of International Investment Law*, Oxford: Oxford University Press, 2008.

Soerjono Soekanto dan Sri Mamudjo, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Jakarta: Raja Grafindo, 1995.

Journals

Barry Appleton, "Regulatory Takings: The International Law Perspective", *New York University Law Review* Journal, Vol. 11, 2002.

C. S. Zoellner, "Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law", *Michigan Journal of International Law*, Vol. 27, 2006.

Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries", *The International Lawyer, 24(3)*, 1990.

Kelly M. Mann, "United Mexican States v. Metalclad Corporation: The North American Free Trade Agreement Provides Powerful Private Right of Action to Foreign Investors*", The Urban Lawyer*, Vol. 35, No. 4, 2003.

M. Houde dan K. Yannaca-Small, "Relationship between International Investment Agreements", *OECD Working Papers on International Investment*, OECD Publishing, No. 1, 2004.

Nikolay A. Ouzounov, "Facing the Challenge: Corruption State Capture and the Role of Multinational Business", *UIC Law Review*, Vol. 37, 2004

Rudolf Dolzer, "FET: A Key Standard in Investment Treaty." *The International Lawyer*, Vol. 39, No. 1, 2005.

Rudolf Dolzer and Margrete Stevens, "Bilateral Investment Treaties", *American Journal of International Law, 90(3)*, 1995.

Sefrani, "FET Standard in International Investment Agreements." Yustisia, Vol. 7 No. 1, 2018.

Stephan W Schill, "FET Under Investment Treaties as an Embodiment the Rule of Law." IILJ Working Paper 2006/6, Global Administrative Law Series, NYU Law School.

Vicki Been and Joel C. Beauvais, "The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine", *New York University Law Review*, Vol. 78, No. 1, 2003.

Laws and Regulations

Emilio Agustíin Maffezini v The Kingdom of Spain, ICSID Case No. ARB/97/7, Award, November 2000.

Metalclad Corporation vs. The United Mexican States, ICSID Case No. ARB (AF)/97/1, Award, August 2000.

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, October 2012.

Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, May 2003.

Energy Charter Treaty, Dec. 17, 1994, 33 I.L.M. 381

North American Free Trade Agreement, Dec. 17, 1992, Canada-Mexico-United State

United Mexican States v. Metalclad Corp, 2001, 89 B.C.L.R.3d 359 (Can.) (No. L002904)

2004 Model Bilateral Investment Treaty.