Brexit, the City and options for ISDS

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Contents

Abstract

This paper explores how the Fair and Equitable Treatment standard and the idea of protecting the investor's legitimate expectations could form the basis of a claim against the UK government for the consequences of Brexit. The discussion operationalises this through the presentation of a case study. We consider the position of foreign financial firms that established themselves in the City of London to take advantage of the UK's much lauded position as the centre of European finance and investigate their options in pursuing a claim through investment treaty arbitration. The paper concludes that it is possible for an investor to win such a case, within a narrow band of facts.

1. Introduction

The process of the United Kingdom's (UK) departure from the European Union (EU), commonly referred to as Brexit, entails a significant degree of uncertainty for the financial industry. While the UK economy has proved more resilient than expected[2] since the 2016 membership referendum[3], a

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[2] Angus Armstrong, Katerina Lisenkova, Simon Lloyd, 'The EU Referendum and Fiscan Impact on Low Income Households, *National Institute of Economic and Social Research* (9 June 2016) <www.niesr.ac.uk/sites/default/files/publications/Report_THE%20EU%20REFERENDUM%20AND%20FISCAL%20IMPACT%20ON%20LOW%20INCOME%20HOUSEHOLDS_June%208th_0.pdf> accessed 16 January 2018
[3] OECD, 'Economic Outlook' (2017) Vol.2017(2) <www.oecd.org/eco/outlook/economic-forecast-summary-united-kingdom-oecd-economic-outlook.pdf> accessed 16 January 2018

growing number of impact studies[4] are warning against severe disruption to come, especially if the UK ceases to be a member of the Single European Market. This is highlighted as a potential danger if any future trade deal fails to include provision for the facilitation of the cross-border supply of financial services[5]. The purpose of this paper is to examine whether the potentially significant regulatory changes that will result from Brexit could give rise to Investor State Dispute Settlement (ISDS) claims from City of London established firms. The focus of the paper is on financial services and the potential of Brexit to violate investor expectations secured under treaty commitments to afford investments fair and equitable treatment. The analysis explores whether and how an investor in financial services -facing the consequences from a loss of access to the Single Market- could utilise treaty protections to seek compensation from the British government. The analysis is premised upon mapping the consequences of a no-deal or hard Brexit which does not lead to a trade deal addressing financial services in any successor relationship between the UK and the EU[6].

The Fair and Equitable Treatment (FET) standard that rests at the core of this discussion is used in Bilateral Investment Treaties (BITs) as a catch all provision for investor protection that is meant to encompass less well-defined aspects of expectations as to the treatment of investors than more conventional standards, such as compensation for expropriation. While treaty drafters may have an intuitive understanding of what FET means, when it comes to arbitral tribunals it is less obvious how to operationalise this standard. Disputes as to FET are likely to preoccupy arbitral tribunals, claimants and their advisors in the next few years[7]. The jurisprudence discussed in this paper suggests that the FET standard can protect legitimate expectations, created through the general regulatory framework. As such, it is argued here, FET can provide grounds for challenging the UK government in the context of Brexit.

If foreign investors were able to succeed in actions against Argentina and Spain for those countries' relatively modest regulatory changes, foreign investors will be tempted to bring claims against the UK for the fundamental changes to its regulatory environment brought about by Brexit. In summary, this paper argues that FET can offer a viable route to a successful claim for compensation for losses arising from Brexit (albeit within a narrow band of possible facts) to foreign investors in the British financial

[4] Scottish Government, 'Scotland's Place in Europe: People, Jobs and Investment' (15 January 2018) <www.gov.scot/Publications/2018/01/6407> accessed 16 January 2018

[5] Cambridge Econometrics, 'Preparing for Brexit' (January 2018) Greater London Authority <www.london.gov.uk/sites/default/files/preparing_for_brexit_final_report.pdf> accessed 16 January 2018

[6] Barnabas Reynolds, 'A Blueprint for Brexit: The Future of Global Financial Services and Markets in the UK' (2016) Politeia <http://www.politeia.co.uk/a-blueprint-for-brexit/> accessed 16 January 2018

[7] Raphael Hogarth, 'Foreign investors could sue UK for billions over Brexit' *The Times* (23 June 2017) <www.thetimes.co.uk/article/32818c1a-5783-11e7-869c-518339a19c7c> accessed 12 July 2017

industry. It is its very nature as a flexible, adaptive standard[8] that presents FET as the best vehicle through which to challenge wholesale systemic changes in regulatory regimes. As the paper explains, there is a solid background of jurisprudence on FET violations, which have found expression as allegations of arbitrariness, denial of justice, violation of legitimate expectations, failure to afford due process, a lack of transparency and bad faith[9]. We examine how these can be used to protest Brexit impacts on financials established in the City of London.

The paper argues that if a Brexit that offers a clean break with existing arrangements takes place (with no provisions for financial services through a successor trade agreement), it will be bring about a change so severe and radical that an arbitral tribunal could find a violation of FET by reference to the frustration of investors' legitimate expectations. What is referred to as a hard Brexit would risk the stability of the legal and business framework of the UK[10] with demonstrable and severe impacts[11] on foreign financial firms conducting European operations through London. This theoretical possibility of violation exists as every investor made a set of reasonable assumptions when they decided to invest in the UK, and those assumptions will arguably be undermined when the UK withdraws from the EU[12]. The paper does not argue that this eventuality will necessarily come to pass, or that exit will happen in April 2019 (when the time limit for withdrawal as set in Art.50 TEU runs out[13]). What the paper does instead, is to provide a roadmap to legal redress for affected investors modelling a worst case scenario.

The reason why investors may seek redress through ISDS is both legal and tactical. The precedent of Argentina is indicative of how aggrieved investors may use ISDS tribunals in the Brexit context[14]. It is crucial to emphasise here that Brexit ISDS actions will not be coming to tribunals necessarily because investors expect to win substantial amounts in compensation. Rather, they will be surfacing at increasing volumes because of the political leverage they create. Countries like Greece, Spain, and

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[8] *Waste Management, Inc. v. United Mexican States ("Number 2"),* ICSID Case No. ARB(AF)/00/3, Award (30 April 2004)
[9] Krista Nadakavukaren Schefer, *International Investment Law* (Edward Elgar 2013) 328
[10] Alison Ross, 'Could Brexit trigger investment claims?' *Global Arbitration Review* (19 June 2017) <globalarbitrationreview.com/article/1143054/could-brexit-trigger-investment-claims> accessed 12 July 2017
[11] Scottish Government (n 4) & Cambridge Econometrics (n 5)
[12] Roger Alford, 'Brexit and Foreign Investors' Legitimate Expectations' *Kluwer Arbitration Blog* (17 December 16) <kluwerarbitrationblog.com/2016/12/17/brexit-and-foreign-investors-legitimate-expectations/> accessed 12 July 2017
[13] Eva-Maria Poptcheva, 'Article 50 TEU: Withdrawal of a Member State from the EU', European Parliamentary Research Service (February 2016) Briefing PE 577.971 <www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf> accessed 16 January 2018
[14] Stephen Park & Tim Samples, 'Tribunalizing Sovereign Debt: Argentina's Experience with Investor–State Dispute Settlement' (2017) Vol.50(4) VAND. J. TRANSNAT'L L. 1033

Argentina have already experienced the consequences, adding to calls for reform of ISDS in general[15]. Investors are likely to hope to force settlements as much as winning actual cases[16]. The British government has already shown willingness to compromise by making promises to certain members of the auto industry[17] to shield them from the consequences of Brexit. While the focus of the paper is an analysis of the legal prospects of such claims, it is not beyond expectation that the threat of legal action will be used as a tool by investors who are negatively impacted by some possible versions of Brexit to steer the government away from them, or to extract concessions, in case policy makers choose paths that entail significant regulatory realignment[18].

The paper is built around an illustrative case study, with which we begin our discussion. This is followed by addressing the thorny issue of whether a tribunal would accept jurisdiction in a matter that is as much legal as it is political. Jurisdiction is determined by identifying the sovereign act that leads to a treaty violation; by examining the nature of impacted assets; and by searching for a significant connection between a state act and any resulting negative impacts for the investor. The potential for a positive outcome in the jurisdictional analysis allows us to proceed to a consideration of the substantive issues. These centre on explaining how the FET standard can be utilised in this case and defining it through case law (especially that emanating from Spain in the last few years). The paper concludes by addressing the key issue of calculating compensation, which sets out the possible, yet narrow, grounds on which a claimant may successfully sue the UK in ISDS.

2. A Brexit Case Study

The paper explores how the FET standard and the idea of protecting the investor's legitimate expectations could form the basis of a claim against the UK government for the consequences of Brexit. We will construct our analysis around the presentation of a case study. We consider the case of foreign financial firms that established themselves in the City of London to take advantage of the UK's much lauded position as the centre of European finance. It is argued here that the British government's own and specific decision to interpret the 2016 Referendum result as a mandate to

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15 UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime' (18 December 2017) <investmentpolicyhub.unctad.org/Publications/Details/1183> accessed 16 January 2018

16 Ioannis Glinavos, 'Brexit Lawsuits, But Not As You Know Them' *VerfBlog* (9 May 2017) <verfassungsblog.de/brexit-lawsuits-but-not-as-you-know-them/> accessed 12 July 2017

17 Hellen Pidd, 'Theresa May's Nissan intervention was remarkable gesture, says ambassador' *The Guardian* (10 November 2016) <www.theguardian.com/politics/2016/nov/10/theresa-may-nissan-intervention-remarkable-says-japanese-ambassador> accessed 13 July 2017

18 Corporate Europe Observatory, 'Brexit bonanza: Lawyers encouraging corporations to sue UK & EU member states' (25 September 2017) <corporateeurope.org/sites/default/files/brexit_bonanza.pdf> accessed 16 January 2018

leave the Single Market[19] heralds a fundamental change to the regulatory environment under which foreign firms had established in the UK. Consequently, foreign owned financials could seek legal redress arguing that the changes brought about by Brexit (from the point of exit onwards) violate legitimate expectations protected by Bilateral Investment Treaties the UK has signed with their country of origin. BITs offer rights, protections and standards to investors that are in some ways superior to those enjoyed under domestic, or even EU law[20]. These protections will survive Brexit as they are creatures of international law, not linked to the UK's EU membership. They are also enforced by an international system of Investor-State Dispute Settlement tribunals. Treaties promise to create favourable conditions for investment, reciprocally. These conditions include the fair and equitable treatment of businesses investing in the UK, freedom from discrimination, full protection and security[21]. It is important to emphasise here that the claims under consideration will be against the UK government, not the EU for potentially denying the UK any benefits of membership post exit. The reason for this is two-fold, first it is the decision of the UK to leave the Union, and second, it is the government's determination of the way in which to leave that will lead to potentially adverse consequences for investors in the financial industry. The sovereign acts that rest at the core of any claim will be those of the British sovereign as explained below in our discussion on the tribunal's jurisdiction.

For example, assuming a hard (or no-deal[22]) Brexit takes place in 2019, a Mexican-owned bank operating out of the City will be able to sue the UK in an investment tribunal for the loss of passporting rights (which allow firms to offer services to the rest of Europe[23]) on the strength of the UK-Mexico BIT of 2006. This is because the loss of passporting is widely projected to lead to very significant direct losses, costs and loss of future profits[24]. In the words of the Bank of England assessing the impacts of a no-deal Brexit on financial services[25]:

[19] Prime Minister's Office, 'The government's negotiating objectives for exiting the EU: PM speech' (17 January 2017) <www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> accessed 12 July 2017

[20] Ioannis Glinavos, 'How Eastern Europe is best placed to hit the ground running after a hard Brexit' *The Conversation* (15 December 2016) <theconversation.com/how-eastern-europe-is-best-placed-to-hit-the-ground-running-after-a-hard-brexit-70451> accessed 17 January 2018

[21] Glinavos (n 16)

[22] Joseph D'Urso and Sarah Glatte, 'Brexit: What would 'no deal' look like?' *BBC News* (24 March 2017) <www.bbc.co.uk/news/uk-politics-39294904> accessed 12 July 2017

[23] Prudential Regulation Authority, 'Passporting' <www.bankofengland.co.uk/pra/Pages/authorisations/passporting/default.aspx> accessed 12 July 2017

[24] BBA, 'Brexit Quick Brief What is 'passporting' and why does it matter?' *British Bankers' Association* (2016) <www.bba.org.uk/wp-content/uploads/2016/12/webversion-BQB-3-1.pdf> accessed 17 January 2018

[25] Bank of England, *Financial Stability Report: Executive summary* (June 2017) 7 <www.bankofengland.co.uk/publications/Documents/fsr/2017/fsrjun17sum.pdf> accessed 12 July 2017

> *There is no generally applicable institutional framework for cross-border provision of financial services outside the European Union. Globally, liberalisation of trade in services lags far behind liberalisation of trade in goods. So without a new bespoke agreement, UK firms could no longer provide services to EEA clients (and vice versa) in the same manner as they do today, or in some cases not at all. This creates two broad risks. First, services could be dislocated as clients and providers adjust. Second, the fragmentation of service provision could increase costs and risks.*

Is it not fanciful to suggest that a foreign investor could use ISDS to protest a change as politically contentious as Brexit? Indeed, there is good precedent for suing western governments for radical changes in regulatory regimes. The more radical (and in a way politically controversial) the change, the better the prospects of a suit. Spain is a pertinent example as we examine later in the paper. The Spanish government had aimed to make the country a leader in clean energy. They had promised a stable and welcoming environment to clean energy generators, which, has been claimed, acted as a guarantee of their successful commercial enterprise and financial viability[26]. Spain had a change of heart which led to a fundamentally different investment environment. One could say the same about the UK and financial services post Brexit.

The discussion that follows presents how a Mexican owned bank (let us call them Mexico City Bank, MexCity for short[27]) may bring an ISDS claim against the UK on the basis of the UK-Mexico BIT of 2006[28]. We are assuming the following facts to flesh out our case study. MexCity was attracted to London due to its much-advertised position as the gateway to European finance at the beginning of the 2010s (before Mr Cameron campaigned in the 2015 election on a manifesto[29] promising a referendum on EU exit). MexCity executives read publications that promoted the idea of London Headquarters for their bank's European operations. London was advertised as providing companies with easy access to the markets of the European Economic Area (EEA). London was then the gateway to the European Union's member states, the world's biggest single market, with a population of nearly 500 million. It was also the leading location for European headquarters, its unrivalled access to markets, talent and cultural diversity suggested as giving it an edge against competing cities. The city's

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[26] Ioannis Glinavos, 'Solar Eclipse: Investment Treaty Arbitration and Spain's Photovoltaic Troubles' in Constantin Gurdgiev, Liam Leonard, Maria Alejandra Gonzalez-perez (eds), *Lessons from the Great Recession* (Emerald 2016) 251-271

[27] Any similarity with a real banking institution is unintentional.

[28] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments (signed 12 May 2006, entered into force 25 July 2007) ('UK-Mexico BIT')

[29] The Conservative Party, 'Conservative Party Manifesto 2015' 30 <www.bond.org.uk/data/files/Blog/ConservativeManifesto2015.pdf> accessed 12 July 2017

concentration of specialist business clusters, excellent transport links and first-class communications infrastructure made it easy for firms based there to manage operations in multiple European countries more efficiently[30]. The main mechanism through which the above benefits accrued to financial firms was the EU financial passport. This 'passport' permits financial services companies based and regulated in one country of the EU (or the broader EEA), and authorised under one of the EU's single market directives, to do business in other member states purely on the basis of their home state authorisation. Introduced in 1995, it was expanded and deepened by a series of EU directives[31].

In addition to promotional material inviting FDI to Britain on the strength of its European identity, MexCity board members would have heard the then PM David Cameron declare in 2010 Britain to be a strong and active member of the European Union, the gateway to the world's largest single market. The PM was proud to have shown in the early days of the Conservative-Liberal Democrat coalition government in 2010 how Britain was a constructive and firm European partner, using its membership of the EU to defend and advance UK interests. The PM explicitly promised 'we will stand up, at each and every turn, for our financial services industry and the City of London. London is Europe's pre-eminent financial centre. With this government, I am determined it will remain so'[32]. This information provision is actually addressed by the UK-Mexico BIT which states (Art.2) that

> *with the aim to significantly increase bilateral investment flows, the Contracting Parties may elaborate investment promotion documents and may provide each other with detailed information regarding investment opportunities, the laws, regulations or provisions that, directly or indirectly, affect foreign investment including, among others, currency exchange and fiscal regimes, and foreign investment statistics in their respective territories.*

However, the referendum on EU-membership resulted in London risking becoming a much different business proposition[33]. Statements of intent and pronouncements by politicians are not simply talk to be easily discounted. In the context of defining investment treaty obligations, as the discussion on the Spanish cases below demonstrates, they can have real consequences. The following discussion takes

[30] London and Partners, 'London, The Only Location for your European Headquarters' (2011) <cdn.londonandpartners.com/l-and-p/assets/business/european_headquarters_brochure.pdf> accessed 12 July 2017
[31] Jonathan Ford, 'Financial future after Brexit: passporting v equivalence' *Financial Times* (12 January 2017) <www.ft.com/content/61221dd4-d8c4-11e6-944b-e7eb37a6aa8e> accessed 12 July 2017
[32] The Cabinet Office, 'David Cameron: Speech to Lord Mayor's Banquet' (15 November 2010) <www.gov.uk/government/speeches/speech-to-lord-mayors-banquet> accessed 12 July 2017
[33] Deloitte, 'Power Up, The UK Workplace' (26 June 17) <www2.deloitte.com/uk/en/pages/international-markets/articles/power-up.html> accessed 12 July 2017

us through the MexCity claim, highlighting the steps a firm in their position will need to take, and assessing their chances of success at each stage.

2.1 Jurisdiction

The first hurdle to overcome by any investor wishing to access ISDS is to establish the jurisdiction of the tribunal. This is done by showing that the investor (or the investment) came under the protection of a Bilateral Investment Treaty between their home jurisdiction and the UK, establishing prima facie that a violation of the terms of the Treaty has taken place, and that this violation is the result of a state act[34]. Our case study assumes that MexCity has established a corporate presence in the UK and obtained relevant licences from the British authorities to allow it to operate in the country and across the EU. The UK-Mexico BIT that we are using as our example defines (Art.1) an enterprise as any entity constituted or organised under applicable law, including any corporation, trust, partnership, sole proprietorship, joint venture or other association. Investment means an asset acquired in accordance with the laws and regulations of the contracting party in whose territory the investment is made, including an interest in an enterprise that entitles the owner to share in income or profits, and an interest in that entitles the owner to share in the assets of that enterprise. Investor means an enterprise, which is either constituted or otherwise organised under the law of a contracting party, and is engaged in business operations in the territory of that party who has made an investment in the territory of the other[35]. The above definitions, as present in the Treaty, would bring the MexCity operations in London within the definition of protected investment.

The following discussion examines the more contentious issues in our case study. It starts by examining whether in a Brexit related claim one could identify a state act, determines whether protected assets could be affected and concludes by looking at whether there is a sufficient connection between said act and its impact for a tribunal to find that it has jurisdiction over a potential claim.

2.1.1 A Sovereign Act

The right to submit a claim to arbitration under investment treaties rests upon the fulfilment of certain conditions, depending on the express terms of the treaty on which the claim is based. As noted earlier, conditions that must be met are broadly interpreted as including the existence of a measure, that the effect of the measure on the investment must be attributable to the host state, and that the measure

[34] Chiara Giorgetti, *Litigating International Investment Disputes, A Practitioner's Guide* (Brill 2014)

[35] For a more general discussion on how the terms investor and investment are defined in international investment law see Barton Legum, 'Defining Investment and Investor: Who Is Entitled to Claim?' (12 December 2005) Symposium Paper <www.oecd.org/investment/internationalinvestmentagreements/36370461.pdf> accessed 17 January 2018

must relate/affect the investment or the investor[36]. The UK-Mexico BIT allows (Art.10) an investor to submit a claim to arbitration specifying the provisions of the agreement alleged to have been breached, the factual and legal basis for the claim, and the remedy sought and the amount of damages claimed. The first step therefore would be to identify the disputed measure. One could identify several actions as potential measures in this case. For example, the decision to exit the EU (through the activation of Article 50[37]), the decision not to pursue a EEA model or remain in the Single Market and/or Customs Union (as per the PM's Lancaster House speech[38]), the coming into effect of the European Union (Withdrawal) Bill , or any government decision operationalising the departure[39] of the UK from the EU (bringing about the loss of associated rights for businesses and citizens) could all serve as sovereign acts with consequences on the investor. Some of these policies/initiatives -at least- could qualify as a law, regulation, procedure, requirement or administrative practice satisfying the Treaty requirement that the investment is affected by an act of the sovereign.

However, it needs to be noted that not every action, omission or decision of the British government in relation to Brexit will provide the basis for a claim. For instance, a possible failure of the UK and the EU to reach a comprehensive trade deal would be more difficult to class as a state act either because it could not be a measure attributable to the UK, or fall outside the remit of a BIT under which a claim is brought. A tribunal would consider the failure to secure an overall UK/EU future-relationship deal either a political issue or, in any event, not an investment issue, taking any dispute outside its jurisdiction. For example, WTO[40] related issues such as tariffs, permits, customs and antidumping duties constitute trade measures, not investment measures[41] and a broad distinction is made between trade and investment issues to avoid an over-reach of investor protection mechanisms[42]. For the above reasons, this paper is limited to analysing a potential action against the UK government (on the basis of it violating investor legitimate expectations anchored in the UK's continued participation in EU structures). It is worth re-emphasising here that such an action could not be brought against the

[36] Jeswald Salacuse, *The Law of Investment Treaties* (OUP 2015) 26
[37] European Council, 'Statement by the European Council (Art. 50) on the UK notification' (29 March 2017) <www.consilium.europa.eu/en/press/press-releases/2017/03/29-euco-50-statement-uk-notification/> accessed 12 July 2017
[38] PM's Office (n 19)
[39] Arabella Lang & Vaughne Miller, 'Brexit: an overview' *UK Parliament* (23 June 2017) <secondreading.parliament.uk/key-issues/brexit-an-overview/> accessed 17 January 2018
[40] William Davey, 'The WTO Dispute Settlement System: The First Ten Years' (2005) Vol.8(1) J Int Economic Law 17-50
[41] Luis González García, 'Do foreign investors have valid international claims against the UK for Brexit?' *The Law of Nations* (6 June 2017) <lawofnationsblog.com/2017/06/06/foreign-investors-valid-international-claims-uk-brexit/> accessed 12 July 2017
[42] UNCTAD, 'ISDS: UNCTAD Series on Issues in International Investment Agreements II' (2012) 33 <unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf> accessed 12 July 2017

EU, as the trigger for the claim is an act of the UK (withdrawing from the EU on its own initiative). The following discussion takes the projected coming into force of the Withdrawal Bill in 2019 as the state act lying at the root of the violation of the investor's legitimate expectations.

2.1.2 Impacted Assets

In order to have a viable chance of surmounting jurisdictional barriers, investors will need to complain about specific impacts on their businesses, not a general detrimental effect of Brexit (and the regulatory changes it entails) on costs and their future profitability. It is for this reason why investors in the financial industry may stand a better chance of securing jurisdiction than other 'victims' of Brexit. Assuming the UK exits the EU without an agreement on continuing the unimpeded cross-border provision of financial services (or mitigating the effects of changes to such provision from 2019 or thereafter[43]) foreign financial firms in the UK could construct claims around the loss of the passporting rights. Losing such rights as a direct result of Brexit will have a quantifiable damaging effect on foreign investors in the financial industry, both as loss of business, costs of relocating assets and operations and future profitability. However, investors will need to overcome the possibility that passporting rights, market share, or the extinguishing of the right to export to the European market could be denied the definition of 'assets' or 'covered investments' with the argument that they do not constitute legal interests or things that can be acquired, mortgaged or disposed in the open market[44]. They will also need to address the objection mentioned earlier, that rights to export services are trade related issues and not investment issues. We turn therefore below to the issue of whether financial services in the context of Brexit could come under the definition of protected assets.

Determining whether an investment comes within the definition of 'protected investment' will depend on the terms of the treaty in question, issues of territoriality (which can be problematic for immaterial assets[45]) and -in part- by what the investor's legitimate expectations were. For instance, the Tribunal in Nagel v. Czech Republic[46] used the concept of the investor's legitimate expectations to determine whether a Cooperation Agreement made between the Claimant investor and a State enterprise of the host State gave rise to a 'claim to…performance under contract having a financial value' such that it constituted a protected 'investment' under the bilateral investment treaty at

[43] The possibility of equivalency or mutual recognition agreements has been explored as an alternative to Single Market participation and passporting. See Raynolds (n 6) and David Blake, 'Brexit and the City' (May 2017) <www.economistsforfreetrade.com/wp-content/uploads/2017/08/BrexitandtheCity.pdf> accessed 17-1-2018

[44] García (n 41)

[45] David Collins 'Applying the Full Protection and Security Standard of International Investment Law to Digital Assets' (2011) Vol.12(2) Journal of World Investment and Trade 225-244

[46] Nagel v Czech Republic, SCC Case 49/2002, Award (9 September 2003), 2004(1) Stockholm Arb. Rep. 141

issue[47]. Such deliberation is crucial, because failing to determine that an investment is protected will spell the end of the claimant's chances. It is therefore necessary at this point to delve deeper into the definition of investment[48]. The International Centre for the Settlement of Investment Disputes (ICSID), which is the one of the fora specified as responsible for dealing with ISDS under the UK-Mexico BIT (Art. 11), offers a useful illustration. Article 25 of the ICSID Convention of 1965 provides that ICSID's jurisdiction extends to any legal dispute arising directly out of an investment between a contracting state and a national of another contracting state. 'Investment' is not defined in the Convention, but it has been a matter of extensive debate in tribunals. In Salini v Morocco[49] for example, the tribunal identified five criteria indicative of the existence of an investment for these purposes, namely a substantial commitment or contribution, duration, assumption of risk, contribution to economic development, regularity of profit and return.

The above criteria are taken as a benchmark for determining tribunal jurisdiction over investments, but they are not an immoveable barrier. For example, in Deutsche Bank v Sri Lanka[50], the majority of the Tribunal distanced itself from the application of this test. The Tribunal indicated that there is no basis for a strict application in every case of the five criteria suggested originally by the tribunal in Fedax v Venezuela[51] and restated in Salini. They are not fixed or mandatory as a matter of law and, as mentioned above, they do not appear in the ICSID Convention[52]. The Tribunal noted that jurisprudence suggests the existence of only three key criteria, namely contribution, risk and duration. It is important to recognise that an investment will usually be a bundle of rights, not an individual contract[53]. The requirement that a dispute arises out of an investment includes measures affecting the investment itself or activities ancillary to the investment[54]. It is interesting that in Fedax the Tribunal noted that the EC (as it then was) in providing for the protection of investments had included all types of assets, tangible and intangible that have an economic value, including direct or indirect contributions in cash, kind or services invested or received. MexCity will argue that the incorporation and establishment of its business in London, through which it supplied a full range of financial services to clients in the UK,

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[47] Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle' (2006) 21.1 ICSID Rev-FILJ 1, 10
[48] Markus Burgstaller, 'Definition of investment in international investment law' UK Practical Law <uk.practicallaw.thomsonreuters.com/7-501-5427> accessed 12 July 2017
[49] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No Arb/00/04, Decision on Jurisdiction (23 July 2001)
[50] Deutsche Bank AG v Sri Lanka, ICSID Case No ARB/09/02, Award (31 October 2012) para 294
[51] Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Award (9 March 1998)
[52] Alejandro Garcia, 'ICSID tribunal considers Salini criteria' UK Practical Law (27 March 2013) <uk.practicallaw.thomsonreuters.com/9-525-4681?__lrTS=20170608091923938> accessed 12 July 2017
[53] Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, ICSID Case No. ARB/08/8, Award (1 March 2012)
[54] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award (26 July 2007)

Europe and overseas, qualifies as an investment. It will also argue that it is complaining about the loss of existing rights that gave value and purpose to its investment, not about trade-related changes instigated by the adoption of measures[55], necessitated by Brexit, in the relations between the UK and the EU.

2.1.3 Significant Connection

Even if we accept that investments in the finance industry count as 'protected investments' under UK BITs, some difficulty arises from the possibility that Brexit and the Withdrawal Act may not establish a significant nexus between a measure and a specific investment (as required for establishing jurisdiction). This is a requirement that applies to both BITs and Article 25(1) of the ICSID Convention as the Methanex Tribunal[56] specified when examining its jurisdiction. An investment dispute requires a legally significant connection between the measure and a specific investment and a tribunal will need to be convinced that the Withdrawal Act (a non-discriminatory measure of general application where potentially everyone in the UK will be affected) in and of itself can be a measure legally connected to a specific investment. Note however that it is not necessary that the state measure in question is directed specifically at a particular investment, only that it has an effect on it; and general measures that affect an investment can form the basis of a claim[57]. We are still debating a particular legal initiative on the part of the state (the expected Withdrawal Act), not government policy in a vague sense. As far as the scope of FET is concerned, current arbitral practice shows that all types of governmental conduct – legislative, administrative and judicial alike – can potentially be found to breach the FET obligation.

In terms of assessing the content of the potentially offending state act, there are two relevant considerations. First conduct will be assessed against the principles of good governance (due process, absence of arbitrariness in decision-making, non-frustration of legitimate expectations); and second, the threshold of liability will be determined by reference to the nature of the violation[58]. The fact that (for example) the Withdrawal Bill (and eventual Act) is not a discriminatory measure does not detract from the fact that it represents a wholesale reversal of the regulatory environment under which firms like MexCity would have established a presence in the UK. As such, the consequences for financial firms (like the loss of passporting) cannot be distinguished from the Act that lies at the heart of the

[55] David Allen Green, 'Brexit and the issue of the WTO schedules' *Financial Times* (28 February 2017) <blogs.ft.com/david-allen-green/2017/02/28/brexit-and-the-issue-of-the-wto-schedules/> accessed 12 July 2017

[56] Methanex Corporation v. United States of America, UNCITRAL, Award (3 August 2005)

[57] AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction (24 April 2005)

[58] UNCTAD (n 42) 12

loss of rights. It is possible therefore that a Brexit tribunal will follow the example set in the CMS case. In CMS v. Argentina[59], an ICSID Tribunal argued that it did not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and could not pass judgement on whether they are right or wrong. It concluded however, that it did have jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts.

One potential problem for the investor is that (as we discuss later) most tribunals have found violations of legitimate expectations when state measures lead to wholesale alterations of regulatory regimes (as they existed at the time of establishment) when these alterations were also sudden. The UK could argue that there was nothing sudden about Brexit. The referendum was present in the Conservative manifesto for the 2015 election. It was held in 2016, and Brexit is not due to take effect before 2 years have passed since the activation of Article 50 in March 2017. The British government would argue that this seems like ample time to prepare and investors should have taken remedial or protective measures to mitigate the effects (if any) on their business. This is a significant issue (with bearing on the calculation of damages as well, that we discuss later on).

MexCity, and firms in their position, could argue as a response to the above concerns that yes Brexit was a possible (if not probable) outcome of the referendum, and that the process –once under way- contained a timeline for the departure of the UK from the EU. However, nothing prepared them for the cliff-edge represented by a total loss of access in the case of hard (or no-deal) Brexit once the 2 years from the activation of the process were up. Indeed, the British government has been consistent in its advice to investors that a cliff-edge scenario must be avoided[60], adding further that there is no planning[61] for the eventuality that negotiations break down, leading to a disorderly Brexit. In any event, the suddenness of the wholesale regulatory reversal contained within the Withdrawal Bill is a result of its abrupt application at the point of exit itself, not due the lack of foresight. Also, one could claim that financial services firms are in any event unable to effectively risk manage a change of this

[59] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (12 May 2005)

[60] HM Treasury, 'Mansion House 2017: Speech by the Chancellor of the Exchequer' (20 June 2017) <www.gov.uk/government/speeches/mansion-house-2017-speech-by-the-chancellor-of-the-exchequer> accessed 12 July 2017

[61] George Parker and Jim Pickard, 'UK has no plan B if Brexit talks fail, insists Boris Johnson' *Financial Times* (11 July 2017) <www.ft.com/content/303c3aa0-6655-11e7-8526-7b38dcaef614> accessed 12 July 2017

magnitude[62], no matter how much notice is provided. If the reason for the investor's establishment in the City of London was to use it as a gateway to Europe, then it is not possible to prepare for a Brexit that takes the UK out of the Single Market – offering no post-exit arrangements for cross-border financial services provision- unless one writes off the investment as a total loss. If risk management means re-establishing in an EU member state and moving all funds, then this entails acceptance of total loss. Viewed in this way, the fact that Brexit is coming (even if we cannot be sure of the date in which it becomes effective) does not alter the situation for the investor, nor does it allow one to mitigate what may otherwise be predictable losses.

2.2 Substantive Claim

The main argument of MexCity in our example will be that Britain violates the FET standard found in the UK-Mexico BIT by leaving the EU without a successor agreement, or in any event without an arrangement that ensures the perseverance of the regulatory environment that was in place when the bank established in the City of London. Note that the argument is not that Britain is not allowed to leave the EU on account of BIT commitments. As with every BIT standards discussion, it is important to emphasise that treaties do not directly limit sovereign discretion; what they do instead is put a price tag on its exercise. This is crucial to understand in this case, as financial firms in the position of MexCity would not seek to interfere in a political process. What they would seek instead is to enforce legal entitlements leading to compensation for legitimate losses. The following discussion presents the history of FET and its evolution, leading to its most recent interpretations in the cases against Spain.

2.2.1 FET in Customary International Law

Protecting the integrity of the person of an investor and accessing due process has a long pedigree and is accepted as part of customary international law, taken to encompass international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties[63]. One of the first cases on what FET means involved a denial of justice case against Mexico from 1926. In Neer v Mexico[64] the tribunal set a very high threshold for violation, stating that to breach international standards, state action should amount to an outrage, to bad faith, to wilful neglect of duty or to insufficiency of governmental action so far short of standards that anyone reasonable would recognise its insufficiency.

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[62] OECD, 'OECD Economic Outlook' (2017) Vol.2017(1) 253 <www.oecd.org/eco/outlook/economic-forecast-summary-united-kingdom-oecd-economic-outlook-june-2017.pdf> accessed 12 July 2017

[63] Anne Peters, Daniel Högger, Bardo Fassbender (eds) *The Oxford Handbook of the History of International Law* (OUP 2014)

[64] L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, Award (15 October 1926), (1946) Vol. IV Reports of International Arbitral Awards, 60-66.

In light of the statements above, one of the first questions to consider is whether host state behaviour towards individual investors should cover their property rights in addition to their physical persons, and if so, whether violations of property related rights ought to be outrageous before giving rise to claims for compensation. In fact, once jurisprudence moved to consideration of the property rights of foreign investors, it became obvious that actions that appear less offensive than those discussed in Neer will still be considered as breaches of international standards[65]. In Mondev v USA[66] the Tribunal saw FET violations as possible even in the absence of outrageous or egregious behaviour on the part of the host state. Emphasis was placed instead on whether a state decision could be considered as improper and discreditable, with the result that the investment had been subjected to unfair treatment. This is admittedly a much lower threshold than the one established in the 1920s. But, does Mondev suggest that FET is something different from the standards previously accepted as customary international law? This possibility caused some concern leading to a reaction to widening definitions. For example, NAFTA's Article 1105 on the FET standard was interpreted as not requiring treatment in addition to -or beyond that- which is required by the customary international law minimum standard of treatment of aliens[67]. This seems to suggest that the Mondev formula is less demanding than a minimum customary international law standard, but is this actually true?

In Glamis Gold v USA[68] the Tribunal argued that while it is difficult to say that customary international law has evolved to a different standard than the one described in Neer, one can still accept that something can be shocking and egregious now, while it would not be considered so abnormal in the 1920s. Therefore Mondev can be reconciled with Neer, if one accepts that the standard remains the same, but the threshold for reaching it is understood differently. If one is looking for a parallel from English law, the standard of proof in civil litigation may be on the balance of probabilities, but a higher level or quality of evidence is expected when the underlying violation is of a criminal nature, like for instance fraud[69]. In the words of the Mondev Tribunal the test is not whether a result is surprising or shocking, but whether this shock leads to justified concerns as to the judicial propriety of the outcome. Other tribunals, such as in International Thunderbird[70] and SD Myers[71] have used the terms 'gross denial of justice', 'manifest arbitrariness' and treatment that is 'unjust and arbitrary'. The Tribunal in Glamis confirmed that the customary international law minimum standard of treatment for aliens

[65] Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award (31 March 2010)
[66] Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002)
[67] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001) B1-2
[68] Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award (8 June 2009)
[69] Re H [1996] 1 All ER 1, Hornal v Neuberger Products Ltd [1957] 1 QB 247
[70] International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (26 January 2006)
[71] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Award (30 December 2002)

includes a duty to protect investors from arbitrary measures. In summary, therefore, to violate FET an act must be sufficiently egregious and shocking entailing a gross denial of justice, or manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or finally a manifest lack of reasons.

The Glamis decision however is more important than as a mere benchmark for FET assessments. It tells us something crucial about how the investor's legitimate expectations link with assessing any violations of FET. The Tribunal stated that a mere contractual breach does not suffice to establish a FET breach, not without something further, such as denial of justice or discrimination. Merely not living up to the investor's expectations is not damning for a state. Nonetheless, there is a second avenue to FET breach, other than the varieties of egregious conduct described above. When a state has made specific assurances or commitments to the investor so as to 'induce' their expectations, then a change of course by the state could lead to a breach of FET. What does this mean? It means that even without an explicit stabilization clause that would freeze regulatory frameworks at the time of the investor's establishment[72], state promises that inform the investor's expectations will be carefully considered by a tribunal in a claim for FET violations. One is reminded at this point of the myriad assurances given to investors as to London's position as the gateway to European finance. Firms in the position of MexCity will rely heavily on such (publically available) information to argue (following Glamis) that they were in receipt of assurances as to the longevity of Britain's regulatory regime. This technique proved successful in the case of Spain as we see below.

As was noted in International Thunderbird, where a contracting party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, the state may be tied to the objective expectations it created in order to induce such investment. In Parkerings v Lithuania[73], it was stated that the expectation is legitimate if the investor received an explicit promise or guarantee from the host state, or the state made assurances or representations that the investor took into account in making the investment. In the absence of explicit statements, the circumstances surrounding the conclusion of the agreement are decisive in determining if the expectation of the investor was legitimate. Treaty standards can operate to prevent (ultimately), one could say, a state from acting unfairly, unreasonably, or inequitably in the exercise

[72] International Finance Corporation, 'Stabilization Clauses and Human Rights' (27.5.2009) IFC/UN Special Representative of the Secretary-General on Business and Human Rights Report < http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES> accessed 12 July 2017
[73] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (11 September 2007)

of its legislative power[74]. This is therefore how the FET standard can escape from its customary international law cage (requiring egregious assaults on the investor) and become something akin to a stabilization clause. This is also one of the primary ways in which FET violation claims could be used in the context of Brexit, as we mentioned already, by attaching to investors who were in receipt of express commitments (contractual or not) on the part of the British authorities as to the continuation of the benefits of European Union membership. As bad faith is not a requirement in finding a violation, the fact that the actions of the UK government can be traced (arguably) to a democratic process, would not act as a bar to any claims.

Following the test in AES v Hungary[75], a tribunal will ask whether there were government representations and assurances made to the investors before the investment was made. If so, were these assurances relied on and did the government act in a manner inconsistent with such representations and assurances. Finally, while the legitimate expectations of the investor cannot be that the state will never modify its legal framework, especially in times of crisis (political or economic), investors must be protected from unreasonable modifications of that legal framework[76]. Arguably, this is the price to pay for attracting foreign investments into the country, with FET seen as limiting (or placing a cost as noted earlier) the sovereign power of states to adapt the legal framework to changing circumstances[77]. One could also see the protective frameworks established by international law, not as constraints on sovereignty, but as strategic commitments contributing to investment, growth and long-term prosperity[78].

2.2.2 An Evolving Standard

The discussion so far has focused on general interpretations of FET as a matter of customary international law. If however a specific formula as to the content of FET is provided for in a BIT or FTA with the UK, a tribunal will not be necessarily using the customary international law derived definitions, but will engage in a contextual analysis of the terms of the treaty in question. This may result in stronger rights for an investor. For example in Lemire v Ukraine[79] the Tribunal found that the customary international law standard can act as a floor (not a ceiling) for investor protections when a BIT offers explicit definitions of FET. The meaning of specific treaty wording is influenced by the

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[74] Giorgio Sacerdoti, Pia Acconci, Anna De Luca (eds) *General Interests of Host States in International Investment Law* (CUP 2014) 42
[75] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22, Award (23 September 2010)
[76] Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award (21 June 2011) para 291
[77] Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Award (27 November 2013) fn79, 119
[78] Ioannis Glinavos, 'Public Interests, Private Disputes: Investment Arbitration and the Public Good' (2016) Vol.13(1) MJIEL 50-62
[79] Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award (28 March 2011)

context in which the treaty was concluded (usually explained in the Preamble). For example, the US-Ukraine BIT that was at issue in Lemire stated in its Preamble that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment. The FET standard therefore was closely linked to the notion of legitimate expectations of the investor at the time when they made their investment.

In the case of Lemire, the claimant was said to generally expect a regulatory system that was consistent, transparent, fair, reasonable and enforced without arbitrary or discriminatory decisions. Therefore, the standard pointed to state responsibility for acts or omissions of the sovereign, which violate a certain threshold of propriety, causing harm to the investor and with a causal link between action or omission and harm. Statements of treaty objectives can also be viewed as framing FET standards in a proactive way. In MTD v Chile[80] the Tribunal stated that FET should be understood to promote even handed and just treatment, conductive to fostering the promotion of foreign investment. Treaty terms can be framed as a proactive statement, for example to promote, to create, to stimulate, rather than prescriptions for a passive behaviour by the state or avoidance of prejudicial conduct against the investors.

We can conclude therefore that tribunals seem to gravitate towards the following consensus. In order to determine whether the threshold for violation has been reached, a tribunal will consider a) whether the state has failed to offer a stable and predictable legal framework, b) whether the state made specific representations to the investor, c) whether due process has been denied to the investor, d) whether there is an absence of transparency in the legal procedure, or in the actions of the state, e) whether there has been harassment, coercion, abuse of power or other bad faith conduct on the part of the state, f) whether any of the actions of the state can be labelled as arbitrary, discriminatory or inconsistent. Answers to the above questions are filtered through recognition of the state's right to legislate in the public interest, the legitimate expectations of the investor at the time of making the investment, the investor's duty to exercise due diligence before investing, and finally the investor's conduct in the host country.

The UK-Mexico BIT limits FET to customary international law (Art.3). This however, does not deduct value from our wider discussion on the meaning of FET offered above, as there is a great deal of debate on what the standard means even at this level, before considering any additional interpretive wording to be found in treaties[81]. Why does the UK-Mexico Treaty employ this language though? An explicit

[80] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (25 May 2004) para 113
[81] UNCTAD (n 42)

link between the FET obligation and the minimum standard of treatment is used in some treaties to prevent over-expansive interpretations of the FET standard by arbitral tribunals and to further guide them by referring to an example of gross misconduct that would violate the minimum standard of treatment of aliens – such as denial of justice. By limiting the source of FET to customary international law, these treaties seek to rein in the discretion of tribunals when considering its content. In other words, treaties incorporating a reference to the minimum standard of treatment of aliens under customary law send out a message to arbitrators that the latter cannot go beyond what customary international law declares to be the content of the minimum standard of treatment. Nevertheless, the difficulty with this line of thinking is that it presupposes the existence of a general consensus as to what constitutes the minimum standard of treatment of aliens under customary international law[82]. The reality is that the minimum standard itself can be highly indeterminate.

In addition to the discussion so far, which assumes an evenly balanced view of the interests and expectations of states and foreign investors, we need to mention that there is some evidence that tribunals tend to prioritise the expectations of investors over the sovereign discretion of states in determining the content of FET provisions. An illustration of this approach (leading to accusations of investor bias on the part of tribunals by a variety of commentators[83]) is the decision in Tecmed[84]. The tribunal in Tecmed argued that investors expect the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with them, so that they may know beforehand any and all rules and regulations that will govern their investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan ahead and comply with such regulations. Crucially, investors also expect the host state to act consistently, without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.

While our discussion uses the Withdrawal Bill as the central state act that forms the core of MexCity's complaint, it is not necessary that a FET violation arises out of a single state act. The Tribunal in El Paso[85] argued that state measures could be seen as cumulative steps, which individually do not qualify as violations of FET, but which amount to a violation if their cumulative effect is considered. A creeping violation of the FET standard could thus be described as a process extending over time and comprising

[82] UNCTAD (n 42) 28
[83] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) Vol.50.1 Osgoode Hall Law Journal 211-268
[84] Técnicas Medioambientos Tecmed, SA v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003)
[85] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award (31 October 2011)

a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result[86]. One cannot read the above passage and not think about the cumulative effect of Brexit on financial services firms.

In a way, resorting to a discussion on legitimate expectations (and the state commitments that generate them) is one of the few ways open to a tribunal to operationalise the FET standard, which otherwise persists at a level of etymological vagueness. In this regard, the Tribunal in Suez v Argentina[87] was open in its view that the standard can only produce an actionable test if one considers that the host state, through its laws, regulations, declared policies and statements creates in the investor certain expectations about the nature of the treatment they may anticipate. The resulting reasonable and legitimate expectations are important factors that influence the initial investment decision and -afterwards- the manner in which the investment is managed. Investor expectations, created by the law of a host country, are in effect calculations about the future, and as such worthy of legal recognition and protection. The tribunal in Saluka[88] wholly adopted this view when it said that an investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment, as well as on the investor's expectation that the conduct of the host state subsequent from the investment will be fair and equitable.

The Suez case, mentioned above, makes a crucial point that is likely to be key to any future Brexit related arbitrations. Investors, deriving their expectations from the laws and regulations adopted by the host country act in reliance upon those laws and regulations and change their economic position as a result. Therefore, one could argue that investor expectations are not only created via direct commitments, statements or representations, but also by the host country's laws, coupled with the act of investing in reliance to them. A subsequent, sudden and fundamental change in those laws can lead to a determination that the host country has treated investors unfairly and inequitably. In Occidental v Equador[89], the Tribunal declared that the relevant question for international law on this issue is whether the legal and business framework meets the requirements of stability and

[86] Christoph Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (OUP 2012) 142
[87] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal SA v. Argentine Republic, ICSID Case No. ARB/03/19, Award (9 April 2015)
[88] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Award (17 March 2006)
[89] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (5 October 2012) para 191

predictability under international law. Such international law may well entail an obligation not to fundamentally alter the legal and business environment in which the investment has been made[90].

As, however, FET cannot be reasonably taken to offer a guarantee of protecting all investor expectations, how does one determine which ones are legitimate and worthy of defence? Surely, a BIT cannot result in protecting future profitability in a dynamic regulatory environment such as financial services? In LG&E v Argentina[91] the Tribunal posited that expectations worthy of protection would have the following characteristics: they would be based on the conditions offered by the host state at the time of the investment, they may not be established unilaterally, they must exist and be enforceable by law, in the event of infringement a duty to compensate must arise, and one must consider business risk and the relevant industry's regulatory patterns. In Duke v Equador[92], it was further acknowledged that the reasonableness and legitimacy of investor expectations will depend on the political, socioeconomic, cultural and historical conditions prevailing in the host state. After all, tribunals highlight the need to balance the reasonable and legitimate expectations of the claimants against the state's sovereign power to regulate[93]. A possible conclusion at this point is that while a state is free to determine its own legal and economic order, this is subject to an international minimum standard and must recognise the investor's concern for planning and stability (based on that order at the time of investment). Host states must at all times be aware that their legal order forms the basis of legitimate expectations which must be taken into account in any future reforms, democratically mandated or not[94]. What happens when host states act disregarding the above statement is best explained by looking at the case of Spain and its recent investment arbitrations.

2.2.3 Spanish Cases

The paper has so far explained how FET is linked to a series of objectively assessed commitments on the part of the state that, if violated, can generate a legitimate claim for compensation by the investor. Crucially, a lot of this discussion revolves around the investor's legitimate expectations, based upon representations made (and conditions prevailing) at the time of entry into the host country. So far so good, but does any of this actually help an investor feeling aggrieved by Britain's decision to leave the EU? This decision, as is well known, was the result of a painstaking judicial and parliamentary process that followed a referendum in June 2016. While one may disagree with the logic behind such a move,

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[90] CMS v Argentina, is a further case where the Tribunal stated reiterated the position that a stable legal and business environment is an essential element of FET.
[91] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, Award (25 July 2007)
[92] Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award (18 August 2008)
[93] ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003) para 184.
[94] Schreuer and Dolzer (n 66) 146

it is beyond doubt that a majority of those voting in the referendum, a majority of the British Parliament (and a majority in the Parliament to emerge from the June 2017 election) support the decision to leave the EU (the question is often how to leave it, rather than leaving it per se). Said decision was transparently made (allegations of misinformation during the referendum campaign aside) and has a good grounding in democratic, or in any case, legitimate processes. In conclusion, it might seem disingenuous to challenge the legal consequences of the decision to effect Brexit, regardless of the enormity of the change they bring to the British regulatory environment. Considering the historical importance and magnitude of Brexit, what is it that entitles us to keep discussing FET as a potential spanner in the works, thrown by foreign investors?

The answer emerges from a single word, that word is Spain. The reason why Spain is central to the relation of ISDS to Brexit, is the fact that the South European country is the closest example of a western, developed economy having faced an avalanche of ISDS claims due to a significant change in regulatory conditions[95]. In the Spanish case, the change involved a reworking of the regulatory framework for clean energy generation. The cases generated by the reaction of investors offer a close parallel to potential Brexit cases, and are of particular importance to our understanding of the role FET violations can play in the context of Britain disentangling itself from the EU.

Here is how Spain found itself on the other side of so many ISDS panels. The financial crisis, which began in 2007 and deepened in 2008, impacted Spain severely and triggered a sharp adjustment to imbalances accumulated during the previous decade. While this crisis was one of private indebtedness, the state sector was not immune to its effects. Spanish sovereign debt went from 40% of GDP in 2007 to more than 100% of GDP in the first six months of 2013[96]. This crisis had major repercussions for Spain's energy market, sparking a pricing crisis. This crisis in electricity prices was caused by the fact that Spain's system capped end-user prices of electricity to several consumer groups under a regulated tariff system. With the generation costs rising faster than the tariff during the crisis years however, this system generated a huge tariff deficit that the government owed to utilities, estimated at billions of Euros already in May 2009[97].

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[95] Spain is the most sued country under the ECT. The ECT Secretariat lists 32 claims against Spain as of July 2017. See <www.energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/> accessed 18 January 2018

[96] Banco de España 'Financial Stability Report' (May 2013) <http://www.bde.es/f/webbde/Secciones/Publicaciones/InformesBoletinesRevistas/InformesEstabilidadFinanciera/13/IEF-Ing-Mayo2013.pdf> accessed 13 July 2017

[97] Glinavos (n 26)

As a response, the government gradually reduced the eligibility for the tariff, and since the beginning of 2009 moved to revise (repeatedly) the whole tariff system to ensure costs were covered[98]. Considering Spain's deteriorating fiscal position, the gradual removal of Feed-In-Tariffs, cutting subsidies and capping the rate of return for investors, were the only fiscally viable options, but these measures also changed severely the conditions under which energy generators were operating. Spain ended up within a short period of time with a drastically different regulatory and incentives environment for renewables, and solar energy in particular. Generation companies understandably saw the post-crisis Spanish scheme as a significantly less attractive business proposition, compared to its earlier versions. Foreign investors in the Spanish Photovoltaic market responded by resorting en-masse to investment tribunals seeking redress[99]. Many of these cases came under the auspices of the Energy Charter Treaty (ECT). It is to these cases that we now turn in an attempt to examine how FET is being used to challenge wholesale regulatory changes in a contemporary, developed-economy context.

The first decision arising from challenges to the reforms that Spain made in the renewable energy sector is Charanne vs Spain[100]. An SCC tribunal found in January 2016 that regulatory measures modifying the Feed-In Tariff regime for the photovoltaic sector in Spain did not amount to an indirect expropriation and did not violate the investors' legitimate expectations[101]. The investors had claimed, amongst other violations, that Spain did not afford them fair and equitable treatment, contrary to article 10 (1) of the ECT. Article 10 provides that contracting states shall encourage and create 'stable conditions' and ensure 'fair and equitable treatment' of investors. Furthermore, 'investments shall also enjoy the most constant protection and security' while 'unreasonable or discriminatory measures' are strictly forbidden[102]. Charanne argued that FET under the ECT demanded the maintenance of a stable and predictable legal framework for the investments. In this case, they claimed, their legitimate expectations had been frustrated by the wholesale changes to the regulation of solar energy described above.

[98] International Energy Agency, 'Energy Policies of IEA Countries - Spain 2009' (2009) < http://www.iea.org/publications/freepublications/publication/spain2009.pdf> accessed 13 July 2017

[99] William Pentland, 'Stampede Of Investors Sue Spain Over Cuts In Solar Subsidies, *Forbes* (19 Februrary 2014) < www.forbes.com/sites/williampentland/2014/02/19/stampede-of-investors-sue-spain-over-cuts-in-solar-subsidies/> accessed 13 July 2017

[100] Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award (21 January 2016)

[101] Monica Feria-Tinta, 'Where Does the First Investor-State Arbitration Award in the Spanish Renewables Cases Leave Us?' *Kluwer Arbitration Blog* (19 April 2016) <kluwerarbitrationblog.com/2016/04/19/first-investor-state-arbitration-award-spanish-renewables-cases-leave-us/> accessed 13 July 2017

[102] These protections are enhanced by the last sentence of the first paragraph of Article 10 which contains an umbrella clause that generally entails a commitment to respect every contractual obligation declaring that 'each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party'.

Spain countered that based on the principles explained by the Tribunal in Methanex, legislative changes introduced in the energy sector were an expression of its sovereign right to regulate. Moreover, it argued that the right to a tariff was not an acquired right (under the ECT) and therefore its modification was legitimate. Meeting the FET standard under the ECT in its view, did not mean freezing a legal framework in place, equivalent to a stabilization clause[103]. Referring to the jurisprudence on how the legitimate expectations of the investor affect an understanding of the content of fair and equitable treatment[104], the Tribunal held that in the absence of specific commitments adopted by Spain, the threshold for a finding of FET violation would not be reached. Specific commitments could have found expression in a stabilization clause or by means of a declaration by Spain addressed to the investors, but this had not taken place. Since such a specific commitment on the part of Spain did not exist, no violations of investors' legitimate expectations had taken place.

The Charanne Tribunal relied on the Electrabel[105] principle, according to which while an investor is promised protection against unfair changes, the host state is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework. The conclusion from Charanne therefore is that in the absence of specific commitments, regulatory changes need to be drastic, in order to constitute unfair changes, and that if this threshold is not reached, then in the absence of additional specific commitments, the investor cannot hope to prove violation of FET.

Could specific commitments derive from political pronouncements, like the promotional material mentioned at the beginning of the paper, and policy statements by leading politicians (like those by David Cameron seen earlier)? Two further cases can be cited in support of the statement that political commitments (while falling short of a stabilisation clause[106] as discussed above) can still inform our understanding of the content of the FET standard. One is Waste Management v Mexico[107] and the other is Methanex where a discussion is offered by the tribunal on specific commitments given to an investor that the government would refrain from certain action (that could be deemed expropriatory). The Tribunal in Waste Management argued that in applying FET it is relevant that the treatment is in

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[103] Robert Howse, 'Freezing government policy: Stabilization clauses in investment contracts' *Investment Treaty News* (4 April 2011) <www.iisd.org/itn/2011/04/04/freezing-government-policy-stabilization-clauses-in-investment-contracts-2/> accessed 13 July 2017
[104] UNCTAD (n 42)
[105] Electrabel S.A. v. The Republic of Hungary, ICSID Case No. ARB/07/19, Award (25 November 2015)
[106] Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 217
[107] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Award (2 June 2000)

breach of representations made by the host State which were reasonably relied on by the claimant. One could argue that general statements of intent by politicians trying to publicise a positive investment climate fall below the level of specificity required to ensure the immutability of the legal order[108].

The above should be encouraging for the British government in the context of Brexit, but with one major qualification: consistently with the Charanne criteria, a different tribunal in a case against Spain did find its changes drastic enough to breach FET. The case was Eiser v Spain[109]. The main issues discussed in this case go to the core of a foreign investor's legitimate expectations. The Tribunal was asked to deliberate on the same content as Charanne beforehand, namely to examine whether FET protects the investor's right to an immutable and stable framework and which type (and extent) of state acts investors can claim to violate their legitimate expectations. Eiser argued that the regulatory framework under which they made their investment, granted them immutable economic rights that were protected by the ECT's FET standard, guaranteeing stable and transparent conditions for the investment. They also claimed that Spain's measures drastically changed the regulatory framework by eliminating and substituting legislation in place at the time of establishment with a completely different and arbitrary regime. Spain, as in Charanne, responded that Eiser could not expect that the regulatory framework would remain frozen, and that the investor only had a right to expect reasonable profits[110].

The Tribunal recognized once more that the FET standard does not grant foreign investors a right to regulatory stability per se, meaning that states maintain their right to modify their regulatory regimes to adapt to circumstances and changing public needs. In the absence of specific commitments of the state directly extended to investors, the key issue for the tribunal was to determine to which extent a foreign investor can trigger the FET protection provided in an investment treaty (in this case, the ECT) and be awarded compensation as a response to the host State's action. In this Charanne had stumbled, by failing to convince the tribunal of the severity of the regulatory change. The Eiser Tribunal concluded that Article 10(1) of the ECT protects investors from a fundamental regulatory change -total and unreasonable- in a manner that does not take into account the circumstances of existing investments made in reliance on the prior regime.

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[108] Alec Stone Sweet & Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP 2017) 202
[109] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (4 May 2017)
[110] Nahila Cortes, 'Spanish Energy Arbitration Saga: Green Light for Investors Claiming Breach of FET?' *Kluwer Arbitration Blog* (17 June 2017) < http://kluwerarbitrationblog.com/2017/06/17/spanish-energy-arbitration-saga-green-light-investors-claiming-breach-fet/> accessed 13 July 2017

Fundamentally, the tribunal recognized that an investor's right to legal stability is an important, albeit limited, element of the FET that must be protected. The tribunal reached this conclusion by looking at ADC v. Hungary[111], which asserted that the regulatory power of the state has a limit that is established by the commitments assumed under investment treaties that cannot be ignored. The Eiser Tribunal reasoned that although Spain did experience a legitimate public policy problem with the tariff deficit, and that the decision to take measures in order to remedy the situation was necessary, the Spanish authorities still had to treat foreign investors in a fair and equitable fashion. Further, any interpretation of the FET under the ECT would need to take into account the ECT objectives of legal stability and transparency[112]. In this case it was understood that the State's obligation to provide FET to investors necessarily implied that the State shall provide fundamental stability in the essential features of the legal framework that investor relied on when making the investment. In reaching this conclusion, the tribunal interpreted ECT Article 10(1) under Article 31 of the Vienna Convention on the Law of Treaties, mandating that interpretation of treaty provisions is carried out in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The outcome of this determination was that the objective of the ECT is to provide a legal framework that will foster long-term cooperation, and the treaty is just an instrument to increase the stability that is required in order to fulfil this purpose.

Support for this idea (that it is an obligation of the state to provide stability to the essential features of the regimen under which the investments was made) was traced by Eiser to decisions[113], such as Total v. Argentina, where it was decided that an investor has the right to expect that the legal framework will respect basic elements of the investments. Also, in El Paso v. Argentina, the tribunal had concluded that the measures adopted by the state considered as a whole, altered the prior legal framework that the investor took in consideration when making the investment and dismantled the existing regulatory framework that was established to attract investors. Further, as we have already seen, in CMS v. Argentina it was decided that the measures transformed and completely modified the legal and business environment in relation to the framework under which the investment was decided to be performed. In other words, regulatory or legislative modifications will be seen as disproportional when they occur suddenly (and in the case of Spain unexpectedly), removing the essential features of the regulatory framework in place.

[111] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award (2 October 2006)
[112] 'the Parties shall create stable, equitable and transparent conditions.' Title 1, ECT
[113] Seen earlier in this paper

Finally, the degree of damage sustained by the investor will be important. In the words of the Eiser Tribunal (para. 365) the host state eliminated a favourable regulatory regime previously extended to claimants and other investors to encourage their investment in Spain. It was replaced with an unprecedented and wholly different regulatory approach, based on wholly different premises. This new system was profoundly unfair and inequitable as applied to existing investments, stripping investors of virtually all of the value of their business. The Tribunal continued (para. 382) to state that taking account of the context and of the ECT's object and purpose, Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This is not to say of course that regulatory regimes cannot evolve. The legitimate expectations of any investor have to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of the powers conferred on them by the law[114]. However, the Article 10(1) obligation to accord FET means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors (who invested in reliance on those regimes) of their investment's value.

It is true that the Eiser Tribunal is consistent with decisions establishing a high threshold to find a breach of the FET standard in the absence of specific undertakings[115]. The picture emerging suggests that the regulatory modification must be fundamental, total, and unreasonable, and must not consider the circumstances under which the existing investment was made. In this sense, the Eiser Tribunal suggests that investors have a right to expect that the host state will not modify the environment under which the investment was made, in a drastic and unexpected way that would fundamentally negatively impact the investment[116]. It is worth repeating here that the Eiser Tribunal's approach to the applicable standard of the FET does not contradict the approach adopted in Charanne, although of course the final outcomes differ[117].

The message for those thinking of pursuing claims against the British government for Brexit is clear: The more drastic the policy change, the better the chance of success when claiming FET violations. The Eiser decision tells those in the position of MexCity that if they established in the UK with a

[114] El Paso v. Argentina, para. 400
[115] Cortes (n 110)
[116] Raul Pereira de Souza Fleury, 'Eiser Infrastructure v. Spain: Could the tide be turning in favor of photovoltaic foreign investors in Spain?' *Kluwer Arbitration Blog* (20 June 2017) <kluwerarbitrationblog.com/2017/06/20/eiser-infrastructure-v-spain-tide-turning-favor-photovoltaic-foreign-investors-spain/> accessed 13 July 2017
[117] Watson, Farley and Williams LLP, 'Update on the ICSID Arbitration Award Eiser v Spain' (May 2017) <www.wfw.com/wp-content/uploads/2017/05/WFW-Briefing-EiserArbitration-May2017.pdf> accessed 13 July 2017

verifiable, legitimate expectation that the broad features of the regulatory framework will remain in place, they can protest Brexit for totally upending this framework if it results in the total negation of their investment. It is to this concept of loss (and the extent of it) that we now turn.

2.3 Compensation

Assuming an investor is successful in a Brexit claim, how will the tribunal assess compensation? International investment agreements in principle require prompt, adequate and effective compensation equal to the fair market value of the lost investment. When non-expropriatory treaty violations are found, damages have been awarded in accordance with the rules of international law that require full compensation[118]. In a number of cases concerning FET breaches, this resulted in an award of the fair market value of the investment calculated by reference to future cash flows[119]. It is notable that tribunals make limited reference to the public interest, to regulatory autonomy or to host state human rights or other international law obligations at the remedies stage of investment claim determinations[120]. We need to acknowledge that successful Brexit lawsuits will result in significantly expanding the 'Brexit-bill' that the UK government will need to settle, an issue which has significant political connotations already[121].

As discussed above, a violation of a treaty obligation causing injury entitles an injured party to compensation for the injury sustained[122]. As a matter of international law, when a state breaches a treaty obligation, its conduct is considered a wrongful act for which reparation is due for any injury caused thereby[123]. The basic principle, as acknowledged by the Tribunal in Eiser v Spain was that states are obligated to make full reparation for any injury caused by an internationally wrongful act. This is set out in Article 31 of the International Law Commission's Articles of State Responsibility. Article 2 provides that 'an internationally wrongful act' occurs when there is state conduct that constitutes 'a breach of an international obligation of the state'. Thus a failure by a state to accord treatment as set

[118] Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (BIICL 2015)
[119] CMS v. Argentina
[120] Margaret Devaney, 'Leave it to the Valuation Experts?' (2012) Society of International Economic Law, Working Paper 2012/06 <www.researchgate.net/publication/251329944_Leave_it_to_the_Valuation_Experts_The_Remedies_Stage_of_Investment_Treaty_Arbitration_and_the_Balancing_of_Public_and_Private_Interests> accessed 13 July 2017
[121] Peter Foster and Ben Riley-Smith, 'Theresa May could storm out of Brexit talks over divorce bill', *The Telegraph* (2 July 2017) < http://www.telegraph.co.uk/news/2017/07/01/theresa-may-could-storm-brexit-talks-divorce-bill/> accessed 13 July 2017
[122] Eiser v Spain, para. 420
[123] James Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) Vol. 18(1) D.Duke Journal of Comparative & International Law 77-149, 85

out in an applicable investment treaty is an internationally wrongful act giving rise to the obligation to make full reparation for any injury caused thereby[124].

The problem with this for investment arbitrations is that the act that gives rise to a claim for compensation (for example an expropriation) may be within the regulatory discretion of the state (thus legal) and at the same time give rise to liability, as per the terms of most BITs. Full reparation or restitution therefore may not be appropriate as it is seen as too limiting on what is otherwise sovereign discretion. It is for this reason why the most commonly employed standard of compensation in investment treaty arbitrations is the 'fair market value' standard[125]. This standard entails recognition that investment law does not commit the tribunal to full restitution, generally leading to lesser damages than a 'full reparation' standard. Fair market value, allows the investor to receive appropriate compensation, without treating the state action in the same way as other violations of international law. It could even be argued that non-discriminatory, large-scale reforms entailing systemic interference with the investor's legitimate expectations may warrant compensation at an amount less than the fair market value of the investment affected[126]. The 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment[127] observe that the amount of compensation that ordinarily will be just or appropriate will be the fair market value of the investment. There need not be an active market for the property in question to be valued for purposes of compensation, but compensation should reflect an objective, real and full value, in effect a market measure[128].

Our MexCity scenario assumes that the whole purpose of their investment in the UK is negated by Brexit. Such a supposition would allow reference to the jurisprudence on full compensation, such as that relating to compensation for indirect expropriation[129], as the appropriate method to calculate the value of MexCity's loss. Both the examination of the tribunal's jurisdiction and the interpretation of a possible violation of FET through the concept of legitimate expectations rested on modelling wholesale changes to the regulatory regime (a hard or no-deal Brexit), as explained earlier in the

[124] Abby Cohen-Smutny, 'Principles Relating to Compensation in the Investment Treaty Context' (19 September 2006) IBA Annual Conference, 2 <www.josemigueljudice-arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/investment_arbitration/compensation_in_inv_treaties-_abbey_cohen_smutny.pdf> accessed 13 July 2017
[125] OECD 'Indirect Expropriation and the Right to Regulation in International Investment Law' (September 2004) OECD Working Papers on International Investment 2004/4 <dx.doi.org/10.1787/780155872321> accessed 13 July 2017
[126] Devaney (n 120) 12
[127] Claudia Wendrich, 'The World Bank Guidelines as a Foundation for a Global Investment Treaty: A Problem-Oriented Approach' (21 December 2005) Vol.5 Transnational Dispute Management
[128] Ioannis Glinavos, 'Haircut Undone? The Greek Drama and Prospects for Investment Arbitration' (2014) Vol.5(3) JIDS 475-497
[129] Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007)

paper. For a firm established in London in order to run European operations (with the financial passport), a loss of the ability to offer financial services to the continent would be equivalent to indirect expropriation. In the words of the Sempra tribunal, compensation is the appropriate standard of reparation in respect of breaches other than expropriation, particularly if such breaches cause significant disruption to the investment made. In such cases it might be very difficult to distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same[130].

Success in establishing jurisdiction and in finding a violation through FET will entitle MexCity to claim for losses, but could anything other than total loss lead to an award significant enough to make it worth pursuing an action in the first place? If MexCity could run its business though establishment in another EU member state, or EU services were only a part of its business adversely affected by Brexit, or if the provision of financial services continues to be possible (albeit at increased costs) through a 'soft' Brexit or a successor trade agreement that contains financial services, then the MexCity case will be significantly weakened in jurisdictional, substantive and award calculation terms. Anything less than catastrophic loss for MexCity would weaken both legal arguments and practically negate the value of pursuing a claim. Assuming therefore a worst-case scenario, the discussion above demonstrates how a fair market value standard would be the most appropriate way to assess their compensation[131]. The final part of the discussion summarises the main findings of the paper and attempts to evaluate MexCity's chances of success, within the parameters set.

3. Conclusion

Key in assessing a claimant's chances of success is determining the degree to which a tribunal will defer to the state's sovereign right to regulate. On this issue, the cigarette plain-packaging arbitrations offer a good summary of the points made earlier in this paper on the conflict between sovereign discretion and investor protection. In Phillip Morris v Uruguay[132] the majority of the tribunal considered that a 'margin of appreciation' as developed in the jurisprudence of the European Court of Human Rights applied equally in disputes arising under BITs, and that tribunals should pay great deference to governmental assessments of national needs. Similarly, with respect to legitimate expectations and stability, the tribunal accepted that neither concept affected the State's rights to

[130] Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award (28 September 2007) par 403

[131] Pierre-Yves Tschanz & Jorge E. Viñuales, 'Compensation for Non-expropriatory Breaches of International Investment Law' (2009) Vol.26(5) Journal of International Arbitration 729–743

[132] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016)

exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances. In particular, changes to general legislation were not prevented by the FET standard if they did not exceed the exercise of the host State's normal regulatory power in pursuance of a public interest and did not modify the legal framework relied upon by an investor outside of an acceptable margin of change. In the absence of any specific undertakings by the host State, the tribunal concluded there could be no legitimate expectation that the regulatory environment would not change. The FET standard, in the tribunal's view, was not a guarantee that nothing should be done by the host state for the first time[133].

Is this what we are looking at here, in the context of Brexit? Should a margin of appreciation be afforded to the actions of the British government in bringing about the country's exit from the EU? It is time to conclude this discussion by predicting the outcome of our case-study. Could someone actually win such a case about Brexit? The answer, considering everything we already discussed, is yes, but within a rather narrow band of facts. This paper has examined the field of financial services, focusing on the issue of FET, as the core substantive question in any Brexit related investment arbitration. Keeping these limitations of scope in mind, we can make the following concluding observations.

In the field of financial services, if a foreign-owned bank from a jurisdiction that has a BIT with the UK (containing FET protection and recourse to ISDS) were to sue the UK after a no-deal, or a hard exit from the EU has taken place, they could win if they satisfy the following criteria. Firstly, they established in the UK in order to carry out predominately European operations, using the financial passporting arrangements as a gateway to Europe. Secondly, they chose to establish in the City of London after being attracted here on the strength of government, local authority, and FDI promoting institutions inviting them in specifically in order to take advantage of the UK's European links (before a referendum on EU membership was aired as a viable policy aim). Thirdly, the loss due to Brexit is catastrophic, leading to the negation of almost the totality of their investment. Fourthly, the tribunal is convinced that a state act (for instance the Withdrawal Bill/Act coming into force) has radically changed the conditions under which the investment was made to the detriment of the investor. Planning for a worst-case scenario does not mean that one wishes it to materialise. Brexit, may be Brexit, but it does not need to be like this.- *Word-count: 12254*

[133] Kate Mitchell 'Philip Morris v Uruguay: an affirmation of 'Police Powers' and 'Regulatory Power in the Public Interest' in International Investment Law' *EJIL: Talk! Blog* (28 July 2016) <www.ejiltalk.org/philip-morris-v-uruguay-an-affirmation-of-police-powers-and-regulatory-power-in-the-public-interest-in-international-investment-law/> accessed 13 July 2017