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FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW

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This document, derestricted under the OECD Secretary General's responsibility, has been developed as an input to the Investment Committee's work aimed at enhancing understanding of the fair and equitable treatment standard in international investment law.

This document benefited from discussions and a variety of perspectives in the Committee. The document as a factual survey, however, does not necessarily reflect the views of the OECD or those of its Member governments. It cannot be construed as prejudging ongoing or future negotiations or disputes pertaining to international investment agreements.

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FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW

Introduction

The obligation to provide "fair and equitable treatment" is often stated, together with other standards, as part of the protection due to foreign direct investment by host countries. It is an "absolute", "non-contingent" standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the "relative" standards embodied in "national treatment" and "most favoured nation" principles which define the required treatment by reference to the treatment accorded to other investment[1]. Although some references to the standard can be found in the first negotiating attempts of multilateral trade and investment instruments, it became established as a principle mainly through the increasing network of bilateral investment treaties.

The obligation of the parties to investment agreements to provide to each other's investments "fair and equitable treatment"[2] has been given various interpretations by governmental officials, arbitrators and scholars. Discussion of this standard has focused mainly on whether the standard of treatment required is measured against the customary international law minimum standard, a broader international law standard including other sources such as investment protection obligations generally found in treaties and general principles or whether the standard is an autonomous self-contained concept in treaties which do not explicitly link it to international law. The implications of this discussion could be very broad, in particular given the growing number of arbitral awards which examine claims of denial of fair and equitable treatment.

The meaning of the "fair and equitable treatment" standard may not necessarily be the same in all the treaties in which it appears. The proper interpretation may be influenced by the specific wording of a particular treaty, its context, negotiating history or other indications of the parties' intent. The attempts to clarify the normative content of the standard itself have, until recently, been relatively few. There is a view that the vagueness of the phrase is intentional to give arbitrators the possibility to articulate the range of principles necessary to achieve the treaty's purpose in particular disputes. However, a number of governments seem to be concerned that, the less guidance is provided for

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1 See *UNCTAD, Bilateral Investment Treaties in the Mid 1990s, 1998.* Also see A. A. Fatouros, "Government Guarantees to Foreign Investors", *Columbia University Press (1962), pp. 135-141, 214-215.*

2 Investment treaties vary in their precise drafting. Some expressly define the standard by reference to international law: treaties concluded by France, US, Canada ; others do not make reference to international law, for instance treaties concluded by the Netherlands, Sweden, Switzerland and Germany. For example, The German model BIT states: "Each Contracting Party….shall in any case accord such investments fair and equitable treatment" and the Swiss model BIT states: "Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment…" See *UNCTAD op. cit. n.1.*

arbitrators, the more discretion is involved and the closer the process resembles decisions *ex aequo et bono, i.e* based on the arbitrators' notions of "fairness" and "equity".

The OECD has on two occasions in the past referred to the "fair and equitable treatment standard" by linking it to the minimum standard required by international law[3] and general principles of international law[4] without however comprehensively analysing its specific content[5]. Since then, a growing case law has been developed, which could shed light on the normative content of the standard.

The present survey provides factual elements of information on jurisprudence, literature and state practice related to the fair and equitable treatment standard. It examines the origins of the standard and its use in international agreements and state practice **(Part I),** its relationship with the minimum standard of international customary law (**Part II)** and the elements of its normative content as identified by arbitral tribunals (**Part III).**

I. The origins of the fair and equitable treatment standard and its current use in international agreements and state practice

A. The origins of the standard

The first reference to "equitable" treatment is found in the ***1948 Havana Charter for an International Trade Organisation*.** Its Article 11(2) contemplated that foreign investments should be assured "just and equitable treatment". The Article provided that the International Trade Organisation (ITO) could:

1. make recommendations for and promote bilateral or multilateral agreements on measures designed…

2. to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another.

The organisation was to be authorised, *inter alia*, to promote arrangements which would facilitate "an equitable distribution" of skills, arts, technology, materials and equipment, with due regard to the needs of all member States. Also, the member States were to recognise the right of each State to determine the terms of admission of foreign investors on its territory, to give effect to "just terms" on ownership of investment, and to apply "other reasonable requirements" with respect to existing and future investments.[6] Because of a number of unresolved issues, some major developed countries did not ratify the Charter, bringing the first post-war multilateral effort on trade and investment to an unsuccessful conclusion.

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3 "Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention", *OECD, pp.13-15, 1967.*

4 "Intergovernmental Agreements Relating to Investment in Developing Countries" *OECD, 1984.*

5 In 1967 and 1984, the OECD countries based their work essentially on state practice and literature.

6. Although this provision is valuable as precedent, it did not itself guarantee this standard of treatment for investors; it merely authorised the International Trade Organisation to recommend that this standard be included in future agreements.

At the regional level, in 1948, the Ninth International Conference of American States adopted the ***Economic Agreement of Bogotá***,[7] an agreement covering among other things, the provision of adequate safeguards for foreign investors. Article 22 of the agreement included the following language:

> *"Foreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied"*.[8]

Like the Havana Charter, the Bogotá Agreement failed to come into force due to lack of support.

At the bilateral level, the ***US treaties on Friendship, Commerce and Navigation (FCN),*** developed after the First World War, contained a standard reference to international law in connection with protection of the persons and property of aliens. In the period following the preparation of the Havana Charter, the terms "equitable" and "fair and equitable treatment" started to appear in certain of the US FCN treaties[9]. The proponents of the standard considered it as a safeguard against state action that violated internationally accepted norms.[10]

In 1959, the ***Draft Convention on Investments Abroad,*** developed under the leadership of Herman Abs, the Director-General of the Deutsche Bank and Lord Shawcross, the UK Attorney General, in its Article 1 stipulated that "each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties".[11] This effort led to the German proposal to the OECD that it develop a convention on the international protection of private property.

Intensive discussions started in the OECD in the early 60's and culminated in the adoption of the ***Draft Convention on the Protection of Foreign Property*** by the OECD Council on 12 October 1967.[12] Under the Article 1 (a) "Treatment of Foreign Property: "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties…". The Draft Convention, although never opened for signature, represented the collective view and dominant trend of OECD countries on investment issues and influenced the pattern of deliberations on foreign

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7. See Stephen Vasciannie in "The Fair and Equitable Treatment Standard in International Investment Law and Practice" in the *British Yearbook of International Law, (2000), vol. 70, pp. 99-164.*

8. In addition, it provided that Parties would not set up "unreasonable or unjustified impediments that would prevent other States from obtaining on equitable terms the capital, skills, and technology needed for their economic development".

9. US FCN treaties with Ireland (1950), Greece (1954), Israel (1954), France (1960), Pakistan (1961), Belgium (1963) and Luxembourg (1963), contained the express assurance that foreign persons, properties, enterprises and other interests would receive "equitable treatment" while others including those with the Federal Republic of Germany, Ethiopia and the Netherlands used the terms "fair and equitable treatment" for a similar set of items involved in the foreign investment process. K. Vandevelde suggests that the term "fair and equitable treatment" as used by the US is the equivalent of the "equitable treatment" set out in various FCN treaties; see Vandevelde "The Bilateral Treaty Program of the United States", *Cornell International Law Journal, 21 (1988) pp. 201-76.*

10. J.C. Thomas "Reflection on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators", *ICSID Review – Foreign Investment Law Journal (2002) 17 (1) pp.21-101.*

11. Abs and Shawcross, "The Proposed Convention to Protect Foreign Investment: A Round Table: Comment on the Draft Convention by its Authors", *Journal of Public Law, 9 (1960), pp. 119-24.*

12 See *op. cit. n. 3.*

investment in that period. The requirement to "ensure fair and equitable treatment" in the Draft Convention placed greater emphasis on the standard than earlier instruments.

B. The current use of the standard in international agreements and state practice

-- *Bilateral Treaties*

The influence of the OECD Draft Convention is obvious in the growing number of ***bilateral investment treaties*** which were negotiated between developed and developing countries beginning in the late 60s. One of the main features which gained a position of prominence was the reference to "fair and equitable treatment". However, while the standard appears in the majority of BITs, it is not always mentioned in treaties concluded by certain Asian countries (e.g. some treaties signed by Pakistan, Saudi Arabia and Singapore)[13]. In recent years, even countries which traditionally were in favour of national control over foreign investments and therefore favoured the use of national treatment over the fair and equitable standard have incorporated the "fair and equitable" standard in their bilateral investment treaties. Bilateral investment treaties of Chile[14] and China[15] as well as between Peru and Thailand, Bulgaria and Ghana, the United Arab Emirates and Malaysia, include the fair and equitable standard.[16] In this category it is worth noting the Latin American countries, which had embraced the Calvo doctrine since the beginning of the XXth century[17] and had firmly avoided the terms "fair and equitable".

The recently concluded new generation agreements, the Free Trade Agreements between the ***United States and Australia[18], Central America (CAFTA)[19], Chile[20], Morocco[21], and Singapore[22],*** in their Investment Chapters, provide with greater specificity that each Party has the obligation to "accord to the covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security".

The Free Trade Agreement between ***Australia and Thailand[23],*** in its Article 909, also provides that each Party has the obligation to "ensure fair and equitable treatment" of foreign investment in its own territory.

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13 See *UNCTAD, Bilateral Investment Treaties in the Mid 1990s, 1998 op. cit. n.1 p.54*

14. Model Treaty, Article 4 on the Treatment of Investments (1994), see *UNCTAD op. cit. n.1 p.54.*

15. Article 3 of the Model Treaty, see UNCTAD *op. cit. n.1.*

16. See ICSID *Investment Laws of the World: Bilateral Investment Treaties (1972-).*

17. According to the Calvo doctrine, these countries were reluctant to enter into treaty arrangements that would result in the transfer of jurisdiction over disputes on property owned by foreigners in the country from domestic to international courts.

18 US-Australia Free Trade Agreement signed on March 1, 2004.

19 US-Central America Free Trade Agreement (CAFTA) signed on January 28, 2004. The Central American countries are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua.

20 US-Chile Free Trade Agreement signed on June 6, 2003.

21 US-Morocco Free Trade Agreement signed on June 15, 2004.

22 US-Singapore Free Trade Agreement signed on May 6, 2003.

23 Australia-Thailand Free Trade Agreement signed on October 19, 2003, see text of the Agreement on http://www.dfat.gov.au/trade/negotiations/aust-thai/aust-thai_fta.pdf.

-- *Multilateral instruments*

In the multilateral context, the ***Draft United Nations Code of Conduct on Transnational Corporations,*** in its Article 48,[24] stated that:

> *"Transnational corporations should receive [fair and] equitable [and non-discriminatory] treatment [under] [in accordance with] the laws, regulations and administrative practices of the countries in which they operate [as well as intergovernmental obligations to which the Governments of these countries have freely subscribed] [consistent with their international obligations] [consistent with international law]".*

Although most of the above issues had not reached consensus in the last version of the text (1986), the negotiating States agreed that the Code should provide for "equitable" treatment of transnational corporations.

The ***1985 Convention establishing the Multilateral Investment Guarantee Agency (MIGA)*** specifies in Article 12 (d) that in order to guarantee an investment, MIGA must satisfy itself that fair and equitable treatment and legal protection for the investment exist in the host country concerned.[25] This would appear to be not only a prudent standard for lowering the risk for guaranteed investments, but also one of the means by which MIGA carries out its mission under Articles 2 and 23 to promote investment flows to and among developing countries, which include promotion of investment protection.

The ***1992 World Bank Guidelines on Treatment of Foreign Direct Investment***[26] stipulate in their article III(2) that: "each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in the Guidelines". It then in II (3) indicates the standards of treatment which are to be accorded to foreign investors in matters such as security of person and property rights, the granting of permits and licenses, the transfer of incomes and profits, the repatriation of capital. The approach suggested is that fair and equitable treatment is an over-arching requirement.

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24. UNCTC, *The United Nations Code of Conduct on Transnational Corporations,* Current Studies, Series A (New York, 1986) UN Doc. ST/CTC/SER. A/4, Annex 1.

25. See http://www.miga.org/screens/about/convent/convent.htm. Article 12 (d) of the Convention stipulates:

> *(d) In guaranteeing an investment, the Agency shall satisfy itself as to:*
>
> *(i) the economic soundness of the investment and its contribution to the development of the host country;*
>
> *(ii) compliance of the investment with the host country's laws and regulations;*
>
> *(iii) consistency of the investment with the declared development objectives and priorities of the host country; and*
>
> *(iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment.*

26. World Bank, "Legal Framework for the Treatment of Foreign Investment", 1992.

The standard can also be found in 1990 ***Lomé IV,***[27] the Fourth Convention of the African, Caribbean and Pacific Group of States and the European Economic Community (EEC) and in the 1987 ***ASEAN Treaty for the Promotion and Protection of Investments,*** in its Article IV.[28]

The ***Colonia Protocol on Reciprocal Promotion and Protection of Investments*** signed by MERCOSUR member States[29] in January 1994, expressly grants to investors from each MERCOSUR country "at any moment, fair and equitable treatment". An additional Protocol on the Promotion and Protection of Investments from non-member States extends the same treatment to these investments.[30]

Article 159 of the 1994 Treaty establishing the ***Common Market for Eastern and Southern Africa (COMESA)*** also requires COMESA member States to "accord fair and equitable treatment to private investors".

Article 1105 (1) of the ***NAFTA,*** which entered into force on 1 January 1994, stipulates under the rubric "Minimum Standard of Treatment" that:

> *"Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".*

The ***Draft OECD Multilateral Agreement on Investment (1998)*** in its preamble indicated that "fair, transparent and predictable investment regimes complement and benefit the world trading system", while under the "General Treatment" Article it stipulated that:

> *"Each contracting Party shall accord fair and equitable treatment and full and constant protection and security to foreign investments in their territories. In no case shall a contracting Party accord treatment less favourable than that required by international law".*

The ***Energy Charter Treaty*** (1995) provides also that fair and equitable treatment shall be accorded at "all times". Although the Treaty is limited to one sector, it is significant in this context because it includes among its Parties several economies in transition[31] which embrace the standard.

Finally, the June 2002 *Agreement between Singapore and EFTA* establishing a free-trade area among the Parties stipulates in its Article 39 that each Party shall "accord at all times to investments of investors of another Party "fair and equitable treatment".

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27. Lomé IV entered into force for a ten-year period on 1 March 1990.

28. The ASEAN Treaty is the Agreement among the Governments of Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand for the Promotion and Protection of Investments.

29. MERCOSUR was established in 1991 by the Asuncion Treaty. Its Member States are: Argentina, Brazil, Paraguay and Uruguay.

30. UNCTAD, *International Investment Instruments: A Compendium (1996) Vol. II, pp. 527-34.*

31. Parties to this Treaty include Armenia, Azerbaijan, Belarus, Bulgaria, Croatia, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan.

II. Fair and equitable treatment and its relation to the minimum standard of international customary law

As mentioned above, the discussion on the "fair and equitable treatment" has been mainly focused on whether the standard requires that the conduct of the host State be measured:

- against the international minimum standard required by customary international law;
- against international law including all sources;
- against an independent self-contained treaty standard.

A. Fair and equitable treatment as a part of the minimum standard[32] required by customary international law

Under customary law, foreign investors are entitled to a certain level of treatment, and any treatment which falls short of this level, gives rise to responsibility on the part of the State[33]. Fair and

32 The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property. While the principle of national treatment foresees that aliens can only expect equality of treatment with nationals, the international minimum standard sets a number of basic rights established by international law that States must grant to aliens, independent of the treatment accorded to their own citizens. Violation of this norm engenders the international responsibility of the host State and may open the way for international action on behalf of the injured alien provided that the alien has exhausted local remedies. The classical monograph on the principle is A. H. Roth, The Minimum Standard of International Law Applied to Aliens, *Leiden, 1949*, where it is defined as follows (p. 127): "… the international standard is nothing else than a set of rules, correlated to each other and deriving from one particular norm of general international law, namely that the treatment of alien is regulated by the law of nations. See also I. Brownlie, Principles of Public International Law, *Oxford, Sixth Edition 2003, p. 502*: "…legal doctrine has opposed an 'international minimum standard', 'a moral standard for civilized States', to the principle of national treatment. Also C. Rousseau, Droit International Public, *Paris, 1970, p. 46*: «La grande majorité de la doctrine estime qu'il existe à cet égard un standard international minimum suivant lequel les Etats sont tenus d'accorder aux étrangers certains droits,…même dans le cas où ils refuseraient ce traitement à leurs nationaux »: The great majority of the doctrine considers that it exists in this respect an international minimum standard according to which the States have to accord to aliens certain rights …even in the case they would deny the same treatment to their nationals [translation by the Secretariat]. *The American Law Institute's Restatement (Second) of Foreign Relations Law of the United States*, 1965, par. 165.2, defines the standard in the following terms: "The international standard of justice…is the standard required for the treatment of aliens by: (a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles, (b) analogous principles of justice generally recognized by States that have reasonably developed legal systems".

33 In the past, the existence of an international minimum standard for the treatment of alien–owned property and investments has been repeatedly challenged. During most of the last century, it has been the object of tension between developed and developing countries, with several countries challenging the existence (or persistence) of a customary norm of an international minimum standard. This tension had implications in several sectors, for example the League of Nations and the UN International Law Commission was unable to reach agreement on a codification of the law of State responsibility for injury to aliens. The work of the UN centre and Commission on Transnational Corporations was equally impaired by the fundamental differences on issues related to the treatment of foreign property. With their overwhelming majority within the UN General Assembly, the developing countries were

equitable has been identified by some as one of the elements[34] of the minimum standard of treatment of foreigners and of their property, required by international law. This view has been supported by a number of scholars.[35,36] Recently, the question has been raised whether the content of the minimum standard is limited to the interpretation given to it in the early 20th century in the context of the *Neer* and *Roberts*' cases[37] or refers to an evolving customary law which has been influenced by the extensive network of BITs (see below *Mondev, ADF* and *Waste Management* cases).

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able to assert the principle of national treatment as the rule in the case of expropriation, Charter of Economic Rights and Duties of States, *Article 22 of Chapter II, UNGA, Res. 3281 (XXIX 1974)* adopted with 104 votes in favour, 16 against (most of the developed countries) and 6 abstentions. For a certain period this approach found support in doctrine, especially from scholars in developing nations. See G. Roha "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law? *American Journal of International Law, 1961, pp. 863 ff.* See also M. Sornarajah, The International Law on Foreign Investment, *Cambridge, 1994, pp. 126 ff.* and P. Juillard, "L'évolution des sources du droit des investissements", *Recueil des Cours, Tome 250, 1994, p. 83.*

34 Case law points to a number of areas across which the notion of an international minimum standard applies. They include: a) the administration of justice in cases involving foreign nationals, usually linked to the notion of *denial of justice*, (see US and Mexico General Claims Commission, *Janes Claim*, United Nations, *Reports of International Arbitral Awards*, 1926, IV, p.82.); b) the *treatment of aliens under detention* : in this case the United States and Mexico General Claims Commission maintained that the equality of treatment with national detainees "is not the ultimate test of the propriety of the acts of the authorities in the lights of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standard of civilisation" (see US and Mexico General Claims Commission, *Harry Roberts Claim*, United Nations, *Reports of International Arbitral Awards*, 1927, IV, 77); c) *full protection and security*, which is usually understood as the obligation for the host State to adopt all reasonable measures to physically protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners, (see G. Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", *Recueil des Cours, Tome 269, 1997, p.347).* Doctrine generally supports the view that the latter standard provides "a general obligation for the host State to exercise due diligence in the protection of foreign investment as opposed to creating 'strict liability' which would render a host State liable for any destruction of the investment even if caused by persons whose acts could not be attributed to the State". See R. Dolzer and M. Stevens in Bilateral Investment Treaties, *ICSID, 1995.* d) although the general *right of expulsion* by the host State has never been questioned, minimum standards have been invoked concerning the way in which it is carried out, which should be the least injurious to the person affected; the classical case is *Boffolo*, United Nations, *Reports of International Arbitral Awards*, 1903, X, p.528.

35. Gann, "The US Bilateral Investment Treaty Program", *Stanford Journal of International Law, 21 (1985);* Huu-Tru, "Le réseau suisse d'accords bilatéraux d'encouragement et de protection des investissements", *Revue générale de droit international public, 92 (1988);* Paterson « Canadian Investment Promotion and Protection Treaties », *Canadian Yearbook of International Law, 29 (1991).*

36. A somewhat different but related view has been expressed by UNCTAD in its study "Bilateral Investment Treaties in the Mid-1990s" (1998): "..this standard covers an array of international legal principles, including non-discrimination, the duty of protection of foreign property and the international minimum standard."

37 The 1926 decision on the *Neer Claim* became the landmark case for the international minimum standard. This claim was presented to the US Mexico Claim Commission by the United States on behalf of the family of Paul Neer, who had been killed in Mexico in obscure circumstances. The claim held that the Mexican Government had shown lack of diligence in prosecuting those responsible and that it ought to reimburse the family. The Commission found that the failure by the Mexican authorities to apprehend or punish those guilty of the murder of the American citizen did not *per se* violate the international minimum standard on the treatment of aliens. In what has become a classical

As noted in Part I, fair and equitable treatment is spelled out in several international instruments although in most of them – with certain exceptions including the NAFTA, the US Free Trade Agreements and the commentaries of the OECD Draft Convention – this is done without any reference to an international law standard.[38] However, international law is referred to in relation to "fair and equitable treatment" in a number of BITs, in particular those concluded by France, Japan, the UK and the US and the new US and Canada model BITs.

– *International instruments and state practice*

In the Notes and Comments to Article 1 of the ***OECD Draft Convention on the Protection of Foreign Property***, the Committee responsible for the draft indicated that the concept of fair and equitable treatment flowed from the "well established general principle of international law that a State is bound to respect and protect the property of nationals of other States". The Committee added:

> *"The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that – subject to essential security interests – protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the "minimum standard" which forms part of customary international law".*[39]

Support for the proposition that "fair and equitable treatment" refers to the minimum standard may be found in a 1979 statement issued by ***the Swiss Foreign office***.[40]

As noted above, ***NAFTA*** in its article 1105 clearly treats "fair and equitable treatment" as part of the requirements of international law.

In the context of NAFTA, early arbitral tribunals gave different interpretations of the "fair and equitable" provision of the NAFTA text. In order to clarify the interpretation of Article 1105 (1), ***the***

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dictum, the Commission expressed the concept as follows: "*the propriety of governmental acts should be put to the test of international standards...the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial"* United Nations, *Reports of International Arbitral Awards*, 1926, IV, pp. 60ff.

38. Sacerdoti notes that this lack of reference to an international standard was "…possibly a way of avoiding the divergence surrounding the latter and in order to give to it a direct content" See *op. cit. n. 34.*

39. *See op. cit. n. 3.*

40. "On se réfère ainsi au principe classique du droit des gens selon lequel les états doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du "standard minimum" international , c'est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques". *Annuaire Suisse de Droit International, 178 (1980*), quoted by Dolzer and Stevens, *op. cit. n. 34.*

NAFTA Free Trade Commission (FTC) issued a binding interpretation on July 21, 2001. According to this interpretation:[41]

> *Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.*
>
> *The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.*
>
> *A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105 (1).*

In considering the meaning and implications of the FTC interpretation, in the context of the NAFTA case *ADF Group Inc. v. United States of America*[42] the ***United States*** expressed the view that the customary international law referred to in NAFTA Article 1105 (1) is not "frozen in time" and that the minimum standard of treatment does evolve. The FTC interpretation in the view of the United States refers to customary international law "as it exists today".[43]

The relationship between the "fair and equitable treatment" standard and the international minimum standard was identified at the time the NAFTA came into force, with ***Canada*** noting in its NAFTA *Statement on Implementation*:[44]

> *"Article 1105, which provides for treatment in accordance with international law, is intended to assure a minimum standard of treatment of investments of NAFTA investors…this article provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law".*

Canada agreed with the US on the view that the minimum standard of treatment does evolve. In the context of the *ADF* case, it noted that: "Canada's position has never been that the customary international law regarding the treatment of aliens was 'frozen in amber at the time of the *Neer* decision'. Obviously, what is shocking or egregious in the year 2002 may differ from that which was considered shocking or egregious in 1926. Canada's position has always been that customary international law can evolve over time, but that the threshold for finding violation of the minimum standard of treatment is still high".[45]

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41. Such an interpretation was made pursuant to NAFTA Article 2001 (2) c which grants the FTC the power to resolve disputes that may arise regarding the Agreement interpretation or application. Article 1131 (2) stipulates that an interpretation by the Commission of a provision of the Agreement shall be binding on a Tribunal established under Section B of Chapter XI.

42. *ADF Group Inc. v. United States of America,* ICSID Case No ARB(AF)/00/1, Award, 9 January, 2003, paragraph 179, p. 86 referring to the Transcript of the Oral Hearing, Vol. II, 16 April 2002, pp. 492-493. Also Post Hearing Transmission of the United States, 27 June 2002, p. 20.

43. Transcript of the Oral Hearing, Vol. II, 16 April 2002, pp. 492-493. Also Post Hearing Transmission of the United States, 27 June 2002, p. 20.

44. Canadian Statement of Implementation for NAFTA, *Canada Gazette, Part I, Jan. 1, 1994, at 149.*

45. Second Submission of Canada Pursuant to NAFTA Article 1128, 19 July, 2002, paragraph 33.

In the same context, ***Mexico,*** corrected the interpretation of its submission by the *Pope & Talbot* Tribunal. Although the test in *Neer* does continue to apply and "the conduct of government toward the investment must amount to gross misconduct, manifest injustice or in the classic words of the *Neer* claim, an outrage, bad faith or the wilful neglect of duty", Mexico also agrees that "the standard is relative and that conduct which may have not violated international law [in] the 1920s might very well be seen to offend internationally accepted principles today".[46]

The Bilateral Investment Treaties negotiated up to now by the ***United States*** have been approved by its Senate on the basis of submissions containing the notice that the general treatment provision incorporated a minimum standard of treatment based on customary international law.[47] In the 1994 US Model Treaty, Article II (3) (a) stipulated that:

> *"Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international law".*

The new 2004 ***US Model BIT***[48] in its article 5 and the recently concluded ***US Free Trade Agreements***[49] in their Chapter on Investment go further and attempt to define the minimum standard of treatment. They provide that:

> "*Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *For greater certainty [the previous paragraph] prescribes the customary international minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments …".*
>
> *[This] obligation to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world…"*

An additional interpretative provision in the US FTAs states the parties' shared understanding of the meaning of "customary international law" as "the general and consistent practice of States that they follow from a sense of legal obligation"… "the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens". This confirms the parties' view that the standard is a customary international law standard, not a conventional standard.

Canada's new Foreign Investment Protection and Promotion Agreement (FIPA) model[50], contains similar language and links the "fair and equitable treatment" to the minimum standard:

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46. Second Submission of the United Mexican States in the Matter of ADF Group Inc. v. United States of America, 22 July, p. 15.

47. Andrea Menaker, "Standards of Treatment: National Treatment, Most Favoured Nation Treatment & Minimum Standard of Treatment", *APEC Workshop on Bilateral and Regional Investment Rules and Agreements,* APEC Committee on Trade and Investment Experts Group, p. 107.

48 For the text of the model BIT see http://www.state.gov/e/eb/rls/prsrl/2004/28923.htm

49 FTAs with Australia, Central America, Chile, Morocco and Singapore, see *op. cit. n. 19-24.*

50 For the text of the new FIPA model see http://www.dfait-maeci.gc.ca/tna-nac/what_fipa-en.asp

"*The Minimum Standard of Treatment ensures investments of investors, fair and equitable treatment and full protection and security in accordance with the principles of customary international law. The minimum standard provides a "floor" to ensure that the treatment of an investment cannot fall below treatment considered as appropriate under generally accepted standards of customary international law".*

– *International Organisations*

The United Nations Centre on Transnational Corporations has issued a study which stated that "fair and equitable treatment is a classical international law standard" and "classical international law doctrine considers certain elements to be firm ingredients of fair and equitable treatment, including non-discrimination, the international minimum standard and the duty of protection of foreign property by the host State".[51]

A document prepared by the ***WTO*** Secretariat for the Working Group on the Relationship between Trade and Investment[52] states that the principle of "fair and equitable treatment" has its roots in customary international law and it is generally considered "to cover the principle of non – discrimination, along with other legal principles related to the treatment of foreign investors, but in more abstract sense than the standards of MFN and national treatment". This paper recalls the difficulties of giving a precise meaning to the principle and refers to documents and practice of the OECD (Draft Convention on the Protection of Foreign Property) and UNCTAD (paper on fair and equitable treatment).[53]

– *Jurisprudence*

Cases arising under Bilateral Treaties[54]

In the ***Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka***[55] case, Judge Asante, in his dissenting opinion, took the opportunity to make specific comments on the meaning of fair and equitable treatment although the majority judgement did not make any reference to it. Noting the juxtaposition of "fair and equitable treatment" with "full protection and security" Asante assumed that they each connoted the same level of treatment. He then considered the meaning of fair and equitable

51. United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties, (1988), p. 42.*

52. WTO, Working Group on the Relationship between Trade and Investment, *Non-Discrimination, Most-Favoured-Nation Treatment and National Treatment*, Note by the Secretariat, WT/WGTI/W/118, 4 June 2002.

53. Another document, presented by the WTO Secretariat to the same Working Group and dealing with the concept of transparency, expresses the view that the principle of "fair and equitable treatment" has been in certain cases interpreted as "requiring parties to adhere to basic norms of transparency" (WTO, Working Group on the Relationship between Trade and Investment, *Transparency*, Note by the Secretariat, WT/WGTI/W/109, 27 March 2002).

54. Bilateral treaties in this case include Friendship, Commerce and Navigation (FCN) Treaties, Treaties of Amity as well as modern Bilateral Investment Treaties.

55. In this case, the claimant's (AAPL) shrimp farm was located in an area of Sri Lanka that had come under the control of Tamil insurgents. During a counter insurgency operation conducted by government security forces, the shrimp farm was destroyed and the farm's manager and staff members were killed. It was unclear whether the government forces or the rebels caused the damage (this fact led Dr Asante to dissent). *International Legal Materials, 30 (1991), pp. 580-655.*

treatment, and primarily by reference to the commentary on the OECD Draft Convention, stressed that the fair and equitable standard conformed to the international minimum standard.

In the case concerning ***Elettronica Sicula Spa (ELSI) (United States of America v. Italy),*** the Chamber of the International Court of Justice (I.C.J.), in its Judgement of 20 July 1989, held that the requirement for constant protection and security, as expressed in the FCN treaty between Italy and the United States, was not a warranty to a U.S. investor that no disturbance in any circumstances would occur, and that the requisition by an Italian government entity of an insolvent Italian company partially owned by the U.S. investor did not violate the requirement. The Court also ruled that the requirement was to be measured by the "minimum international standard" and that a sixteen month delay in a municipal judicial proceeding did not violate that standard. However, a different approach was taken in a dissenting opinion by Judge Schwebel. He reviewed the *travaux préparatoires* and preamble to the Supplementary Agreement and deduced that one of the underlying principles of this Agreement and the Treaty it supplemented was that "of equitable treatment".[56] With this in mind, he concluded, *inter alia*, that a requisition order issued by the Italian authorities against ELSI deprived the shareholders of their rights of control, and constituted a violation of the principles of equitable treatment.

In another case before the International Court of Justice, ***Oil Platforms (Iran v. United States)***,[57] in the preliminary objection phase of the case, the question before the Court was whether the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States provided a basis of I.C.J. jurisdiction. In the Judgement, the Court held that Article IV (1) of the Treaty, which included the obligation to treat companies of the other Party in a "fair and equitable" manner, did not cover the actions of the United States complained of by Iran. Although the Court did not specifically address the meaning of the standard, Judge Higgins, in a separate opinion, expressed the following view:

> *"The key terms 'fair and equitable treatment to nationals and companies' and 'unreasonable and discriminatory measures' are legal terms of art well known in the field of overseas investment protection, which is what is there addressed…"*

In the case of ***American Manufacturing & Trading (AMT) (US), Inc. v. Republic of Zaire***,58 the ICSID Tribunal found a violation of the standards of fair and equitable treatment and full protection and security as contained in the US-Zaire 1989 BIT, as a result of loss to AMT investment caused by widespread looting in Zaire. The tribunal found that Zaire has "manifestly failed to respect the minimum standard required of it by international law"59and stated that:

> " …These treatments of protection and security of investment required by the provisions of the BIT of which AMT is beneficiary must be in conformity with its applicable laws and must not be any less than those recognised by international law. For the Tribunal, this last requirement is fundamental for the determination of the responsibility of the [host state]. It

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56. *Elettronic Sicula S.P.A. (ELSI) (US. V. Italy), 1989, I.C.J. 15,* reprinted in *28 International Legal Materials 1109.* Also see Murphy, "The ELSI Case: An Investment Dispute at the International Court of Justice"*, Yale Journal of International Law, 16 (1991), pp. 391-452.*

57. *Oil Platform (Iran v. United States),* 1996, I.C.J. 803 (Preliminary Objection).

58. *American Manufacturing & Trading, Inc. (AMT) (US) v. Republic of Zaire,* ICSID case No. ARB/93/1 Award, 21 February, 1997, reprinted in *36 International Legal Materials 1531 (1997).*

59. AMT *para. 6.10., p. 30.*

is thus an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law".[60]

In ***Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia***,[61] the claimant sought to recover losses related to its investment in an Estonian financial institution. The ICSID tribunal, after having considered whether certain actions of the Bank of Estonia amounted to a violation of its obligation to accord "fair and equitable treatment" and "non-discriminatory and non-arbitrary treatment" under the US-Estonia 1994 BIT, dismissed the claim. In its consideration, it described the standard as follows:

> *"..Under international law, this requirement is generally understood to 'provide a basic and general standard which is detached from the host State's domestic law'. While the exact content of the standard is not clear, the Tribunal understands it to require an 'international minimum standard that is separate from domestic law, but that is, indeed, a <u>minimum</u> standard.* (Emphasis in the original).

In the case ***CME (Netherlands) v. Czech Republic***,[62] CME, the claimant had purchased in the Czech Republic a joint venture media company. It alleged, *inter alia*, breaches of the "fair and equitable" treatment provisions of the Netherlands-CSFR BIT because of the actions of the Czech Republic Media Council. The Tribunal stated:

> *"The standard for actions being assessed as fair and equitable are not to be determined by the acting authority in accordance with the standard used for its own nationals. Standards acceptable under international law apply".*

To find the standard acceptable under international law the Tribunal turned to suggestions by a leading academic[63].

<u>NAFTA cases</u>

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60. *Idem, para. 6.06, p. 29.*

61. *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia,* ICSID Case no ARB/99/2 (Award) (June 25, 2001) [*rectification denied],* available at www.worldbank.org/icsid/cases/genin.pdf.

62. *CME (Netherlands) v. Czech Republic* (Partial Award) (13 September, 2001) available at www.mfcr.cz/scripts/hpe/default.asp

63. The Tribunal cited Prof. Detlev Vagts' arguments in his Article "*Coercion and Foreign Investment Rearrangements",* 72 A.J. I. L. 17 (1978) , to establish the appropriate threshold to determine whether a coerced expropriation took place with respect to CME's rights:

> *"Cancellation of the franchise, permit, or authorisation to do business in which the investor relies, except in accordance with its terms; and Regulatory Action without bona fide government purpose (or without bona fide timing) designed to make the investor's business unprofitable".*

In the ***Mondev*** case,[64] a subsidiary of Mondev, a Canadian real-estate development company, brought a lawsuit against the City of Boston for breach of a contract to develop a shopping mall in Boston. The subsidiary won in the trial court but the State's Judicial Court reversed the judgment in 1998 and Mondev submitted the claim against the US under the NAFTA investment chapter. The Tribunal extensively interpreted the "fair and equitable treatment" standard by specifically referring to the relationship between "fair and equitable" and "minimum standard of treatment" in customary international law and developed its reasoning on the evolutionary character of the minimum standard. The award[65,] stated that "the Tribunal need not pass upon all the issues debated before it as to the Free Trade Commission's interpretations of 31 July 2001". But in its view,

> *"there can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party under NAFTA, the term 'customary international law' refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for 'fair and equitable' treatment of, and for 'full protection and security' for, the foreign investor and his investments."*[66]

According to the Tribunal, "it would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927"[67].

> *At the same time, "Article 1105 (1) did not give a NAFTA Tribunal an unfettered discretion to decide for itself, on a subjective basis, what was 'fair' or 'equitable' in the circumstances of each particular case…the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is 'fair' or 'equitable' without reference to established sources of law".*[68]

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64. Mondev is a Canadian real-estate development company. In the 1970s, a Mondev subsidiary agreed with the City of Boston and the Boston Redevelopment Authority to develop a shopping mall in Boston. A bank foreclosed on the shopping mall in 1990, and Mondev's subsidiary later brought a lawsuit against the City and the Authority for breach of contract, among other claims. The subsidiary won in the trial court, but the Massachusetts Supreme Judicial Court reversed the judgment in 1998. Mondev then submitted its claim to arbitration against the United States under the North America Free Trade Agreement's (NAFTA) investment chapter, seeking $50 million in damages. The claimant alleged violations of NAFTA Articles 1102 (National Treatment), 1105 (Minimum Standard) and 1110 (Expropriations and Compensation).

65. See *Mondev International LTD v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Award) (11 October, 2002).

66 . *Idem* para. 125.

67. *Idem* para. 117.

68. *Idem* para. 119.

In another NAFTA case, ***United Parcel Service of America Inc. v. Government of Canada***[69]**,** in the award on jurisdiction (22 November 2002), the Tribunal recognized the obligatory nature of the FTC's interpretation on Chapter 11 Tribunals.[70] It has also agreed that the "obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard". On the contrary, "this obligation is included within the minimum standard".[71]

In ***ADF Group Inc. V. United States of America***,[72] ADF, a steel producer, claimed damages for alleged injuries resulting from federal legislation and implementing regulations that required federally-funded state highway projects to use only domestically produced steel. In its final Award (9 January, 2003), the ICSID Additional Facility Tribunal recognised the obligatory nature of the FTC interpretation and relied heavily of the *Mondev* case in order to address the question whether fair and equitable treatment is a reference to customary international minimum standard as well as to discuss the evolving nature of the standard.

The Tribunal, referring to the NAFTA parties' position with respect to an evolving customary law, expressed the view that:

> *"...what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the Neer case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development".*[73]

The question asked by the Tribunal was: "…are the US measures here involved inconsistent with a general customary international law standard of treatment requiring a host State to accord "fair and equitable treatment" and "full protection and security" to foreign investments in its territory"?[74] The Tribunal stated:

> *"We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited contexts) to accord fair and equitable treatment and full protection and security to foreign investments. The Investor for instance, has not shown that such a requirement has been brought into the corpus of present day customary*

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69 UPS claimed that Canada Post, which UPS alleged is a letter monopoly, engaged in anti-competitive practices: in providing its non-monopoly courier and parcel services (Xpresspost and Priority Courier), it allegedly, unfairly used its postal monopoly infrastructure to reduce the costs of delivering its non-monopoly services. UPS alleged that Canada had breached its obligations under the NAFTA, 1) to supervise a "government monopoly" and "state entity" (Arts. 1502 (3)(a) and 1503 (2); 2) to accord treatment no les favourable than it accords, in like circumstances, to its own investors (Article 1102); and 3) to accord treatment in accordance with international law (Article 1105).

70. "…And in any event the FTC's interpretation is binding on Chapter 11 Tribunals including this one". *Award on Jurisdiction, para. 96.*

71. *Idem,* para. 97.

72. The claimant in ADF, a steel producer, claimed damages for alleged injuries resulting from federal legislation and implementing regulations that required federally-funded state highway projects to use only domestically produced steel. The claimant argued, *inter alia,* that the US breached its NAFTA obligation to provide fair and equitable treatment, *see op.cit. n. 43*. For the NAFTA countries' position in this case see paragraphs 34-37.

73. *Id.* para. 179, p. 86.

74. *Id.* para.186, p. 90.

international law by the many hundreds of bilateral investment treaties now extant. It may be that, in their current state, neither concordant state practice nor judicial or arbitral case law provides convincing substantiation (or, for that matter refutation) of the Investor's position".[75]

In agreement with the *Mondev* Tribunal, the *ADF* Tribunal stated that: "any general requirement to accord 'fair and equitable treatment' and 'full protection and security' must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law".[76] The Tribunal dismissed the Investor's claims on this point.

In the ***Loewen Group, Inc and Raymond L. Loewen v. United States of America***[77] case, the Loewen Group, Inc., a Canadian company involved in the death care industry, and its former Chairman and CEO, Raymond Loewen, brought arbitration claims in October 1998 against the United States under NAFTA, contending the US was liable under NAFTA for damages that allegedly resulted from a jury verdict against the company in a Mississippi state court in 1995-1996[78]. In its final award (23 June 2003), the ICSID Tribunal recognised the obligatory nature of the FTC interpretation by virtue of Article 1131 (2). The Claimants in this case did not challenge this interpretation but argued that the treatment of Loewen violated the minimum standard. The Tribunal in its decision stated:[79]

"The effect of the Commission's interpretation is that 'fair and equitable treatment' and 'full protection and security' are not free-standing obligations. They constitute obligations only to the extent that they are recognised by customary international law. Likewise, a breach of Article 1105(1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that NAFTA Tribunals in Metalclad, S.D. Myers and Pope & Talbot, may have expressed contrary views, those views must be disregarded."

The Tribunal noted that "the whole trial (in local courts) and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment".[80] However, the trial court conduct did not amount to a violation of "fair and equitable treatment" by the United States because it was not established that the US had failed to make adequate remedies reasonably available to the complainants, i.e. the possibility of appeal. The Tribunal concluded that Loewen had failed to demonstrate that those remedies, in particular resort to the US Supreme Court, were not reasonably available to it.

– *Literature*

Fatouros, in comparing contingent and non-contingent standards, notes that "non-contingent standards present certain advantages in that the treatment they prescribe is determined beforehand and

75. *Id.* para.183, p. 88.

76. *Id.* para.184, p. 89.

77. See *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID case no. ARB(AF)/98/3.

78. Loewen alleged violations of three provisions of NAFTA – the anti-discrimination principles (Article 1102), the minimum standard of treatment (Article 1105) and the prohibition against uncompensated expropriation (Article 1110).

79. Paragraph 128 of the award.

80. *Idem para. 137.*

thus, presumably, does not fall below a minimum standard".[81] In an article on "Some Aspects of the Australia-China Investment Protection Treaty", ***Mo*** indicates that fair and equitable treatment imposes an obligation on the contracting parties to "implement the measures of treatment in accordance with international standards".[82] ***Kohona*** suggests that the phrase "just and equitable treatment in accordance with international law" which occurs, for instance in certain Australian bilateral investment treaties, amounts to the international minimum standard.[83] ***Leben*** notes that "the fair and equitable treatment should be considered as referring to the minimum standard of treatment of aliens, the way this standard has been conceived by customary international law (from which results the clause "in conformity with international law)".[84] ***Sacerdoti,*** in its discussion on standards of treatment in BITS, affirms that "lawfully acquired property is protected by a minimum international standard, which is often defined as *fair and equitable"*.[85]

Juillard,[86] commenting on the draft OECD Convention, notes that although its reference to fair and equitable is blurry, there is no doubt about the fact that "fair and equitable" is a principle; that this principle is a general principle of international law; and that the general principle of international law exists independently of the conventional support expressing it". He maintains however that the inability of States to give content to the principle demonstrates that the common core is only a minimum core. And because the minimum core is a *minimum agreement* ("accord minimum") of States, the notion of minimum standard arises. He then explains the concept of minimum standard by making reference to the standard of justice. In support, he cites the text of the Second Restatement which defines the international standard of justice in the following terms:[87]

> *"The international standard of justice….is the standard required for the treatment of aliens by:*
>
> *a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognised sources or, in the absence of such applicable principles,*
>
> *b) analogous principles of justice generally recognised by States that have reasonable developed legal systems."*

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81. See Fatouros, *op. cit., n.1.* He adds that "the generality and abstraction of these standards, however, remains an important drawback. It is generally difficult to determine whether a certain measure is in accordance with them, that is to say, whether, in the usual treaty terms, it is "just", "reasonable", or "equitable".

82. Mo, "Some Aspects of the Australia-China Investment Protection Treaty, *Journal of World Trade Law, 25 (1991), no. 3, pp.43-80,* as quoted by Stephen Vasciannie in "The Fair and Equitable Treatment Standard in International Investment Law and Practice" *op. cit. n. 7.*

83. Kohona, "Investment Protection Agreements: An Australian Perspective", *Journal of World Trade Law, 21 (1987), pp. 79-103.*

84. Charles Leben « L'évolution du Droit International des Investissements », in *Journée d'études « Un accord multilatéral sur l'investissement : d'un forum de négociation à l'autre? »* organised *by the Société Française pour le Droit International (1999) pp.7-28.*

85. G. Sacerdoti, *op. cit. n. 34.*

86. See Juillard, *op. cit. n. 33, pp. 132-34.*

87. American Law Institute's *Restatement (Second) of Foreign Relations Law of the United States, 1965, para. 165.2.*

Although writing from the perspective of developing countries, ***Robinson*** indicated that fair and equitable treatment "is a classical example of the so-called international minimum standard claimed by developed countries for foreign investment". In his view, during the negotiations on the Article 48 of the Draft United National Code of Conduct on Transnational Corporations, the Group of 77 collectively believed that the language of fair and equitable treatment amounted to the international minimum standard advocated by developed countries.[88]

B. Fair and equitable treatment as a part of international law including all sources

There is also a view that the "fair and equitable treatment standard" is not limited to the minimum standard as contained in the international customary law but takes into account the full range of international law sources, including general principles and modern treaties and other conventional obligations. This view was expressed in a 1984 OECD study and by the NAFTA Tribunals in the *Metalclad* and *S.D. Myers* cases.

-- *State practice*

In a 1984 study[89], the ***OECD*** reviewed the experiences of OECD Member countries with the main types of intergovernmental agreements used for the protection and promotion of foreign direct investment in developing countries, i.e. friendship, commerce and navigation treaties (FCN), investment guarantee agreements, investment protection treaties, general agreements for economic co-operation with investment-related clauses and sector-or project-related agreements. Contributions received from Member countries in response to a questionnaire formed the basis of this analysis.

According to all Member countries which commented on this point, "fair and equitable treatment introduced a substantive legal standard referring to general principles of international law[90] even if this is not explicitly stated and is a general clause which can be used for all aspects of the treatment of investments, in the absence of more specific guarantees. In addition it provides general guidance for the interpretation of the agreement and the resolution of difficulties which may arise".

According to the survey, in a considerable number of treaties the principle of fair and equitable treatment is contained in clauses which specifically refer to the rules and principles of international law. The examples refer to some treaties concluded by France which provided for "just and equitable treatment in conformity with international law or the general principles of international law"; treaties by the US, which stated that "the treatment, protection and security of the investment shall in no case

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88. Robinson, "Guidelines for the Organisation of Eastern Caribbean States in Negotiating Bilateral Investment Treaties" (undated). See also Robinson, "The Question of a reference to International Law in the United Nations Code of Conduct on Transnational Corporations" *UNCTC Current Studies, Series A, Number I (1986), p. 2.* both as quoted by Vasciannie, *op. cit. n.7.*

89 See *op. cit. n. 4.*

90. A large number and a wide variety of international legal rules are generated by means other that the explicit consent of states expressed in treaties. "Sometimes these other kinds of international law are grouped together under descriptive rubrics like 'general international law' or 'international common law', but they are usually better known by their more specific appellations: customary international law, the general principles of international law, natural law, *jus cogens* and equity. Despite diverse sources, international rules not based on treaties share certain characteristics; among other things, they may sometimes be more generally applicable to states than are rules emanating from international agreements; however such rules are typically less definite in their formulation and thus often more subject to doubt in practice". *An Introduction to International Law, Mark. W. Janis, Second edition, Little, Brown and Company, 1993 p. 41.*

be less than that required by international law"; and treaties by the UK which provided that, "after termination of the treaty, the investment will continue to be protected for a stated number of years, without prejudice to the application thereafter of the general principles of international law".

-- *Jurisprudence*

In the case ***Metalclad Corporation v. United Mexican States***91**,** Metalclad alleged that its subsidiary COTERIN's attempt to operate a hazardous waste landfill that it constructed in the municipality of Guadalcázar had been thwarted by measures attributable to Mexico. Metalclad commenced an action under the NAFTA, claiming, *inter alia*, that the alleged lack of transparency surrounding the municipality's exercise of authority breached Article 1105 of the NAFTA and that an ecological decree promulgated after the claim was made violated Article 1110 on expropriation and compensation.

In defining the scope and nature of Mexico's obligations under Article 1105, the *Metalclad* Tribunal cited a number of other NAFTA provisions including the preamble and Chapter 18 on transparency requirements.[92,93]

In the Tribunal's view, this obligation to ensure transparency was a component of the duty to ensure that investors received the minimum standard of treatment as guaranteed under Article 1105. The Tribunal concluded that "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment"[94], and had accordingly violated Article 1105.

Mexico sought judicial review of the *Metalclad* award in the deemed place of arbitration, British Columbia. The Supreme Court of British Columbia found that the Tribunal in this case had exceeded its jurisdiction by basing its finding on the treaty obligations of transparency that were outside the scope of Chapter 11 and the limited grant of subject matter jurisdiction conferred upon a Chapter 11 tribunal by Articles 1116 and 1117[95]. According to the Court, the Tribunal not only interpreted NAFTA Article 1105 (1) in a broad manner to include a transparency obligation found in NAFTA Chapter 18, but it did so without reference to any authority or evidence to establish that transparency is a principle that has become part of customary law. In this regard, the Supreme Court stressed that "international law" referred to "customary international law" as distinguished from conventional

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91. ICSID case No ARB/AF/97/1, Tribunal Decision August 30, 2000. The text of the award is published in *ICSID Review – FILJ (2001)16.*

92. Mexico took the view that the Tribunal's importation and expansion of conventional transparency obligations not found in customary law amounted to an excess of jurisdiction. Transparency is a conventional law concept which has been developed in international trade law (GATT Article X), not the body of international investment-protection law from which the concept of minimum standard of treatment expressed in Article 1105 has been derived.

93. In order to avoid this kind of interpretation by arbitral tribunals, the recently signed US FTAs and the new US model BIT provide in their Article on the Minimum Standard of Treatment, that *"a determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article"*. The new Canada FIPA also contains such a clarification: "*…the fact that a Tribunal may find that a Party has breached another obligation of the FIPA, such as National Treatment, does not mean that that constitutes a violation of the minimum standard of treatment obligation"*.

94 *Idem* at para.101.

95 Article 1116 is on "Claim by an Investor of a Party on behalf of itself". Article 1117 is on "Claim by an Investor of a Party on behalf of an Enterprise".

international law. In its decision, the Court of British Columbia also noted its disagreement with the *Pope & Talbot* tribunal's analysis (see below).

In ***S.D. Myers Inc. v. Canada***[96]**,** the US company alleged that Canada violated Chapter 11 by banning the export of PCB waste to the United States where S.D. Myers operated a PCB remediation facility. It submitted a claim under the UNCITRAL Arbitration Rules. In its Article 1105 complaint, S.D. Myers claimed that the promulgation of the export ban by Canada was done in a discriminatory and unfair manner that constituted a denial of justice and a violation of good faith under international law.

In its award, the Tribunal took the view that the terms "fair and equitable" and "full protection and security" must be read in conjunction with treatment according to international law.[97] It affirmed that the inclusion of a "minimum standard" provision is necessary to avoid what might otherwise be a gap. "A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals…. t*he 'minimum standard' is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner".* Although it took this position with respect to the minimum standard, it then cited a statement by Dr. Mann with respect to the content of the fair and equitable[98]. Recognising that modern commentators might consider this statement to be "an over-generalisation", the majority of two arbitrators nevertheless determined that on the facts of this particular case¸ the breach of Article 1102 (National Treatment) essentially established a breach of Article 1105. By taking this decision, the Tribunal took a breach of a conventional international law rule (National Treatment) and equated that with a breach of the minimum standard although the form, contents and purposes of the two articles differ[99].

C. Fair and equitable treatment as an independent self-contained treaty standard

-- *Jurisprudence*

An expansive interpretation of Article 1105 was given by the arbitral tribunal in the case ***Pope & Talbot Inc. v. Government of Canada***[100]. In this case, Pope & Talbot challenged the implementation of the Canada-US Softwood Lumber Agreement, and the allocations of export quota that had been

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96 *S.D. Myers, Inc. v. Canada, (*November 13, 2000), Partial Award. International Legal Materials 408.

97. Turning to the text of Article 1105, the Tribunal noted that the terms "fair and equitable treatment" and "full protection and security" cannot be read in isolation. Rather, the article "must be read as a whole", and the terms "must be read in conjunction wit the introductory phrase…treatment in accordance with international law". In light of the general purpose of the article and its wording the Tribunal stated:

"The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case."

98 F.A. Mann, "British Treaties for the Formation and Protection of Investment", *British Yearbook of International Law 24, 244 (1981).*

99. See J.C. Thomas, *op. cit. n. 10.*

100 *Pope & Talbot Inc. v. Government of Canada,* Award on the Merits (April 10, 2001).

made under that Agreement and alleged multiple breaches of the NAFTA. The Tribunal acknowledged that the text of Article 1105 "suggests that those elements [of fair and equitable treatment and full protection and security] are included within the requirements of international law…" However, it commented:

> *Another possible interpretation of the presence of the fairness elements in Article 1105 is that they are additive to the requirements of international law. That is, investors under NAFTA are entitled to the international law minimum, plus the fairness elements. It is true that the language of Article 1105 suggests otherwise, since it states that the fairness elements are included in international law…*

and it concluded that*:*

> *…the Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be "egregious", "outrageous" or "shocking" or otherwise extraordinary*.[101]

No case has been found which applies the "fair and equitable treatment" standard of a bilateral investment treaty as an autonomous treaty standard. In one case however, ***Tecmed S.A. v. The United Mexican States***[102], the Tribunal mentions that approach as one of the alternative approaches but it goes on to judge the claim against the international law principle of good faith. Técnicas Medioambientales Tecmed, S.A., filed a claim with the ICSID Additional Facility alleging that the Mexican government's failure to re-license its hazardous waste site contravened various rights and protections set out in the bilateral investment treaty (BIT) between Spain and Mexico. In its Award, the ICSID Tribunal stated:

> *"the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement… is that resulting from an autonomous interpretation, taking into account the text of Article 4(1) of the Agreement according to its ordinary meaning (Article 31(1) of the Vienna Convention), or from international law and the good faith principle, on the basis of which the scope of the obligation assumed under the Agreement and the actions related to compliance therewith are to be assessed".*

– *Literature*

Dr. Mann[103]**,** who wrote primarily with reference to UK Bilateral Investment Treaties, is widely cited as the main dissident voice by most of the commentators who wrote on this issue.

In his view, the proposition that investments shall have fair and equitable treatment and full protection and security constitutes the "overriding obligation". This overriding obligation is wider than simply a prohibition on arbitrary, discriminatory or abusive treatment; it also embraces other standards as it "may well be that other provisions of the Agreements affording substantive protection are no

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101. By expressing this view, the Tribunal dismissed the criteria expressed in the cases in the early 1920s which first articulated the minimum standard.

102 *Técnicas Medioambientales Techmed S.A. v. the United Mexican States*, ICSID case No ARB(AF)/00/2 (Award) (May 29, 2003).

103. F.A. Mann, *see op. cit .n. 98.*

more than examples or specific instances of this overriding duty". Mann goes on to say that it is misleading to equate the fair and equitable with the minimum standard: this is because "the terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously".[104]

Mann[105] addressed this in different and far less expansive terms in his treatise published a year after the above mentioned one. He noted that:

> *"In some cases, it is true, treaties merely repeat, perhaps in slightly different language, what in essence is a duty imposed by customary international law; the foremost example is the familiar provision whereby states undertake to accord fair and equitable treatment to each other's nationals and which in law is unlikely to amount to more than a confirmation of the obligation to act in good faith, or to refrain from abuse or arbitrariness".*

Dolzer and Stevens[106] state that "the fact that parties to BITS have considered it necessary to stipulate this standard as an express obligation rather than rely on a reference to international law and thereby invoke a relatively vague concept such as the minimum standard is probably evidence of a self-contained standard. Further, some treaties refer to international law in addition to the fair and equitable treatment, thus appearing to reaffirm that international law standards are consistent with, but complementary to, the provision of the BIT".

According to an **UNCTAD**[107] Secretariat study, at the policy level, an approach that equates fair and equitable treatment with the international minimum standard is problematic in certain respects:

> *If States and investors believe that the fair and equitable standard is entirely interchangeable with the international minimum standard, they could indicate this clearly in their investment instruments; but most investment instruments do not make an explicit link between the two standards. Therefore, it cannot be readily argued that most States and investors believe fair and equitable treatment is implicitly the same as the international minimum standard.*

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104. Patrick G. Foy and Robert J.C. Deane, commenting on this position noted that a new argument was introduced during the NAFTA tribunals' debate: "the customary international law norms regarding fair and equitable treatment of foreign nationals and their property are evolving. Dr Mann's views represent contemporary international law standards not required to have been found in the claims brought before the Mexican Claims Commission, and not surprisingly inconceivable in that era. On this view, Dr Mann's perspective is not contrary to the belief that "fair and equitable treatment" is to be assessed according to customary international law, but rather represents an expanded, contemporary understanding of customary international law", *"Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement"* in ICSID Review –Foreign Investment law Journal, Volume 16, Number 2, Fall 2001.

105. F.A. Mann, "The Legal Aspects of Money" (1982) p. 510, as quoted by J.C. Thomas *op. cit .n..10 p. 58.*

106. See *op. cit. n. 34.*

107. "Fair and equitable treatment", *UNCTAD series on issues in international investment agreements, 1999.*

> *Attempts to equate the two standards may be perceived as paying insufficient regard to the substantial debate in international law concerning the international minimum standard. More specifically, while the international minimum standard has strong support among developed countries, a number of developing countries have traditionally held reservations as to whether this standard is a part of customary international law.*

The UNCTAD study goes on to say that "fair and equitable treatment is not synonymous with the international minimum standard. Both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination, and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors. Where the fair and equitable standard is invoked the central issue remains simply whether the actions in questions are in all circumstances fair and equitable or unfair and inequitable

On this point, ***Vasciannie***[108] notes that "the plain meaning approach is no doubt, entirely consistent with canons of interpretation in international law" according to the Article 31 paragraph 1 of the Vienna Convention on the Law of Treaties (1969).[109]

III. Meaning and elements of the content of the standard as defined by arbitral tribunals

The lack of general agreement on the content of the "fair and equitable" standard has engendered debate as to the proper prescriptive role the principle plays in the protection of international investment and constraints on state sovereignty.[110]

Though most investment protection agreements require that investments and investors covered receive "fair and equitable" treatment, there is no general agreement on the precise meaning of this principle.[111] On this point Professor ***Muchlinski***[112] has stated that:

> *"The concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most, it can be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign investors".*

Professor ***Juillard***[113] suggested that the inclusion of the fair and equitable standard in investment agreements provides a basic auxiliary element for the interpretation of the other provisions in the

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108. Vasciannie, *op. cit. n. 7.*

109. Article 31 (1) of the Vienna Convention on the Law of Treaties on the "General Rule of Interpretation" stipulates that: "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

110. Patrick G. Foy and Robert J.C. Deane, see *op. cit. n. 104.*

111. Rudolf Dolzer and Magrete Stevens, see *op. cit. n. 34;* Mahmoud Salem, in « Le développement de la protection conventionnelle des investissements étrangers », *Journal du Droit International, No. 3 (1986) pp.579-626.*

112. Peter Muchlinski, "Multinational Enterprises and the Law" (1995) p. 625.

113. P. Juillard see *op. cit. n. 32.*

agreement and for filling gaps in the treaty. He also maintains that the interpretation of the fair and equitable treatment, an imprecise notion – "notion aux contours imprécis" will be progressively developed through the "praetorian" work of the arbitral tribunals.

Arbitral tribunals have indeed done some work in this respect. In their interpretation of the "fair and equitable standard", they have gone beyond the specific discussion on the relationship between the fair and equitable treatment standard and the minimum standard as defined by customary international law and attempted to identify the elements encompassed in this standard. These elements can be analysed in five categories[114]: a) Obligation of vigilance and protection, b) Due process including non-denial of justice and lack of arbitrariness, c) Transparency, d) Good faith – which could include transparency and lack of arbitrariness and e) Autonomous fairness elements.

A. Obligation of vigilance and protection

In a number of decisions, the tribunals make reference to the obligation of vigilance, also phrased as an obligation to exercise due diligence in protecting foreign investment[115] in order to define an act or omission of the State as being contrary to fair and equitable treatment and full protection and security. In these cases, the standards of "fair and equitable treatment" and "full protection and security" have been interlocking and examined together by tribunals. The latter standard, full protection and security, is often included in treaties as a separate obligation and it applies essentially when the foreign investment has been affected by civil strife and physical violence. The obligation of vigilance has been considered a standard deriving from customary international law[116].

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114 The Tribunals, in the first four of these categories examined in the present survey, defined "fair and equitable" in accordance with international law, while one Tribunal adopted an autonomous definition.

115 "Il est des devoirs internationaux qui consistent à exercer sur les individus soumis à l'autorité de l'État une vigilance correspondante aux fonctions et aux pouvoirs dont l'État est investi. Celui-ci n'est pas internationalement obligé d'empêcher d'une façon absolue que certains faits se réalisent ; mais il est tenu d'exercer, pour les empêcher, la vigilance qui rentre dans ses fonctions ordinaires Le défaut de diligence est une inobservation du devoir imposé par le droit international, sans qu'il y ait alors à parler de faute au sens propre du mot » : It is one of the international duties consisting of exercising on the individuals under the authority of the State, a vigilance corresponding to the functions and the power vested by the State. The State does not have the international duty to prevent –in an absolute way – certain facts from happening; but it is obliged to exercise, in order to prevent them, a vigilance under its ordinary functions. The lack of diligence is a failure to observe the duty imposed on the State by international law, without necessary involving what would be fault in the usual sense of the term…..[translation by the Secretariat] *Anzilotti*, « La responsabilité internationale des États – A raison des dommages soufferts par les étrangers », *Revue Générale de Droit International Public (1906) p.291*. *Brownlie* sees the due diligence standard as a version of national treatment "Circumstances, for example the outbreak of war, may create exceptions to the international treatment rule, even when this applies in principle. Where a reasonable care or due diligence standard is applicable, then *diligentia quam in suis* might be employed , and would represent a more sophisticated version of the national treatment principle" …it would allow for the variations in wealth and educational standards between the various states of the world and yet would not be a mechanical national standard, tied to equality. Though the two are sometimes confused, it is not identical with national treatment…" *Jan Brownlie, see op. cit. n.32* p. 504. In the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 1929, "due diligence is a standard not a definition", *Hildebrando Accioly* Recueil des Cours, 1959, pp. 400, 401.

116 *Alfred Verdross* « …Dans toutes ses mesures de répression, l'État doit développer comme dans les mesures de prévention, l'activité d'un État normal. C'est donc selon le principe du *standard*

In ***Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka***[117](see above)**,** one of the main issues was whether a government assurance of "full protection and security " in Article 2(2) of the Sri Lanka/UK Bilateral Investment Treaty created an obligation of strict liability for each State Party. Judge Asante, in his dissenting opinion, made the following comments on the meaning of fair and equitable treatment:

> *Article 2(2) prescribes the general standard for the protection of foreign investment. The requirement as to fair and equitable treatment, full protection and security and non-discriminatory treatment all underscore the general obligation of the host state to exercise due diligence in protecting foreign investment in its territories, an obligation that derives from customary international law. The general nature of the protection standard in Article 2(2) is reflected in the absence of any specific situation or specific compensation standards. Thus …it is distinguished from articles 4 and 5 which stipulate specific standards to address special situations, namely losses incurred in civil disturbances and expropriation respectively.*

In the case of ***American Manufacturing & Trading (AMT), INC. v. Republic of Zaire***[118] (see above), the ICSID Tribunal found that Zaire has "manifestly failed to respect the minimum standard required of it by international law" and based its decision on the following reasoning:

> *"The obligation [to accord fair and equitable treatment and protection and security] …constitutes an obligation of guarantee for the protection and security of the investments made by nationals and companies of one or the other Party….The obligation incumbent upon Zaire is an obligation of vigilance, in the sense that Zaire….shall take all measures necessary to ensure the full enjoyment of protection and security of its [the US] investment and should not be permitted to invoke its own legislation to detract from any such obligation. Zaire must show that it has taken all measures of precaution to protect the investments of AMT in its territory".*

In ***Wena Hotels LTD (UK) v. Arab Republic of Egypt***[119], the claimant had entered into a lease agreement with the State-owned Egyptian Hotels Company ("EHC") for the management and

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international qu'il faudra apprécier si les mesures de prévention ou de réaction ….sont ou non suffisantes au point de vue de droit des gens …. De l'avis des gouvernements [à la Société des Nations à l'occasion de la préparation de la Conférence pour la codification du droit international 'la diligence à prendre en considération est celle qu'on peut attendre *d'un État civilisé' »*: In all its corrective measures, the State has to develop as in its preventive measures, the activities of a normal State. It is therefore according to the principle of the *international standard* that we will have to evaluate whether the preventive measures or the responses …are or not sufficient from the point of view of international law….According to the opinion of governments [in the Society of Nations on the occasion of the preparation for the Conference on the codification of international law] 'the diligence to take into consideration is the one, one can expect from a civilized nation [translation by the author] *«Les Règles Internationales concernant le Traitement des Étrangers » 37 R.C.A.D.I. 325 (1931 p.388.*

117 *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, see op. cit. n. 55.* One of the main issues was whether a government assurance of "full protection and security" in Article 2(2) of the Sri Lanka/United Kingdom Bilateral Investment Treaty (1980) created and obligation of strict liability for each State Party. Both the majority judgement and the dissent denied the strict liability approach. The relevant Article 2(2) was as follows: "Investments or nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment with full protection and security in the territory of the other Contracting Party".

118 *American Manufacturing & Trading), Inc. (AMT) (US) v. Republic of Zaire* see *op. cit. n. 58.*

improvement of two hotels. Following a dispute with respect to the lease agreement, agents of the EHC forcibly and illegally seized both hotels. The ICSID Tribunal in interpreting a similar provision from the BIT between Egypt and the UK held that:

> *The obligation incumbent on the [host state] is an obligation of vigilance, in the sense that the [host state] shall take all measures necessary to ensure the full enjoyment of protection and security of its investments and should not be permitted to invoke its own legislation to detract from any such obligation.*

Finding that there was sufficient evidence that Egypt was aware of the EHC's intention to seize the hotels yet took no preventative action, did nothing to protect Wena's investment after the illegal seizures, made no attempts to return the hotels to Wena following the illegal seizures, refused to compensate Wena for its losses and failed to prosecute the EHC or its senior officials, "Egypt violated its obligation [under the BIT] by failing to accord Wena's investments fair and equitable treatment and full protection and security".

B. Due process/ denial of justice/arbitrariness

The majority of the cases arise out of denial of justice[120] in the matter of procedure, some deficiency in the vindication and enforcement of the investor's rights. The principle of "denial of justice" [121] has been considered as being part of customary international law and is used in three senses[122]. In the broadest sense, it "seems to embrace the whole field of State responsibility, and has

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119 *Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt*, ICSID Case No ARB/98/4 (Award) (Dec. 8, 2000), [*annulment denied]* reprinted in 41 I.L.M. 896 (2002).

120 *E. Borchard* "Long before article 38 of the Permanent Court of International Justice made the "general principles of law recognised by civilised states" a source of international law, foreign offices and arbitral tribunals had relied on such general principles to work out a loose minimum which they applied constantly in interstate practice….It is well known that aliens may be denied numerous privileges….and may be restricted …in municipal law. Yet the alien must enjoy police and judicial protection for such rights as the local law grants and its arbitrary refusal is a *denial of justice* [emphasis added]. Bad faith, fraud, outrage resulting in injury, cannot be defended on the ground that it is custom of the country to which nationals must almost submit". He also adds that although it is difficult to give a definition of the substantive content of the standard, on the procedural side he is in less doubt "fair courts, really open to aliens, administering justice honestly impartially, without bias or political control, seem essential elements of a fair trial and objective justice required of all systems". "*The 'Minimum standard' of the treatment of aliens'' Michigan Law Review 1940, vol. 3, No 4. pp. 445-461*. Referring to the procedural aspects of the standard, *Root* in 1910 characterised it as a "standard of justice, very simple, very fundamental and of such general acceptance by all civilised countries as to form a part of the international law of the world" *Root, "The Basis for Protection to Citizens Residing Abroad", 4 PROC. AM. SOC.INT.L.16 at 21 (1910).*

121 The principle of denial of justice encompasses both procedural and substantive wrongdoing by the court—both improper procedures and unjust decisions. This dual definition of denial of justice has become widespread in last century –among scholars, in attempts to codify the law of state responsibility to aliens and in arbitral decisions. See *Alwyn V. Freeman* "Steady international practice ….as well as the overwhelming preponderance of legal authority, recognises that not only flagrant procedural irregularities and deficiencies may justify diplomatic complaint, but also gross defects in the substance of the judgement itself" in "*The International Responsibility of States for Denial of Justice"309 (Kraus Reprint Co. 1970) (1938).*

122 *F.V. García-Amador et Al.*, Recent Codification of the Law of State Responsibility for Injuries to Aliens (180) 1974.

been applied to all types of wrongful conduct on the part of the State towards aliens"[123] it includes therefore acts or omissions of the authorities of any of the three branches of government, *i.e.* executive, legislative or judiciary[124]. In the narrowest sense, it is "limited to refusal of a State to grant an alien access to its courts or a failure of a court to pronounce a judgement". There is also an intermediary sense, in which it is "employed in connection with the improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions"[125],[126]. The majority of the cases examined approach fair and equitable treatment in the intermediate sense and many also address in their analysis the concept of arbitrariness[127]. A significant number of the recent cases supporting this interpretation refer to the ELSI case (see below).

123 *Idem.*

124 *Charles de Visser* emphasizes the role of the judiciary: «Le déni de justice est toute défaillance dans l'organisation ou dans l'exercice de la fonction juridictionnelle [de l'État] qui implique manquement à son devoir international de protection judiciaire des étrangers », en ajoutant toutefois, «qu'il importe peu qu'à l'origine de cette défaillance de la fonction juridictionnelle se trouve un fait qui, de point de vue du droit interne, apparaît comme imputable à un autre pouvoir de l'État… » : Denial of justice is any deficiency in the organisation or in the exercise of the jurisdictional function which implies a deficiency in its [the State's] international duty to judicial protection of foreigners" adding however, that "it is not very important that this deficiency originated from a fact which from the national law point of view, appears to draw from a different power of the State…" *"La responsabilité des États » Recueil des Cours (1923*) as cited by *H. Accioly in Recueil des Cours (1959) op.cit. n.115*, p. 379. *Hackworth* in its *Digest of International Law i*ndicated that, "in a wider sense, denial of justice can result from acts or omissions of the authorities of any of the three branches of government (executive, legislative or judiciary)". *A. Freeman* shares the same view in *« The International Responsibility of States for Denial of Justice » (1938)* both as cited by *Accioly op. cit. n. 115 p.380.*

125 See Garcia-Amador, *op. cit. n.122.*

126 *Brownlie describes* the Harvard Research Draft on International Law as the "best guide" to the meaning of denial of justice: "denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgement. An error of a national court which does not produce manifest injustice is not a denial of justice", *See op. cit. n. 32 at 506.* In *Azinian v. the United Mexican States* the Tribunal held that: « A denial of justice could be pleaded if the relevant courts refuse to entertain such a suit, if they subject it to undue delay, or if they administer justice in a serious inadequate way….There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mark a violation of international law", ICSID case No ARB(AF)/97/2 paragraphs 102-103.

127 *A. Verdross* « L'État viole le droit des gens s'il porte *arbitrairement* atteinte aux droits privés des étrangers, fût ce même par un acte de législateur. Et cela même si de tels actes ne sont pas dirigés contre les personnes en raison de leur qualité d'étranger, mais se fondent sur des lois générales, applicables aussi aux nationaux » : The State violates international law if it *arbitrarily* impairs the private rights of aliens, even through a legislative act. And this, even if such acts are not directed against these persons because they are aliens, but are founded on general laws, applicable to nationals as well [translation by the Secretariat]. *see op. note 117 pp. 358-9. The Restatement (Third) of the Foreign Relations Law of the Unites States* defines "an arbitrary act" as "an act that is unfair and unreasonable, and inflicts serious injury to established rights of foreign nations…" para 712 reporter's note 11 (1986).

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In the case concerning ***Elettronica Sicula (ELSI) (US) v. Italy***[128](see above), the Chamber of the International Court of Justice (I.C.J), although it did not interpret the "fair and equitable treatment" provision of the relevant international agreement, it nevertheless made an historical interpretation of the article I of the Supplementary Agreement, which proscribes certain arbitrary and discriminatory measures[129] in the context of due process of law. It rejected the argument that a finding by a local court of an unlawful act necessarily implies that the act is arbitrary[130] and described arbitrariness at international law as follows:

> *"….it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise…..To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow that an act was unjustified, or unreasonable, or arbitrary that, that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.*

Citing the ICJ's judgement in the *Asylum* case[131], the Chamber stated that:

> *"Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law*[132]*…It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial property".*

In his dissent, Judge Schwebel concurred in the "Chambers' classic concept of what is an arbitrary act in international law". He then interpreted Article I as creating an obligation of result (as opposed to an obligation of conduct) and stated that "failure to correct an arbitrary measure constitutes a violation of the FCN treaty regardless of the existence of local remedies"[133].

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128 *Elettronic Sicula S.P.A. (ELSI) (US. V. Italy),* see *op. cit. n.59.*

129 ELSI provides interesting elements as to the meaning of the terms minimum standard in international customary law and fair and equitable treatment. In applying a treaty describing the rules contained therein as "principles of equitable treatment", the Chamber equated "constant protection and security" to the international minimum standard". Also, its formulation of arbitrariness at international law declined to equate mere unlawfulness at domestic law, without more, with arbitrariness.

130 The Chamber also noted that while local court findings may be relevant, the standard of arbitrariness under international law may be quite different, Judgement para. 29.

131 *Asylum* Judgement, ICJ Reports 1950 at p. 284.

132 According to Murphy, "this interpretation renders a previously useful standard of protection less effective. Under this approach a local government could pass various laws and administrative regulations that arbitrarily impugn the interest of foreign investors. Yet so long as the government provides a judicial forum in which a court applies those laws and regulations, then the measures will not be deemed arbitrary under the FCN treaty". *Sean D. Murphy*, see *op. cit. n. 56.*

133 This analysis of obligation of "conduct" and "result" originates in the International Law Commission's Draft Articles on State Responsibility.

In ***Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia***[134] (see above), the ICSID tribunal connected the standard under Article II(3)(a) of the Us-Estionia BIT to the minimum standard and described its elements as follows:

> *"Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith".*

Regarding "arbitrariness" under Article II(3)(b), the Tribunal, having regard to the totality of the evidence, regarded the decision by the Bank of Estonia to withdraw Genin's license as justified[135]. It stated that:

> *"In light of this conclusion, in order to amount to a violation of the BIT, any procedural irregularity that may have been present would have to amount to bad faith, a willful disregard of due process of law or an extreme insufficiency of action. None of these are present in the case at hand. In sum, the Tribunal does not regard the license withdrawal as an arbitrary act that violates the tribunal's "sense of judicial propriety"*[136].

In ***Companie Générale des Eaux (Vivendi) v. Argentine Republic***[137]**,** Vivendi instituted ICSID proceedings against Argentina, alleging that governmental acts taken by the Province of Tucuman abrogated a concession agreement for the provision of sewage services between Vivendi and Tucuman, and that the failure of the Argentine government to prevent Tucuman's acts or its failure to cause Tucuman to comply with the concession contract, were a violation of the Argentine- French BIT. Vivendi argued, *inter alia*, that the acts of the government, or its failure to act, breached Argentina's obligation to accord fair and equitable treatment to Vivendi's investment. The Tribunal stated:

> *"Because the Tribunal has determined that on the facts presented, Vivendi should first have challenged the actions of the Tucumán authorities in its administrative courts, any claim against the Argentine Republic could arise only if Claimants were denied access to the courts of Tucumán to pursue their remedy under Article 16.4 or if the Claimants were treated unfairly in those courts (denial of procedural justice**)** or if the judgment of those courts were substantively unfair (denial of substantive justice) or otherwise denied rights guaranteed to French investors under the BIT by the Argentine Republic.*

However, since Vivendi failed to seek relief from the Tucumán administrative courts and since there was no evidence before the Tribunal that these courts would have denied Vivendi procedural or substantive justice, the Tribunal found that there was no basis on this ground to hold the Argentine Republic liable under the BIT.

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134 *Alex Genin, v. Republic of Estonia,* see *op. cit. n. 61.*

135 It is interesting that, although the Tribunal examined separately these two provisions of the US-Estonia BIT (obligations to accord "fair and equitable treatment" and "non-discriminatory and non-arbitrary treatment"), it reached the same conclusions on the interpretation of the standards.

136 Citing the ELSI case.

137 *Companie Générale des Eaux (Vivendi) (France) v. Argentine Republic,* ICSID case No ARB/97/3 (Award) (November 21, 2000).

In ***Middle East Cement Shipping and Handling Co S.A. (Greece) v. Egypt***[138], Middle East Shipping instituted ICSID arbitration proceedings against Egypt under the Greece-Egypt BIT to recover losses related to a concession agreement[139]. Relying on Article 2.2 of the BIT the Tribunal stated:

> *"The BIT requires that 'Investments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security, in the territory of the other Contracting Party." This BIT provision must be given particular relevance in view of the special protection granted by Art. 4 against measures "tantamount to expropriation," and in the requirement for "due process of law" in Art.4.a). 'Therefore, a matter as important as the seizure and auctioning of a ship of the Claimant should have been notified by a direct communication for which the law No. 308 provided under the 1st paragraph of Art. 7, irrespective of whether there was a legal duty or practice to do so by registered mail with return receipt requested as argued by Claimant (CV 4). The Tribunal finds that the procedure in fact applied here does not fulfill the requirements of Art. 2.2 and 4 of the BIT.*
>
> *Thus, the Tribunal concludes that the [Poseidon] was taken by a "measure the effects of which would be 'tantamount to expropriation' and that the claimant is entitled to a compensation…"*

In ***Lauder (US) v. Czech Republic***[140], the Claimant initiated UNCITRAL arbitration proceedings against the Czech Republic for alleged breaches of the US-CSFR BIT, based on treatment accorded by the State's Media Council to his investment interest in a joint venture media company (CNTS)[141]. Lauder argued that the Media Council failed to accord fair and equitable treatment to his investment by (1) reversing prior approvals regarding CNTS's exclusive right to use, benefit from and maintain a television broadcasting license; and (2) engaging in hostile conduct towards CNTS. The Tribunal stated:

> "*As with any treaty, the Treaty shall be interpreted by reference to its object and purpose, as well as by the circumstances of its conclusion (Vienna Convention on the Law of Treaties, Articles 31 and 32). The preamble of the Treaty states that the Parties agree "that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources". The Arbitral Tribunal notes that there is no further definition of the notion of fair and equitable treatment in the Treaty.*
>
> *The United Nations Conference on Trade and Development has examined the meaning of this doctrine. Fair and equitable treatment is related to the traditional standard of due*

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138 *Middle East Cement Shipping and Handling Co S.A. (Greece) v. Egypt* ICSID Case No ARB/99/6 (Award) (April 12, 2002).

139 The Claimant alleged that the actions of Egyptian authorities resulted in a *de facto* revocation of its license to import and store cement, which in turn led to substantial losses with respect to its cement supply agreements and other damages. Among the damages were those caused by Egypt's administrative seizure and subsequent auction of a ship owned by the Claimant.

140 *Lauder (US) v. Czech Republic* (Final Award) (September 3, 2002) available at www.mfcr.cz/scripts/hpe/default.asp>

141 The joint venture participants were CEDC (a German company owned by Lauder), CET 21 (a Czech company), and the Czech Savings Bank.

diligence and provides a 'minimum international standard which forms part of customary international law'[142]*. In the context of bilateral investment treaties, the "fair and equitable" standard is subjective and depends heavily on a factual context. It "will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances*[143]*.*

The Tribunal determined that none of the challenged measures amounted to breach of the obligation to provide fair and equitable treatment, referencing the earlier reasoning with respect to arbitrary and discriminatory measures:

"…most of the arguments denying the existence of any arbitrary and discriminatory measure from the Czech Republic as from 1996 also apply to the Respondent's compliance with the obligation to provide fair and equitable treatment".

The Tribunal held that the Media Council acted *consistently* in its application of the law, and dismissed the fair and equitable treatment claim.

-- *NAFTA*

In ***S.D. Myers Inc v. Canada*** (see above), the Tribunal took the view that the terms "fair and equitable" and "full protection and security" must be read in conjunction with treatment according to international law. It added that:

"The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders…"[144]

However, the S.D. Myers Tribunal decided not to examine the specific application of Article 1105 to the facts of the case but to rely instead on its finding regarding the breach of Article 1102 on National Treatment. It concluded that, in the present case, the discrimination suffered by the claimant in breach of the national treatment provision "essentially establishes a breach of Article 1105 as well"[145].

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142 U.N. Conference On Trade & Development: Bilateral Investment Treaties In The Mid-1990s at 53, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998) (English version).

143 U.N. Conference On Trade & Development: Fair And Equitable Treatment, Vol. III at 10,15, U.N. Doc. UNCTAD/ITE/IIT/II, U.N. Sales No. E.99.11.D.15 (1999) (English version).

144 The Tribunal finally added that in some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied ***"****fair and equitable treatment"*, but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105.

145 Although the formulation of the test –a violation of the obligation to accord "fair and equitable treatment"—seemed consistent with the NAFTA Parties' stated views, the NAFTA Parties criticised the decision on the ground that having set out the content of Article 1105 by referring to customary international law standards, the Tribunal then took a breach of a conventional international law rule (National Treatment) and equated it with a breach of the minimum standard. See J.C. Thomas " op. cit. n. 11 *pp.67-68.*

In the ***Mondev International LTD v. US***[146] case (see above), after having shown the importance of the specific context in which an Article 1105(1) claim is made, the Tribunal went on to apply the standard of denial of justice[147] to the violation of the "fair and equitable standard. In connection to whether the investor had the right to submit the claim to NAFTA tribunals it stated:

> *"The standard laid down in Article 1105(1) has to be applied in both situations, i.e., whether or not local remedies have been invoked. Thus under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule "are interlocking and inseparable"…. The Tribunal is thus concerned only with that aspect of the Article 1105(1) which concerns what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State's courts or tribunals.*

It then referred to the ELSI case[148] and characterized the I.C.J. Chamber's criterion of arbitrary conduct as "useful also in the context of denial of justice and it has been applied in that context". The Tribunal went on to hold:

> *"The Tribunal would stress that the word "surprises" does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities"*[149].

In ***ADF Group Inc. v. United States of America***[150] (see above), ADF argued, *inter alia*, that the US breached its NAFTA obligation to provide "fair and equitable treatment". In appraising the ADF's claim according to NAFTA Article 1105(1), the Tribunal looked at the argument of ADF that the U.S. measures [of domestic content and performance requirements in governmental procurement] are

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146 *Mondev International LTD v. United States of America, see op. cit. n. 64,65*.

147 Canada, in its second submission on this case, noted that: "The standard to which a NAFTA Party is to be held under Article 1105 is an international law standard, which, is a standard that would be applied in a "reasonably developed legal system…It follows that a single NAFTA Party cannot claim that its system alone should be the benchmark, but that the practice of NAFTA Parties collectively as well as those of other "developed nations" may provide some guidance as to what meets the standards of a "reasonably developed legal system". p.14.

148 *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), op. cit.n.56, I*CJ Report p. 15 at p. 76 (para. 128), citing the judgment of the Court in the *Asylum* case, which referred to arbitrary action being "substituted for the rule of law".

149 The Tribunal commented on this point in a footnote, that one may compare the rule stated in the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Article 8 (b), referring to a decision which "unreasonably departs from the principles of justice recognized by the principal legal systems of the world"; reprinted in L.B. Sohn & R.R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens" (1961) 55 *AJIL* 515 at p. 551.

150 *ADF Group Inc. v. United States of America,* see *op. cit,. n. 42*.

themselves "unfair and inequitable within the context of NAFTA." The Tribunal concluded on this point that, "domestic content and performance requirements in governmental procurement are by no means limited to the NAFTA Parties. To the contrary, they are to be found in the internal legal systems or in the administrative practice of many States. Thus, the *U.S. measures cannot be characterized as idiosyncratic or aberrant and arbitrary*. It also stated that:

> *"the Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under U.S. internal administrative law. We do not sit as a court with appellate jurisdiction with respect to US measures. Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law. The Tribunal would emphasize, too, that even if the U.S. measures were somehow shown or admitted to be ultra vires under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in Article 1105(1). An unauthorized or ultra vires act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity. But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1).."*.

ADF also maintained that the United States failed to comply with obligations under Article 1105(1) in good faith, and breached its duty under customary international law to perform its obligations in good faith. The Tribunal stated in this regard that: "An assertion of breach of a customary law duty of good faith adds only negligible assistance in the task of determining or giving content to a standard of fair and equitable treatment. At the same time ….the Investor did not try to prove, that the rejection of its request for waiver of the Buy America requirements by the FHWA was *flawed by arbitrariness*[151].

In the ***Loewen Group, Inc and Raymond L. Loewen v. United States of America***[152](see paragraphs 57-58), the Tribunal made also an attempt to define the "unfair and inequitable treatment" in the context of denial of justice[153].

> ***"****Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms"*.

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151 "More generally, the Investor did not establish a serious basis for contending that some specific treatment received by ADF International from either the FHWA or the VDOT constituted a denial of the fair and equitable treatment and full protection and security included in the customary international law minimum standard embodied in Article 1105(1)".

152 *The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, see *op. cit. n. 77.*

153 "It is not in dispute between the parties that customary international law is concerned with denials of justice in litigation between private parties. Indeed, Respondent's expert, Professor Greenwood QC, acknowledges that customary international law imposes on States an obligation "to maintain and make available to aliens, a fair and effective system of justice" (Second Opinion, para. 79)".

The Tribunal after referring to the *Mondev* Tribunal's conclusions, that

> *"the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment",*

noted that if that question be answered in the affirmative, then a breach of Article 1105 is established.

> *"…whether the conduct of the trial amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against the decisions of municipal courts. However, the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."*

In the ***Waste Management v. Mexico*** case[154] Waste Management, Inc., a U.S. waste disposal company, filed claims against Mexico under the ICSID Additional Facility Rules alleging breaches of NAFTA Articles 1105 and 1110. The Tribunal issued an award on June 2, 2000 dismissing the investor's claim for lack of jurisdiction. Waste Management resubmitted its case and after having accepted jurisdiction, the Tribunal issued on April 30, 2004, an unanimous award[155] dismissing Waste Management's claims in their entirety. The Tribunal in, having reviewed the decisions of former NAFTA tribunals, such as S.D. Myers, Mondev, ADF and Loewen, noted on the fair and equitable treatment standard:

> *"… The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary,grossly unfair, unjust or indiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety –as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying the standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant"*[156].

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154 The notice of arbitration asserted that the State of Guerrero and the municipality of Acapulco granted a 15-year concession to Waste Management Inc.'s, --then USA Waste Services, Inc-- Mexican subsidiary, Acaverde, in 1995 for public waste management services (street cleaning, landfilling, etc.), but failed to comply with payment and other obligations set forth in the concession agreement despite full performance by Acaverde. It also asserted that Banobras, a Mexican bank that had issued an unconditional guarantee for the payment, arbitrarily refused to honor the payment guarantee. Waste Management claimed damages of US$60 million.

155 *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3.

156 *Idem, paragraph 98.*

C. Transparency

In a few recent cases, Arbitral Tribunals have defined "fair and equitable treatment" drawing upon a relatively new concept not generally considered a customary international law standard: transparency.

In ***Metalclad Corporation v. United Mexican States***[157] (see paragraphs 66-69), the Tribunal found that the absence of a clear rule concerning construction permits requirements in Mexico, had "*failed to ensure a transparent and predictable framework for Metalclad's planning and investment"*[158]. It decided that this failure of the part of Mexico to ensure the transparency required by NAFTA –in its Article 1802 on transparency—was a breach of fair and equitable treatment under Article 1105.

The Tribunal defined the concept of "transparency" (stated in Article 1802) as the idea that "all relevant legal requirements for the purpose of investing should be capable of being readily known to all investors". It also held that in the event a Party would become aware of "confusion or misunderstanding" among investors concerning the legal requirements to be fulfilled, the Party would have "the duty to ensure that the correct position [would be] promptly determined and clearly stated so that the investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws"[159]. (This decision of the tribunal was rejected in judicial review.)

In ***Maffezini (Argentina) v. Kingdom of Spain***[160], the Tribunal addressed the unauthorised transfer of the claimant's funds by a Spanish official. It held that:

> *"….because the acts of SODIGA (public company) relating to the loan cannot be considered commercial in nature and involve its public functions, responsibility for them should be attributed to the Kingdom of Spain. In particular, these acts amounted to a breach by Spain of its obligation to protect the investment as provided for in Article 3(1) of the Argentine-Spain Bilateral Investment Treaty. Moreover, the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment in accordance with Article 4(1) of the same treaty. Accordingly, the Tribunal finds that, with regard to this contention, the Claimant has substantiated his claim and is entitled to compensation…"*.

The Tribunal did not elaborate what it meant in referring to a "lack of transparency".

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157 *Metalclad v. Mexico*, see *op. cit. n. 91.*

158 *Metalclad* Award at para 99.

159 *Id.* At para 76.

160 *Maffezini v. Kingdom of Spain, ICSID case No ARB/97/7 Award (November 13, 2000).*

D. The good faith principle[161] *as a combination of elements: respect of basic expectations, transparency, lack of arbitrariness*

In the ***TECMED S.A. v. The United Mexican States***[162] case (see above), the Tribunal interpreted the "fair and equitable treatment standard" as resulting from the good faith principle. It is not clear however, whether the Tribunal considered good faith as a source of obligation *per se*, i.e. a general obligation[163] or as a principle which governs the creation of the obligation to accord "fair and equitable treatment".

The Tribunal found that the obligation of fair and equitable treatment is an expression and part of the "*bona fide principle* recognised in international law", although –citing the *Mondev* case[164]--bad faith from the State is not required for its violation. This principle encompasses the basic expectations of the investor to be treated by the State in a transparent, consistent, i.e. non arbitrary manner which would not *conflict with what a reasonable and unbiased observer would consider fair and equitable*".. The Tribunal elaborated its view by reference to the findings of the *Neer* and *ELSI* cases:

> "*The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally*

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161 According to *Anthony d'Amato* "The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully and to refrain from taking unfair advantage that might result from a literal an unintended interpretation of the agreement between them…..The principle of good faith [thus] owes its present authoritative status to the natural law foundations of general international law, to customary international law as derived from the articulation of that custom in numerous treaties and to its explicit encapsulation in Article 31(1) of the Vienna Convention…" "Good Faith" in *Encyclopedia of Public International Law, 1984 pp.107-109.*

162 *See op. cit. n. 102.*

163 The International Court of Justice, however, has rejected this contention, holding that the principle of good faith is, "one of the basic principles governing the creation and performance of legal obligations" (Nuclear Tests, I.C.J. Reports 1974, p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist. A decade later, the International Court of Justice reaffirmed the proper role of the principle of good faith in its decision on competence in Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275 (June 11). Nigeria argued that Cameroon violated the principle of good faith by secretly preparing to invoke the Court's compulsory jurisdiction even while it maintained bilateral contact with Nigeria on border issues. Id. at 296 ¶ 31. The Court rejected Nigeria's position, noting that "although the principle of good faith is 'one of the basic principles governing the creation and performance of legal obligations . . . it is not in itself a source of obligation where none would otherwise exist.'" Id. at 297 ¶ 39 (quoting Border and Transborder Armed Actions). The Court further noted that there was "no specific obligation in international law" applicable to the conduct at issue, and concluded: "In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions." Id.32 All above as cited in the US Rejoinder Memorial on Jurisdiction, Admissibility and the Proposed Amendment in the Methanex case, June 27, 2001, pp.25-26.

164 "To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith". *Mondev* case *op.cit. n. 64.*

transparently in its relations with the foreign investor ….The foreign investor also expects the host State to act consistently, i.e. 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. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, compliance by the host State with such pattern of conduct is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary; i.e. as presenting insufficiencies that would be recognized "…by any reasonable and impartial man," [165] or, although not in violation of specific regulations, as being contrary to the law because: "...(it) shocks, or at least surprises a sense of juridical propriety"[166].

The Tribunal ruled that Mexico's behaviour as well as the "deficiencies" drawn from this behaviour, amounted to a violation of the BIT guarantees to provide "fair and equitable treatment".

E. Autonomous fairness elements

In ***Pope & Talbot Inc. v. Canada***[167], although the Tribunal acknowledged – in the Award on the Merits (Second Award) -- that the text of Article 1105 suggests that those elements ["fair and equitable treatment" and "full protection and security"] are included in the requirements of international law, it commented that the fairness elements were additive to the requirements of international law (see paragraph 77).

Subsequent to the Tribunal's Second Award, the NAFTA Free Trade Commission delivered its notes of interpretation. The Tribunal then, in its Award in Respect of Damages (Third Award),[168] examined the compatibility of its Second Award with the FTC's interpretation and conceded that "it might appear" that its own interpretation was different from the one adopted by the Commission. It nevertheless concluded that this was not necessarily the case and that the question of the consistency of these two interpretations would depend on "whether the concept behind the fairness elements under customary international law [was] different from those elements under ordinary standards applied in NAFTA countries"[169].

The Tribunal decided to verify the validity of its finding contained in its Second Award by using the threshold standard of "egregious" unfair conduct that Canada had asserted should apply under Article 1105. It concluded that even applying this "restrictive interpretation" to the facts of the case, would lead to the exact same conclusions it reached in its previous Award.

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165 *Neer v. Mexic*o case (1929) R.I.A.A.

166 Referring to the *ELSI* case.

167 *Pope & Talbot Inc. v. Canada, See op. cit. n. 100.*

168 Award in Respect of Damages (31 May 2002).

169 *Idem para. 56.*

Summing up

There is diversity in the way the "fair and equitable treatment" standard is formulated in investment agreements. Certain agreements, in particular some BITs, expressly define the standard by reference to international law while others do not make such reference to international law.

- Because of the differences in its formulation, the proper interpretation of the "fair and equitable treatment" standard depends on the specific wording of the particular treaty, its context, the object and purpose of the treaty, as well as on negotiating history or other indications of the parties' intent. For example, some treaties include explicit language linking or, in some cases limiting, fair and equitable treatment to the minimum standard of international customary law. Other treaties which either link the standard to international law without specifying custom, or lack any reference to international law, could, depending on the context of the parties' intent, for example, be read as giving the standard a scope of application that is broader than the minimum standard as defined by international customary law.

- Independently of the way governments interpret the "fair and equitable treatment" standard, it is understood that the minimum standard refers to an evolving international customary law which is not "frozen" in time, but may evolve over time depending on the general and consistent practice of states and *opinio juris*, as may be reflected in jurisprudence related to the interpretation and application of these treaties.

- An analysis of the opinions of the arbitral tribunals which have attempted to interpret and apply the "fair and equitable treatment" standard identified a number of elements which, singly or in combination, have been treated as encompassed in the standard of treatment. Most of the arbitral opinions in the present survey mention two elements, due diligence and due process (including non-denial of justice and lack of arbitrariness), while only a few mention transparency and good faith. Due diligence and due process including non-denial of justice and lack of arbitrariness are elements well grounded in international customary law while transparency is an element which is often defined in international agreements as an obligation under a separate provision. Good faith seems to be considered more a basic principle underlying an obligation rather than a distinct obligation owed to investors pursuant to the "fair and equitable treatment" standard.

- The identified elements appear to have sufficient legal content to allow cases to be judged on the basis of law in accordance with the Vienna Convention on the Law of Treaties, and decisions are not made by a process approaching *ex aequo et bono.*

- It would be inappropriate at this stage to establish a definitive interpretation of the "fair and equitable treatment" standard. The jurisprudence which has applied it and identified elements of its normative content is relatively recent and is not uniform, and therefore does not allow for a firm and conclusive list.