



International Investment Law

A CHANGING LANDSCAPE

**A COMPANION VOLUME TO INTERNATIONAL
INVESTMENT PERSPECTIVES**



OECD PUBLISHING

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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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Foreword

International investment agreements reinforce domestic liberalisation and underpin legal security for investment. Recently, a new generation of bilateral and regional investment agreements has emerged, together with a growing body of jurisprudence. The OECD serves as an effective forum for international discussions in this field. It engages in thorough analysis of the core provisions of investment treaties and systemic issues related to investor-state dispute settlement in co-operation with the International Centre for Settlement of Investment Disputes (ICSID), other institutions, academics and practitioners. The goal of this work is to enhance common understanding of their implications, and ultimately better and more predictable outcomes for governments and investors.

The OECD has been at the centre of the discussion on investment agreements since the beginning of its existence: in the 1960s, the draft OECD Convention on the Protection of Foreign Property provided the basis for future bilateral investment treaties; in the 1980s, it reported on OECD members' positions on main features of investment agreements; and, in the 1990s, the work on a Multilateral Agreement on Investment, whilst not reaching a successful conclusion, advanced the understanding of issues facing treaty negotiators.

I am very pleased that we are able to share the OECD's most recent work with a broader audience. The present publication includes four surveys. The first survey examines the current rules relating to transparency and third party participation in investor-state dispute settlement procedures, as well as recent steps taken to improve transparency. The work has given rise to a public statement by the Investment Committee on additional transparency which is also included in this publication.

The survey on "Indirect Expropriation and the Right to Regulate" touches upon one of the most frequently contested provisions in investor-state arbitration. It identifies main criteria found in investment agreements and used by tribunals to articulate the relationship between the two concepts. The survey on "Fair and Equitable Treatment Standard" reviews the concept and the elements of its content, based on jurisprudence and state practice. The survey on "Most-Favoured-Nation

Treatment” reviews accepted principles to interpret the application of this long standing provision in investment agreements.

A handwritten signature in black ink, appearing to read 'Manfred Schekulin', with a stylized flourish at the end.

Manfred Schekulin
Chair, OECD Investment Committee

Note by the Editor

This publication has been developed as an input to the Investment Committee's work aimed at enhancing understanding of international investment law. The material in this publication benefited from discussions and a variety of perspectives in the Committee. The publication as a collection of factual surveys, however, does not necessarily reflect the views of the Organisation for Economic Co-operation and Development or those of its member governments. It cannot be construed as prejudging ongoing or future negotiations or disputes pertaining to international investment agreements.

International Investment Law – A Changing Landscape is a companion volume to the 2005 edition of *International Investment Perspectives*. Queries concerning this annual publication should be addressed to the Investment Division of the OECD Directorate for Financial and Enterprise Affairs (Hans Christiansen, Editor, tel: 33-1 45 24 88 17; email: hans.christiansen@oecd.org; Pamela Duffin, Publications Officer, email: pamela.duffin@oecd.org).

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Chapter 1

Transparency and Third Party Participation in Investor-state Dispute Settlement Procedures*

The system of investment dispute settlement has borrowed its main elements from the system of commercial arbitration. However, investor-state disputes often raise public interest issues which are usually absent from international commercial arbitration. As a result, the traditional manner in which governmental measures are reviewed for compliance with international law in a private setting, i.e. confidential in-camera proceedings has come under increased scrutiny and criticism.

This survey examines the current rules related to transparency and third party participation in investor-state dispute settlement procedures, steps taken to improve transparency and the perceived advantages as well as the challenges of additional transparency.

* This survey was prepared by Catherine Yannaca-Small, Investment Division, OECD Directorate for Financial and Enterprise Affairs, and benefited from discussions, comments and a variety of perspectives in the OECD Investment 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.

Statement by the Investment Committee

June 2005

There is a general understanding among the members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to necessary safeguards for the protection of confidential business and governmental information, is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence. Members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific guidelines.

Introduction

The system of investment dispute settlement has borrowed its main elements from the system of commercial arbitration. However, investor-state disputes often raise public interest issues which are usually absent from international commercial arbitration. As a result, the traditional manner in which governmental measures are reviewed for compliance with international law in a private setting, i.e. confidential *in camera* proceedings has come under increased scrutiny and criticism.

The present document surveys the issues related to transparency and third party participation in investor-state dispute settlement procedures. Section 1 examines the way in which the current rules apply to these issues. Section 2 describes the steps taken to improve the transparency of the system at the governmental level, by the arbitral Tribunals and the International Centre for the Settlement of Investment Disputes (ICSID). Section 3 examines the perceived advantages as well as the challenges of additional transparency. The last section sums up.

1. Current arbitration rules provide for limited transparency

International arbitration can provide the advantage of impartial and competent decision making. A traditional commercial arbitration, between two private companies for instance, may run its course without public disclosure even of the existence of the dispute. Under the existing rules in this area, hearings are treated as entirely private matters and publication of the resulting award often depends on the decision of one or both parties. There are cases in which published awards are edited to obscure the identity of the parties.¹ The policy of confidentiality serves to expedite arbitrations, as well as to protect the confidentiality of information and reputation. There is no mechanism ensuring that the public will ever know about the claim brought, the positions taken by the parties, the decisions issued by the tribunals and the precise reasons for them. The notion that arbitrators (usually three) decide a purely commercial dispute behind closed doors “does not offend fundamental principles of justice”.² That the same three arbitrators may decide in the same way whether the measures taken by a government – which

1. See Jack J. Coe, Jr., *Symposium: International Commercial Arbitration: “Taking Stock of NAFTA Chapter 11 in its Tenth year: An Interim Sketch of Selected Themes, Issues and Methods”*, 36 *Vanderbilt Journal of Transnational Law*, 1381, October 2003.

2. Nigel Blackaby “*Public Interest and Investment Treaty Arbitration*”, *Investment Treaties and Arbitration*, ASA Swiss Arbitration Association, Conference in Zürich on 25 January 2002.

may raise sensitive issues of public policies³ – are compatible with an investment treaty could be more problematic. Current arbitration procedures provide for varied degrees of transparency.

1.1. Registration of disputes

In treaties such as BITs or Energy Charter, for instance, which do not require investors to publicly manifest their intention to launch a dispute settlement process, public disclosure depends on the arbitral rules chosen by the Parties or the will of the Parties to make such a disclosure where the rules do not control the matter.

When ICSID⁴ is chosen as the arbitration facility, the ICSID Secretariat applies a policy of registering all cases (the register can also be found in its Web site). The register includes the name of the Parties involved in the dispute, the date of registration and a short description of the dispute.

On the other hand, if another institution is chosen (ICC or SCC), there is no publication of registered cases. Since investment disputes account for a small part of the submitted disputes, it is also difficult to have exact knowledge of the existence, the number and general nature of these investment disputes.

Ad hoc (non-institutional) arbitration, for its part, may take place anywhere without any requirement for registration. The most common rules used in an *ad hoc* arbitration are the UNICTRAL⁵ rules. An increasing number of cases based on UNCITRAL rules are offered nowadays the administrative support of the ICSID Secretariat.

1.2. Access to the proceedings and submissions by non-disputant parties

Confidentiality may also apply to the arbitration proceedings. NAFTA in its Articles 1128 and 1129 provides for access to the documents and submissions on issues of interpretation by non-disputant parties (but only by the two other governments party to NAFTA). These submissions are regularly posted on the Web. Non-disputant private parties have no access to the

3. In the NAFTA context for instance: In *SD Myers*, Canada was required to pay damages for blocking the export to the US of hazardous waste products; in *Metalclad*, Mexico did not allow the construction of a toxic waste processing plant by issuing a decree to protect the area in question for environmental reasons; *Methanex* (a Canadian company) challenges California's decision to ban the use of gasoline additive containing methanol.

4. See worldbank.org/icsid. Two thirds of all cases brought to ICSID since 1966 were filed within the last five years. Fourteen NAFTA proceedings have been brought to ICSID since 1994 and six under the UNCITRAL rules.

5. Although UNCITRAL has a Secretariat, its Secretariat has no mandate to register cases or keep data of the use of its rules by investors.

proceedings unless there is consent of the parties to open or the Tribunal in its discretion opens up the proceedings to *amici curiae*, i.e. friends of the court. However, new developments are taking place in this regard and some new investment agreements as well as arbitral tribunals provide for interested third parties to participate in the proceedings and submit written submissions related to the case (see Section 2).

1.3. Access to the awards

There is no general binding rule for the publication of awards and they remain generally confidential unless the parties to the dispute agree to disclose them. However, NAFTA's Annex 1137.4 provides for the possibility of making the awards public. This Annex stipulates that if Canada and the US are the disputing Parties, either they (whoever is the disputing party in the specific case) or the disputing investor that is a party to the arbitration may make the award public. If Mexico is the disputing Party, the applicable arbitration rules apply to the publication of an award.

According to the ICSID Convention,⁶ the Centre may publish an award only when both parties give their consent. The ICSID Secretariat encourages the parties to the dispute to make the awards public by posting them on the Web and circulating them through its Foreign Investment Law Journal. Statistically, in about fifty per cent of the cases, ICSID obtains consent of the parties to publish the award. However, when one of the parties does not consent to the publication of the award by ICSID, the other party commonly releases it for publication by such other sources as *International Legal Materials*, the *Journal du Droit International* or ICSID Reports. If the Centre does not have the required consent of both parties for publication of the full text of the award and it is not published by another source, ICSID publishes (on its Web site and in the *ICSID Review – Foreign Investment Law Journal*) excerpts from the legal holdings of the award, pursuant to ICSID Arbitration Rule 48(4). In short, all ICSID arbitral awards, or at least their key legal holdings, are published.

The UNCITRAL rules⁷ provide that an award may be made public “only with the consent of the parties” and the same confidentiality requirements apply under the other institutional rules.

Today, several arbitration institutions, as well as independent publishers, have started to regularly publish arbitral awards. For example the ICC publishes sanitised extracts of awards (the names of the parties as well as

6. Article 48(5) of the ICSID Convention.

7. Article 32(5) of the UNCITRAL Rules.

relevant details are always omitted) in its regular periodical bulletin.⁸ Such publication of awards is done regularly unless the parties desire otherwise.

2. Steps towards additional transparency

The principle of public hearings in judicial proceedings is embodied in national laws. The closed doors approach of investment arbitration on issues of public interest, including the non-publication of awards in many cases, has engendered pressure from the public and interest groups to allow them access not only to the final arbitral award, but also to proceedings similar to those which they would have in national adjudication. Some States – in particular in the context of NAFTA – have taken steps in this direction, reflecting commitments to openness and transparency in dispute settlement procedures. In some cases, the existence of national laws related to freedom of information has brought in new developments which entail lower levels of confidentiality in existing processes. While tribunals' practice is also evolving, ICSID, as the main institutional body administering investment disputes has offered some reflections on improvements on both publication of awards and access of third parties.

2.1. States' interpretations and declarations

In 2001, the NAFTA Free Trade Commission⁹ (FTC) issued an Interpretation clarifying that "nothing in the NAFTA" imposes a general duty of confidentiality precluding the parties from providing public access to documents submitted to or issued by a Chapter Eleven Tribunal, "apart from the limited specific exceptions set forth expressly in the relevant arbitral rules". In addition, each NAFTA country agreed to make available to the public "in a timely manner"¹⁰ all documents submitted to and issued by Chapter Eleven Tribunals other than confidential business information protected from disclosure under the relevant arbitral and domestic law rules.

The NAFTA FTC issued a second Statement in October 2003 by which it confirmed that no provision of NAFTA limits a Tribunal's discretion to receive submissions from a third non-disputing party. The Statement also set forth guidelines for the procedures to be followed by prospective interested parties.

8. Bulletins are available at the International Court of Arbitration Web site www.icbbooks.com/TopBannerSites/bulletin.asp.

9. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp. Or see, NAFTA Free Trade Commission, Clarifications Related to NAFTA Chapter 11, 31 July 2001, available at www.ustr.gov/regions/whemisphere/nafta-chapter11.PDF.

10. *Idem*.

The NAFTA FTC at its joint statement of 16 July 2004 made a special mention to the progress of the transparency initiatives it had announced in its October 2003 Statement. It also welcomed the fact that Mexico joined the United States and Canada in their support of open hearings in the context of investor-states disputes. (The three NAFTA statements are reproduced in Annex 1).

2.2. International Agreements

Draft Multilateral Agreement on Investment (MAI)

Already in the 1990s, the draft Multilateral Agreement on Investment did not include a limitation in the publication of awards and provided that the award should be a publicly available document. However, appropriate safeguards for the protection of business confidential information were incorporated into the proposed publication criteria (see Annex 2).

New generation of investment agreements: Free Trade Agreements and New Model BITs

Renewed efforts towards a more transparent investment arbitration system are reflected in the investment provisions of the most recent US Free Trade Agreements as well as the new model US Bilateral Investment Treaty and Canada's Foreign Investment Promotion and Protection Agreements (FIPA) Negotiating Programme.

Like NAFTA Article 1128, under the US FTAs with Chile,¹¹ Singapore,¹² Dominican Republic-Central America (DR-CAFTA)¹³ and Morocco,¹⁴ non-disputing State parties to these agreements may make oral and written submissions to the Tribunal on issues of interpretation. The latter FTAs also provide that Tribunals also have the authority to accept and consider written *amicus curiae* submissions from a person or entity that is not a party to the dispute. In terms of transparency of arbitral proceedings, the main documents¹⁵ related to

11. US-Chile Free Trade Agreement, signed on 6 June 2003, entered into force on 1 January 2004.
12. US-Singapore Free Trade Agreement signed on 6 May 2003, entered into force on 1 January 2004.
13. Dominican Republic-Central America – Free Trade Agreement (DR-CAFTA) signed on 5 August 2004. The countries parties to the Agreement are: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua and the United States.
14. US-Morocco Free Trade Agreement signed on 15 June, 2004.
15. These documents include:
 - a) the notice of intent;
 - b) the notice of arbitration;
 - c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions;
 - d) minutes or transcripts of hearings of the tribunal, where available; and
 - e) orders, awards, and decisions of the tribunal.

the dispute settlement procedures must be made public and the hearings must be open to the public. However, a safeguard is included for sensitive information which is protected accordingly (see Annex 3 for the relevant provisions).

The same provisions are found in the most recent version of the US Model Bilateral Investment Treaty (Articles 28 and 29).

Canada's new FIPA contains similar provisions. It promotes transparency by providing that "all documents submitted to or issued by the Tribunal, including transcripts of hearings, will be promptly made available to the public, subject to redaction for [...] privileged information". It also provides for all hearings to be open to the public and institutionalises the possibility for the acceptance of written *amicus curiae* submissions. The provisions in these agreements are compatible with ICSID and UNCITRAL rules which require the consent of both parties; the State parties have conditioned their consent upon transparency and therefore the investor/party to the dispute consents to the transparency provisions by initiating the proceedings pursuant to that agreement. (The relevant provisions of the US and Canada model agreements are reproduced in Annex 4.)

2.3. Arbitral Tribunals

Publication of documents

Loewen case. The first NAFTA Chapter 11 case brought against the United States (*Loewen case*)¹⁶ required the arbitral tribunal to consider the United States obligation under its domestic law to release documents related to the arbitration proceedings. Indeed, the US Freedom of Information Act (FOIA)¹⁷

16. *Loewen Group, Inc. and Raymond Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Award) (26 June 2003). The Loewen Group, Inc. ("TLGI"), a Canadian corporation involved in the death-care industry, and Raymond L. Loewen, its chairman and CEO at the time of the events at issue, had filed claims under the ICSID Additional Facility Rules in their individual capacities and on behalf of Loewen Group International, Inc., TLGI's US subsidiary (collectively "Loewen"). Loewen sought damages for alleged injuries arising out of litigation in which the company was involved in Mississippi state courts in 1995-96. Loewen alleged violations of three provisions of NAFTA – the anti-discrimination principles set forth in Article 1102, the minimum standard of treatment required under Article 1105, and the prohibition against uncompensated expropriation set forth in Article 1110. Loewen requested damages in excess of USD 600 million. On 26 June 2003, the tribunal dismissed the claims against the United States in their entirety.

17. At present, some 50 countries, including developing countries, have passed laws equivalent to FOIA and more have laws either in the drafting stage or with legislatures; see www.freedominfo.org. Margrete Stevens, "The Right to Information and Investor-State Disputes: the Development of a New Procedural Framework in NAFTA Chapter 11 Arbitrations", Presentation in the Conference "International Economic Disputes-A Wider Perspective" St John's College, Cambridge, 1-3 April 2004.

provides that any person has a right of access to federal agency records subject only to some specific exemptions. This right is enforceable in court. The *Loewen* Tribunal considered the United States request to release the documents and decided that there were no implied rules under the ICSID Additional Facility Rules and no general obligation of confidentiality in NAFTA arbitrations.¹⁸ In addition, based on the Loewen Group's request for clarification of this decision, the tribunal noted that neither of its decisions was intended to affect any statutory obligation of disclosure by which any party might be bound.¹⁹ Following these decisions, the United States, complying with the FOIA, gradually released documents related to the case.

Amici Curiae submissions and open hearings

Two NAFTA Tribunals concluded in principle that they have the authority to accept *amici curiae* briefs: the *Methanex* and the *UPS* Tribunals. Open hearings were also allowed in these two cases and in a recent third case, *Canfor v. United States of America*.

Methanex case. The second NAFTA case against the United States was brought by a Canadian investor, *Methanex*.²⁰ In this case, the Parties agreed that orders, pleadings and awards could be made public by either side. A few months later, the *Methanex* Tribunal took a decision on public participation that is of groundbreaking relevance to UNCITRAL arbitrations, if not to all future investor-state arbitrations.²¹

18. *Idem*.

19. *Idem*.

20. This case concerns a USD 1 billion claim against the United States by a Canadian company, a major producer of methanol, a key component of a gasoline additive called MTBE. Methanex launched an international arbitration in response to the March 1999 order by the state of California to ban the use of MTBE by the end of 2002 because the additive was contaminating drinking water supplies, and was therefore posing a significant risk to human health and safety, and the environment. Methanex argues that the ineffective regulation and non-enforcement of domestic environmental laws including the US Clean Water Act, is responsible for the presence of MTBE in California water supplies. It argues that the planned ban is tantamount to an expropriation of the company's investment: a violation of NAFTA's Article 1110 and was enacted in breach of the national treatment (Article 1102) and minimum international standards of treatment (Article 1105) provisions.

21. *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as "*amici curiae*", 15 January 2001. The petitions and all the documents relevant to this case can be found on www.state.gov/s/l/c5818.htm.

The public participation issue was first raised in August 2000 through a “Petition”, seeking *amicus curiae* status²² for the International Institute for Sustainable Development (IISD).²³ This was followed in September by a submission from Earthjustice,²⁴ a US legal NGO, on behalf of other California-based environmental groups. The two NGOs were seeking the following results:

- i) permission to make written submissions in the case
- ii) an order for the hearings to be made open to the public;
- iii) an order of disclosure to IISD of all documents for purposes of making the submissions;
- iv) an order allowing for oral arguments to be made.

In its decision, the Tribunal accepted the first three requests but did not allow for oral arguments to be made by *amici*.

In an important part of its reasons to allow *amici curiae* submissions, the Tribunal noted the large distinction between the substantive issues at stake in the arbitration before it as compared to traditional commercial arbitration. It stated that the present type of issues:

“... extend far beyond those raised by the usual transnational arbitration between commercial parties [...] the public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions.”²⁵

At the same time, Canada and the United States recognised in their submissions that the closed nature of Chapter 11 proceedings was damaging to the public credibility of the process itself.

The Methanex Tribunal issued a press release on 30 January 2004 indicating its decision to allow NGOs or other interested non-parties to apply to make submissions. In March 2004, the IISD and Earthjustice submitted their briefs to the Tribunal. Open hearings, broadcast live, took place in the World Bank headquarters on 7-17 June 2004.

United Parcel Services (UPS) case. In the *United Parcel Services of America v. Canada* case,²⁶ the Canadian Union of Postal Workers²⁷ and the Council of

22. For the history of these *amici curiae* submissions see Howard Mann’s “Opening the Doors, at Least a Little: Comment on the Amicus Decision in Methanex v. United States” RECIEL 10(2, 2002):241-245.

23. The IISD is a Canadian-based NGO www.iisd.org/investment.

24. See Earthjustice’s Web site: www.earthjustice.org.

25. Decision of the Tribunal, par. 49, see *op. cit.*, No. 21.

26. Decision of the Tribunal on Petitions for Intervention and Participation as *amici curiae* (17 October 2001), available at www.state.gov/documents/organisation/6033.pdf.

27. The Canadian Union of Postal Workers is a labour union which represents approximately 46 000 operational employees and 40 000 retirees of Canada Post.

Canadians²⁸ made a case about having a direct interest in the subject matter of the claim and in the broader public policy implications of the dispute.²⁹ In addition, they noted their interest in addressing the lack of transparency that has historically attended international arbitral processes and based their request on Article 15(1)³⁰ of the UNCITRAL Arbitration Rules which gives discretion to the arbitral tribunal to conduct the arbitration in a manner it finds appropriate. They petitioned the Tribunal requesting:³¹

- i) standing as parties to any proceedings related to the case;
- ii) in case of denial, the right to intervene as *amici curiae* in such proceedings to be accorded on terms that are consistent with the principles of fairness, equality and fundamental justice;
- iii) disclosure of the main documents³² related to the proceedings;
- iv) the right to make submissions concerning the place of arbitration;
- v) the right to make submissions concerning the jurisdiction of this Tribunal, and once they are fully known the arbitrability of the matters the disputing investor has raised; and
- vi) an opportunity to amend the Petition as further details of the claim become known to the petitioners.

28. The Council of Canadians, founded in 1985, is a non-governmental organisation with more than 100 000 members which lobbies members of parliament, conducts research and runs national programmes related to the future of Canada's social programmes, the protection of public health and the environment and the functioning of public institutions.

29. UPS claims that Canada Post, which UPS alleges is a letter mail monopoly, engages in anti-competitive practices: in providing its non-monopoly courier and parcel services (Express post and Priority Courier), it, allegedly, unfairly uses its postal monopoly infrastructure to reduce the costs of delivering its non-monopoly services. UPS alleges that Canada has 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 less 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). UPS seeks USD 160 million in damages.

30. Article 15(1) of the UNCITRAL Rules provides: "*Subject to these Rules the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*"

31. See *op. cit.*, No. 29, par. 1.

32. Disclosure of the statement of claim and defence, memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal.

Canada and the US supported in their submissions the view that the Tribunal is authorised to accept written submissions from third parties as *amici curiae*, while Mexico disagreed.³³

The Tribunal considered that it was indeed within the scope of article 15(1) of the UNCITRAL rules to receive submissions offered by the third parties with the purpose of assisting the Tribunal in that process and found that it had power to accept such written *amicus* briefs from the Petitioners. In its decision it also recalled “the emphasis placed on the value of greater transparency for proceedings such as these. Such proceedings are not now, if they ever were, to be equated to the standard run of international commercial arbitration between private parties”.³⁴

In addition, both parties agreed to make publicly available, subject to the protection of confidential information: “pleadings, and submissions of any disputing party or NAFTA Party, together with their appendices and attached exhibits, including the note of intent, notice of arbitration, amended statement of claim, statement of defense, memorials, affidavits, responses to tribunal questions, transcripts of public hearings, correspondence to or from the Tribunal, and any awards, including procedural orders, rulings, preliminary and final awards.”

Parties to the dispute also agreed to make the hearings open to the public, subject to the protection of confidential information. The public hearings, broadcast live, took place in the World Bank headquarters on 29-31 July 2002.³⁵

Canfor v. United States of America. In *Canfor v. United States of America* case,³⁶ the arbitral tribunal allowed and parties to the dispute agreed to make the hearings open to the public. The public hearings, broadcast live, were held on 7-9 December 2004 in the World Bank headquarters.

33. See *op. cit.*, No. 29, par. 8, 9, 10.

34. See *op. cit.*, No. 29, par. 70.

35. ICSID Press Release: www.worldbank.org/icsid/ups.htm.

36. Canfor Corporation, a Canadian forest products company, has delivered a notice of arbitration under the countervailing duty and material injury determinations on softwood lumber. The US Department of Commerce issued final antidumping and countervailing duty determinations on softwood lumber in March 2002. In May 2002, the US International Trade Commission issued a final determination that the US softwood lumber industry was threatened with material injury by reason of imports from Canada of softwood lumber. As a result of those determinations, a Canfor subsidiary is required to pay increased duties on softwood lumber products imported to the United States. Canfor's notice alleges that the United States, by virtue of these determinations, has breached NAFTA Chapter Eleven by not according it national treatment (Art. 1102) or most-favoured-nation treatment (Art. 1103); by not according it treatment in accordance with international law (Art. 1105); and by expropriating its investment without compensation (Art. 1110). The notice claims damages of not less than USD 250 million.

Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. the Argentine Republic. In the Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A., v. the Argentine Republic case, it was the first time a Tribunal in an ICSID Convention case under a BIT, ruled that it had the power to entertain legal arguments from interested non-parties.³⁷

On 28 January 2005, five non-governmental organisations, Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores, filed a “Petition for Transparency and Participation as *Amicus Curiae*” in the above ICSID case. Asserting that the case involved matters of public interest and the fundamental rights of people living in the area affected by the dispute in the case, the petitioners requested the Tribunal to grant three requests

- i) to allow them access to the hearings;³⁸
- ii) to allow them the opportunity to present legal arguments as *amicus curiae*;³⁹ and
- iii) to allow them timely, sufficient, and unrestricted access to all of the documents in the case.⁴⁰

37. Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, of 19 May 2005.

38. The Petitioners cited the NAFTA cases of *Methanex v. United States of America* and *UPS v. Canada*. By “access to hearings” they did not only request the right to attend hearings but also to be given the opportunity to make oral presentations to the Tribunal, asserting the “right of every person to participate and make their voices heard in cases where decisions may affect their rights”. *Idem*, par. 4.

39. The Tribunal noted that the Petitioners did not define in detail the role and nature of an *amicus curiae* or “friend of the court” but it assumed that “the *amicus curiae* role the Petitioners seek to play [...] is similar to that of a friend to the court recognised in certain legal systems and more recently in a number of international proceedings. In such cases, a non-party to the dispute, as a ‘friend’, offers to provide the court or tribunal its special perspectives, arguments, or expertise on the dispute, usually in the form of a written *amicus curiae* brief or submission”. *Idem*, par. 8.

40. Petitioners requested the Tribunal “[...] to concede [...] timely, sufficient, and unrestricted access to the documents of the arbitration, namely the parties submissions, transcripts of hearings, statements of witnesses and experts, and any other documents produced in this arbitration”. *Idem*, par. 30.

The Tribunal rejected the first request to have the arbitral hearings open to the public founding its decision on the ICSID Rule 32(2) which requires the consent of the parties.⁴¹ Noting that while in the previous cases under NAFTA – *Methanex* and *UPS* – the Tribunals allowed open hearings, this was done with the consent of both parties, which was a missing element in the present case. It stated that:

*“Although the Tribunal [...] does have certain inherent powers with respect to arbitral procedure, it has no authority to exercise such power in opposition to a clear directive in the Arbitration Rules, which both Claimants and Respondents have agreed will govern the procedure in this case.”*⁴²

On the question of allowing the submission of *amicus curiae* briefs, the Tribunal responded in the affirmative. Although the Claimant argued against such a submission, the Tribunal founded its decision on Article 44 of the ICSID Convention⁴³ and unanimously concluded that the Convention grants it the power to admit *amicus curiae* submissions from suitable non-parties in appropriate cases. It found further support for this decision in international arbitration proceedings in the practices of NAFTA, the Iran-US Claims Tribunal and the WTO. It then stated that:

*“The exercise of the power conferred on the Tribunal by Article 44 to accept amicus submissions should depend on three basic criteria: a) the appropriateness of the subject matter of the case; b) the suitability of a given non-party to act as amicus curiae in that case; and c) the procedure by which the amicus submission is made and considered.”*⁴⁴

On the first point, the Tribunal unanimously concluded that the case was an appropriate one in which non-parties may make *amicus curiae* submissions since it involved “matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable non-parties”.⁴⁵ It added that:

“The acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public

41. ICSID Arbitration Rule 32(2) states: “The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.”

42. Order op. cit., No. 37, par. 6.

43. Article 44 of the ICSID Convention states: “Any arbitration proceeding shall be conducted in accordance with the provisions of his Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect of the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”

44. Order op. cit., No. 37, par. 17.

45. *Idem*, par. 20.

acceptance of the legitimacy of international arbitral process, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function [...] Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.”⁴⁶

The Tribunal chose to set out a procedure whereby interested interveners will need to petition the tribunal for leave to make such submissions. As part of this screening process, the Tribunal will assess the bona fide and expertise of the *amici* and determine whether they should be given leave to submit legal briefs in the case.⁴⁷

Finally, the Tribunal deferred the decision on the request that all documentation related to the case be disclosed to the public. Observing that the ICISD Convention, Rules and the practice of the Centre present certain constraints, the Tribunal elected to wait to address the request “until such a time as it may grant leave to a particular non-disputing party to file an *amicus curiae* brief”.⁴⁸

2.4. ICSID Secretariat proposal

In 2004, ICSID Secretariat presented draft proposals on possible improvements of the framework for ICSID arbitration, including in relation to transparency and third party participation.⁴⁹ Following comments received by various interested constituencies, amendments to these draft proposals were presented in May 2005 (see Annex 5).

As mentioned above, the main legal holdings of all ICSID arbitral awards are now published. An important consideration is, however, the timeliness of publication when many cases involving similar issues are pending. It is not until several months have passed that ICSID receives the consent of both parties for it to publish an award. In the meantime, ICSID might publish excerpts of the main holdings, while it awaits the consents for publication of the full text. ICSID Secretariat proposes to amend Arbitration Rule 48(4) and

46. *Idem*, par. 22.

47. The information required by the Tribunal should include (*idem*, par. 25):

- “a. The identity and background of the petitioner, the nature of its membership if it is an organisation, and the nature of its relationships, if any, to the parties in the dispute;
- b. The nature of the petitioner’s interest in the case.;
- c. Whether the petitioner has received financial or other material support from any of the parties or from any person connected with the parties in this case.;
- d. The reasons why the Tribunal should accept petitioner’s *amicus curiae* brief.”

48. Order, *op. cit.*, No. 37, par. 30-31.

49. “Possible Improvements of the Framework for ICSID Arbitration: ICSID Secretariat Discussion Paper”, 22 October 2004. Full text is available at: www.worldbank.org/icsid/improve-arb.htm.

the corresponding provision of the Additional Facility Arbitration Rules, Article 53(3) to make it mandatory for ICSID to publish promptly the excerpts of the legal conclusions or the Tribunal.

As for the acceptance of submissions from third parties, ICSID Secretariat proposes by amendments of ICSID Arbitration Rule 37 and Article 41 of the Additional Facility Arbitration Rules regarding evidence, that tribunals would have the authority, after consulting both parties as far as possible, to accept and consider submissions from third parties. The amendments set out conditions for the submissions – for example, the demonstration by the non-disputing party that its submission brings a particular knowledge or insight, addresses a matter within the scope of the dispute and that the non-disputing party has a significant interest in the proceedings.

According to the ICSID and Additional Facility Arbitration Rules, the tribunal may allow other persons to attend the hearings only “with the consent of the parties”.⁵⁰ Hearings open to the public have been consented to by the parties in two cases administered by ICSID under the UNCITRAL Rules. ICSID Secretariat proposes that Arbitration Rule 32(2) and Article 39(2) of the Additional Facility Arbitration Rules be amended so that the consent of both parties would no longer be obligatory for decisions of the tribunal to permit additional categories of persons to attend the hearings or even to open them to the public. According to the ICSID draft proposal, after consultation with the Secretary General and with the parties as far as possible, the Tribunal may allow other persons to attend or observe all or part of the hearings by establishing procedures for the protection of proprietary information and the making of appropriate logistical arrangements.

3. Perceived advantages and challenges of additional transparency

This section examines the case for additional transparency as well as the need for careful consideration of its modalities, based on the results of stakeholder consultations held in OECD, ICSID and other fora.

3.1 Publication of awards

Investment arbitral awards may have a significant impact on the State's future conduct, the national budget and the welfare of the people, so the public interest in investment disputes is understandable. Increased transparency can contribute to enhancing effectiveness and continued acceptance of the system of investment arbitration.

There are a growing number of arbitration awards which are likely to influence future cases and this has argued for their systematic and quick

50. ICSID Arbitration Rule 32(2); Additional Facility Arbitration Rules, Art. 39(2).

publication. This is considered to enhance the equality of the parties, since today some parties and their representatives do not have the same knowledge of and access to the most recent and yet unpublished opinions. The publication of arbitral awards would contribute to the further development of a public body of jurisprudence which would allow investors and host states to understand how investment agreements are interpreted and applied and ultimately contribute to a more predictable and consistent system. States reading an award are also free to consider whether there is anything in the award that needs to be taken into account in their future negotiations.

At the same time, it is understood that any publication of awards should take into account the protection of confidential business and governmental information. The business community has made known its expectation that full clarity would be provided about which parts of the arbitration proceedings would be covered by extended transparency requirements under a reformed ICSID framework. There is also a view that the consent of the parties for the publication of the award should be requested at the close of the oral proceedings, rather than after the award is rendered. In this case however, this would mean that the parties may be willing to consent to the publication of the award before they know the outcome.

In addition to any possible changes of the ICSID Rules and in order to have increasing transparency, the question has been raised as to whether it might also be necessary to include or modify language in the Bilateral Investment Treaties involving as many countries as possible. Some consider a consistent practice defensible on a case-by-case basis preferable than any new rules on this matter. It has also been suggested that a common approach among treaty partners would be preferable to having dispersed provisions, as this would also ensure that arbitration awards may be published under the other applicable arbitration rules, *e.g.* UNCITRAL, ICC, SCC or *ad hoc*. There is also a view that when the institutional rules, such as the ICC for example, require confidentiality, the institutional rules should prevail.

3.2. Third Party Participation

The issues of allowing third party submissions and access to hearings, require a more qualified approach. Although in principle there is merit in allowing interested parties to provide submissions and also allow open hearings, a widely-held view is that it would be preferable that third party participation be subject to specific rules and guidelines and close monitoring based on the following considerations:

- It is important to have a threshold showing of substantive and legitimate interest by the third parties and also have them demonstrate

that they are accountable, professional and transparent themselves by disclosing the origin of the funds with which they operate.⁵¹

- Ensure that they are independent and not backed by any of the disputing parties.
- Ensure that the terms of their participation do not enable them to either dictate the outcome or change the rules in the middle of the case.
- Avoid giving non-governmental organisations a higher standing than the non-disputing governments; allow them to submit *amicus* briefs but not to call witnesses, nor to have the possibility to amend the claims or independently affect the process.
- Transparency in the proceedings could be enhanced by having at least part of the hearings held in the country or area where the problem has arisen.

There is an important linkage between third party participation and access to all documents related to the dispute, including notices of intent and arbitration, pleadings, memorials and briefs if third party submissions are required to demonstrate a substantive interest and address all matters within the scope of the dispute. At present, several countries⁵² allow for access to such documents, subject to safeguards for the protection of confidential information. As mentioned above, examples of such access linked to *amici curiae* submissions and/or open hearings are the three NAFTA cases (*Methanex*, *UPS* and *Canfor*) and one BIT case (*Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.*). For international investment agreements that do not provide for third party participation including access to documents and open hearings, tribunals will continue to deal with requests for access on an *ad hoc* basis, respecting the intent of the parties.

4. Summing up

Investment arbitration and in particular investor/state, has borrowed its main elements from commercial arbitration. Whether confidentiality at all stages – from the registration of the dispute to the publication of awards – should be applied for matters of general public interest found in investment arbitration has been questioned.

51. In a recent WTO case, the WTO Tribunal refused to consider an *amicus* brief which made public certain information ordered by the WTO to be kept confidential. The Tribunal found that this was not appropriate behaviour for a “friend of the tribunal”.

52. These countries include: the NAFTA countries, based on the Free Trade Commission’s Interpretation of 2001; Canada and the United States based on their model BITs and Chile, Singapore, Dominican Republic-Central America and Morocco, based on their FTAs with the United States.

Public interest groups have been advocating more transparency and participation in the proceedings in order to enhance the acceptability and credibility of arbitral decisions. A few governments, committed to openness and transparency – often called for by their freedom of information acts – are publishing the arbitration proceedings and awards and are inserting relevant provisions in their new model investment agreements. ICSID is proposing to modify its rules in order to take into account these new developments. Finally, breakthrough developments occurred recently with four tribunals' decisions to allow interested parties to submit briefs and/or to allow for open hearings.

Although there is support among governments for the publication of arbitral awards subject to necessary safeguards for the protection of confidential business and governmental information, there is a more qualified reaction to third party participation including public access to other documents submitted to or issued by a tribunal. Monitoring as well as specific rules and guidelines are considered by many members important to guide third party participation either in the form of *amici curiæ* submissions or open hearings.

ANNEX 1.A1

NAFTA Free Trade Commission's Interpretations and Statements

1. Access to documents (31 July 2001)

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

A. Access to documents

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.
2. In the application of the foregoing:
 - a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.
 - b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
 - i) business information;
 - ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
 - iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

- c) The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.
 - d) The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.
3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.

2. Statement of the Free Trade Commission on non-disputing party participation (October 2003)

A. Non-disputing party participation

- 1. No provision of the North American Free Trade Agreement ("NAFTA") limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party (a "non-disputing party").
- 2. Nothing in this statement by the Free Trade Commission ("the FTC") prejudices the rights of NAFTA Parties under Article 1128 of the NAFTA.
- 3. Considering that written submissions by non-disputing parties in arbitrations under Section B of Chapter 11 of NAFTA may affect the operation of the Chapter, and in the interests of fairness and the orderly conduct of arbitrations under Chapter 11, the FTC recommends that Chapter 11 Tribunals adopt the following procedures with respect to such submissions.

B. Procedures

- 1. Any non-disputing party that is a person of a Party, or that has a significant presence in the territory of a Party, that wishes to file a written submission with the Tribunal (the "applicant") will apply for leave from the Tribunal to file such a submission. The applicant will attach the submission to the application.
- 2. The application for leave to file a non-disputing party submission will:
 - a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
 - b) be no longer than 5 typed pages;

- c) describe the applicant, including, where relevant, its membership and legal status (*e.g.*, company, trade association or other non-governmental organisation), its general objectives, the nature of its activities, and any parent organisation (including any organisation that directly or indirectly controls the applicant);
 - d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
 - e) identify any government, person or organisation that has provided any financial or other assistance in preparing the submission;
 - f) specify the nature of the interest that the applicant has in the arbitration;
 - g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
 - h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission; and
 - i) be made in a language of the arbitration.
3. The submission filed by a non-disputing party will:
 - a) be dated and signed by the person filing the submission;
 - b) be concise, and in no case longer than 20 typed pages, including any appendices;
 - c) set out a precise statement supporting the applicant's position on the issues; and
 - d) only address matters within the scope of the dispute.
 4. The application for leave to file a non-disputing party submission and the submission will be served on all disputing parties and the Tribunal.
 5. The Tribunal will set an appropriate date by which the disputing parties may comment on the application for leave to file a non-disputing party submission.
 6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:
 - a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
 - b) the non-disputing party submission would address matters within the scope of the dispute;
 - c) the non-disputing party has a significant interest in the arbitration; and

- d) there is a public interest in the subject-matter of the arbitration.
- 7. The Tribunal will ensure that:
 - a) any non-disputing party submission avoids disrupting the proceedings; and
 - b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
- 8. The Tribunal will render a decision on whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal will set an appropriate date by which the disputing parties may respond in writing to the non-disputing party submission. By that date, non-disputing NAFTA Parties, pursuant to Article 1128, address any issues of interpretation of the Agreement presented in the non-disputing party submission.
- 9. The granting of leave to file a non-disputing party submission does not require the Tribunal to address that submission at any point in the arbitration. The granting of leave to file a non-disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration.
- 10. Access to documents by non-disputing parties that file applications under these procedures will be governed by the FTC's Note of 31 July 2001.

3. NAFTA Free Trade Commission Joint Statement on the Decade of achievement (San Antonio, 16 July 2004)

"[...] We are pleased that the transparency initiatives we took during our October 2003 meeting have already begun to improve the operation of the investment chapter investor-state dispute-settlement mechanism. Earlier this year, for the first time a tribunal accepted written submissions from a non-disputing party and adopted the procedures that we recommended following our 7 October 2003 meeting in Montreal, for the handling of such submissions.

We were pleased Mexico has now joined Canada and the United States in supporting open hearings for investor-state disputes. In addition, we have agreed that the same degree of openness should apply to proceedings under the Dispute Settlement provisions of Chapter 20 of the NAFTA, and asked officials to develop rules governing open hearings for such proceedings [...]"

ANNEX 1.A2

The Multilateral Agreement on Investment: Draft Consolidated Text⁵³

Investor-state procedures

Article 16. Final awards

- d) The award shall be drafted consistently with the requirements of paragraph 17 and **shall be a publicly available document**. A copy of the award shall be delivered to the Parties Group by the Secretary-General of ICSID, for an award under the ICSID Convention or the Rules of the ICSID Additional Facility; by the Secretary-General of the ICC International Court of Arbitration, for an award under its rules; and by the tribunal, for an award under the UNCITRAL rules.

Article 17. Confidential and Proprietary Information

Parties and other participants in proceedings shall protect any confidential or proprietary information which may be revealed in the course of the proceedings and which is designated as such by the party providing the information. They shall not reveal such information without written authorisation from the party which provided it.

53. See www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.

ANNEX 1.A3

*Provisions on Transparency of Proceedings
in US Free Trade Agreements with Chile,
Singapore, Dominican Republic-
Central America (DR-CAFTA) and Morocco*

An example: CAFTA-DR**Article 10.20: Conduct of the Arbitration**

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 10.16.3. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.
2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.
3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

[...]

Article 10.21: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:
 - a) the notice of intent;
 - b) the notice of arbitration;
 - c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25;
 - d) minutes or transcripts of hearings of the tribunal, where available; and
 - e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 21.2 (Essential Security) or Article 21.5 (Disclosure of Information).
4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
 - a) subject to subparagraph d), neither the disputing parties nor the tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph b);
 - b) any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
 - c) a disputing party shall, at the same time that it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information; only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1; and
 - d) the tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may i) withdraw all or part of its submission containing such information, or ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under i) by the disputing party that first submitted the information or re-designate the information consistent with the designation under ii) of the disputing party that first submitted the information.
5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

ANNEX 1.A4

Model Bilateral Investment Treaties

1. Draft United States Model BIT

Article 28: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.
2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.
3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public:
 - a) the notice of intent referred to in article 24(2);
 - b) the notice of arbitration referred to in article 24(4);
 - c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) (Non-Disputing Party submissions) and (3) (Amicus Submissions) and Article 33 (Consolidation);
 - d) minutes or transcripts of hearings of the tribunal, where available; and
 - e) orders, awards, and decisions of the tribunal.
2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical

arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18.

(Essential Security Article) or Article 19 (Disclosure of Information Article)

4. Protected information shall, if such information is submitted to the tribunal, be protected from disclosure in accordance with the following procedures:
 - a) Subject to subparagraph 4(d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with paragraph 4(b).
 - b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal.
 - c) A disputing party shall, at the same time that it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Parties and made public in accordance with paragraph 1.
 - d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may i) withdraw all or part of its submission containing such information, or ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and 4(c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under ii) of the disputing party that first submitted the information.
5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

2. Canada's Draft Foreign Investment Protection and Promotion Agreement

Article 38. Public Access to Hearings and Documents

1. Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.
2. The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings, in consultation with the disputing parties.
3. All documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information.
4. Notwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.
5. A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.
6. The Parties may share with officials of their respective federal and sub-national governments all relevant unredacted documents in the course of dispute settlement under this Agreement, but they shall ensure that those persons protect any confidential information in such documents.
7. As provided under Article 10(4) and (5), the Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which it determines to be contrary to its essential security.
8. To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated confidential by the Tribunal.

Article 39. Submissions by a Non-Disputing Party

1. Any non-disputing party that is a person of a Party, or has a significant presence in the territory of a Party, that wishes to file a written submission

with a Tribunal (the “applicant”) shall apply for leave from the Tribunal to file such a submission, in accordance with Annex C.39. The applicant shall attach the submission to the application.

2. The applicant shall serve the application for leave to file a non-disputing party submission and the submission on all disputing parties and the Tribunal.
3. The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.
4. In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which:
 - a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
 - b) the non-disputing party submission would address a matter within the scope of the dispute;
 - c) the non-disputing party has a significant interest in the arbitration; and
 - d) there is a public interest in the subject-matter of the arbitration.
5. The Tribunal shall ensure that:
 - a) any non-disputing party submission does not disrupt the proceedings; and
 - b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
6. The Tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Party may, pursuant to Article 34 (Participation by the Non-Disputing Party), address any issues of interpretation of this Agreement presented in the non-disputing party submission.
7. The Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.
8. Access to hearings and documents by non-disputing parties that file applications under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under Article 38 (Public Access to Hearings and Documents).

ANNEX 1.A5

Suggested Changes to the ICSID Rules and Regulations

Working Paper of the ICSID Secretariat

12 May 2005

Publication of Awards – Suggested changes to ICSID Arbitration Rule 48

Rule 48 – Rendering of the Award

[...]

4. The Centre shall not publish the award without the consent of the parties. The Centre may shall, however, promptly include in its publications excerpts of the legal rules applied by conclusions of the Tribunal.

Note: As stated in the Discussion Paper of 22 October 2004, Article 48(5) of the ICSID Convention and the first sentence of Arbitration Rule 48(4) preclude the Centre from publishing a Convention award without the consent of the parties. However, the Centre may publish excerpts from the legal holdings of the award.

The suggested changes would facilitate the prompt release of excerpts, by making their early publication mandatory, and clarify the wording of the provision. Prompt publication of the excerpts is particularly important in view of the increase in the number of pending cases at the Centre.

Similar changes would be made to the corresponding provisions in the Additional Facility Arbitration Rules, Article 53(3).

Access of Third Parties – Suggested changes to ICSID Arbitration Rule 32

Rule 32 – The Oral Procedure

[...]

2. After consultation with the Secretary-General and with the parties as far as possible, the Tribunal shall decide, with the consent of the parties, which may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may, to attend or observe all or part of the hearings. The Tribunal shall for such cases establish procedures for the protection of proprietary information and the making of appropriate logistical arrangements.

[...]

Note: In certain cases, it could be useful to have hearings open to persons other than those directly involved in the proceeding. The suggested changes would make clear that this might be considered by a tribunal after consultation with the Secretary-General and both parties as far as possible. Such consultation with the parties would ensure that any objection or concern they may have will be taken into account by the tribunal in considering whether to allow any third parties to attend or observe the hearings. The changes would also require the tribunal for such cases to prescribe procedures to protect proprietary information and make the appropriate logistical arrangements.

Similar changes would be made to the corresponding provisions in the Additional Facility Arbitration Rules, Article 39(2).

Access of Third Parties – Suggested changes to ICSID Arbitration Rule 37

Rule 37 – Visits and Inquiries; Submissions of Non-disputing Parties

1. If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.
2. After consulting both parties as far as possible, the Tribunal may allow a person or a State that is not a party to the dispute (hereafter called the “non-disputing party”) to file a written submission with the Tribunal. In determining whether to allow such a filing, the Tribunal shall consider, among others things, the extent to which:

- a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- b) the non-disputing party submission would address a matter within the scope of the dispute;
- c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding, unduly burden or unfairly prejudice either party, and that both parties are given an opportunity of presenting their observations on the non-disputing party submission.

Note: The suggested changes would make clear that ICSID tribunals may accept and consider written submissions from a non-disputing person or a State, after consulting both parties as far as possible. The tribunal would have to be satisfied that any such submissions would assist the tribunal in the determination of a factual or legal issue within the scope of the dispute, that the non-disputing party has a significant interest in the dispute and that this would not disrupt the proceeding or unfairly burden either party.

Similar changes would be made to the Additional Facility Arbitration Rules, by introducing a new paragraph to Article 41.

Chapter 2

“Indirect Expropriation” and the “Right to Regulate” in International Investment Law*

In recent times, disputes related to nationalisation of investments that marked the 70s and 80s have been replaced by disputes related to foreign investment regulation and indirect expropriation. Foreign investors increasingly make claims for compensation based on governmental regulations, such as placing restrictions on the legal use of property that do not actually remove the owner's title to the property but nevertheless substantially affect its value or the owner's control. There is some concern that concepts such as indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society.

How has state practice defined and articulated the difference between an indirect expropriation requiring compensation and a governmental measure impacting an investment but not requiring compensation? How have arbitral tribunals drawn the line? Has the doctrine shed any additional light on this distinction?

This survey provides factual elements of information on jurisprudence, state practice and literature related to “Indirect Expropriation” and the “Right to Regulate”. It presents the issues at stake and describes the basic concepts of the obligation to compensate for indirect expropriation, reviews whether and how legal instruments and other texts articulate the difference between indirect expropriation and the right of the governments to regulate without compensation and attempts to identify a number of criteria emerging from jurisprudence and state practice for determining whether an indirect expropriation has occurred.

* This survey was prepared by Catherine Yannaca-Small, Investment Division, OECD Directorate for Financial and Enterprise Affairs, and benefited from discussions, comments and a variety of perspectives in the OECD Investment 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.

Introduction

It is a well recognised rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation. Two decades ago, the disputes before the courts and the discussions in academic literature focused mainly on the standard of compensation and measuring of expropriated value. The divergent views¹ of the developed and developing countries raised issues regarding the formation and evolution of customary law. Today, the more positive attitude of countries around the world toward foreign investment and the proliferation of bilateral treaties and other investment agreements requiring prompt, adequate and effective compensation for expropriation of foreign investments have largely deprived that debate of practical significance for foreign investors.

Disputes on direct expropriation – mainly related to nationalisation that marked the 70s and 80s – have been replaced by disputes related to foreign investment regulation and “indirect expropriation”. Largely prompted by the first cases brought under NAFTA, there is increasing concern that concepts such as indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society. The question that arises is to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a “taking” and having to compensate for this act. One leading commentator suggests that the issue

1. A number of developed countries endorsed the “Hull formula”, first articulated by the United States Secretary of State Cordell Hull in response to Mexico’s nationalisation of American petroleum companies in 1936. Hull claimed that international law requires “prompt, adequate and effective” compensation for the expropriation of foreign investments. Developing countries supported the Calvo doctrine during the 1960s and 1970s as reflected in major United Nations General Assembly resolutions. In 1962, the General Assembly adopted its Resolution on Permanent Sovereignty over Natural resources which affirmed the right to nationalise foreign owned property and required only “appropriate compensation”. This compensation standard was considered an attempt to bridge differences between developed and developing states. In 1974, the UN General Assembly decisively rejected the Hull formula in favour of the Calvo doctrine in adopting the Charter of Economic Rights and Duties of States. While Article 2(c) repeats the “appropriate compensation” standard, it goes on to provide that “in any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals...”. Nowadays, the Hull formula and its variations are often used and accepted and considered as part of customary international law.

of definition of expropriation in this context may become the dominant issue in international investment law.²

Despite a number of decisions of international tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated and depends on the specific facts and circumstances of the case. However, while case-by-case consideration remains necessary, there are some criteria emerging from the examination of some international agreements and arbitral decisions for determining whether an indirect expropriation requiring compensation has occurred.

The present survey provides factual elements of information on jurisprudence, state practice and literature on this matter. It presents the issues at stake and describes the basic concepts of the obligation to compensate for indirect expropriation (Section 1), reviews whether and how legal instruments and other texts articulate the difference between indirect expropriation and the right of the governments to regulate without compensation (Section 2) and attempts to identify a number of criteria which emerge from jurisprudence and state practice for determining whether an indirect expropriation has occurred (Section 3).

1. Basic concepts of the obligation to compensate for indirect expropriation

Customary international law does not preclude host states from expropriating foreign investments provided certain conditions are met. These conditions are: the taking of the investment for a public purpose, as provided by law, in a non-discriminatory manner and with compensation.

Expropriation or “wealth deprivation”³ could take different forms: it could be *direct* where an investment is nationalised or otherwise directly expropriated⁴ through formal transfer of title or outright physical seizure. In addition to the term expropriation, terms such as “dispossession”, “taking”, “deprivation” or “privation” are also used.⁵ International law is

2. Dolzer, “Indirect Expropriations: New Developments?” Article of the Colloquium on Regulatory Expropriation organised by the New York University on 25-27 April 2002; 11 *Environmental Law Journal* 64.
3. “Wealth deprivation” is a term which according to Weston avoids most, if not all, of the major ambiguities and imprecision of the traditional terminology. See B. Weston “‘Constructive Takings’ under International Law: A Modest Foray into the Problem of ‘Creeping Expropriation’”, *Virginia Journal of International Law*, 1975, Vol. 16, pp. 103-175 at 112.
4. In general, expropriation applies to individual measures taken for a public purpose while nationalisation involves large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain.
5. Dolzer and Stevens, “Bilateral Investment Treaties”, *ICSID*, 1995 at 98.

clear that a seizure of legal title of property constitutes a compensable expropriation.

Expropriation or deprivation of property⁶ could also occur through interference by a state in the use of that property or with the enjoyment of the

6. In the context of international law, “property” refers to both tangible and intangible property. Under Article 1139 of the NAFTA, the definition of “investment” covers, among other things, “real estate or other property, *tangible or intangible* [emphasis supplied], acquired in the expectation or used for the purpose of economic benefit or other business purposes.” Likewise, most BITs contain a relatively standard definition of investment that also covers intangible forms of property: “intellectual property and contractual rights.” Source UNCTAD “Bilateral Investment Treaties in the Mid-1990s” 1998. See also the recently concluded US FTAs with Australia, Chile, Dominican Republic-Central America, Morocco and Singapore: “An action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.” The Iran-United States Claims Tribunal stated that “[the claimants] rely on precedents in international law in which case measures of expropriation or takings, primarily aimed at physical property, have been deemed to comprise also rights of a contractual nature closely related to the physical property...” It has consistently rejected attempts made by Iranian respondents for a narrow interpretation of “property” and has confirmed that shareholder rights and contractual rights can be the object of expropriation *Starret Housing Corp. v. Islamic Republic of Iran*, 4, Iran-US Cl. Trib. Rep. 122, 156-57 (1983), *Amoco International Finance Corporation v. Iran*, Award No. 310-56-3 (14 July 1987), 15 Iran-US C.T.R. 189-289. Under the Protocol 1 of the European Convention on Human Rights, the concept of property is very broadly defined by reference to all the proprietary interests of an individual. It covers a range of economic interests: “movable or immovable property, tangible and intangible interests, such as shares, patents, an arbitration award, the entitlement to a pension, a landlord’s entitlement to rent, the economic interests connected with the running of a business and the right to exercise a profession...”

One of the first instances in which the violation of an intangible property right was held to be an expropriation, was the *Norwegian Ship-owners’* case. Although the United States contended that it had requisitioned only ships and not the underlying contracts, the Tribunal found that a taking of property rights ancillary to those formally taken had occurred and required compensation. *Nor. v. US*, 1 R.I.A.A. 307, 332 (Perm. Ct. Arb. 1922). In the 1926 case of *German Interests in Polish Upper Silesia – the Chorzow Factory* case – the Permanent Court of International Justice found that the seizure by the Polish government of a factory plant and machinery was also an expropriation of the closely interrelated patents and contracts of the management company, although the Polish government at no time claimed to expropriate these. *F.R.G. v. Pol.*, 1926 P.C.I.J. (ser. A) No. 7 (May 1925).

However, certain intangible property rights or interests, by themselves, may not be capable of being expropriated, but may be viewed instead, as elements of value of business. In the 1934 *Oscar Chinn* case, the Permanent Court did not accept the contention that good will is a property right capable, by itself, of being expropriated. The P.C.I.J. found that a granting of a *de facto* monopoly did not constitute a violation of international law, stating that “it was unable to see in [claimant’s] original position – which was characterised by the possession of customers – anything in the nature of a genuine vested right” and that “favourable business conditions and good will are transient circumstances, subject to inevitable changes”. 1934 P.C. I. J. Ser A/B, No. 63. In two more recent NAFTA cases,

benefits even where the property is not seized and the legal title to the property is not affected. The measures taken by the State have a similar effect to expropriation or nationalisation and are generally termed “indirect”, “creeping”,⁷ or “*de facto*” expropriation, or measures “tantamount” to expropriation.

However, under international law, not all state measures interfering with property are expropriation. As **Brownlie** has stated, “state measures, *prima facie* a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation”.⁸ Similarly, according to **Sornarajah**,⁹ non-discriminatory measures¹⁰ related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the efficient functioning of the state.

the NAFTA Tribunals addressed claims concerning market access and market share and suggested that these might be property rights for purposes of expropriation. In neither case, however, did the tribunal find that market access or market share could be capable *themselves* of being expropriated, nor did either tribunal find that an expropriation took place. See *Pope & Talbot, Inc v. Canada*, Interim Award (26 June 2000), par. 96-98 and *S.D. Myers, Inc. v. Canada*, (13 November 2000) Partial Award, 232. International Legal Materials 408, par. 232. See also *e.g.* G. White “Nationalisation of Foreign Property” 49 (1961); *The Iran-United States Claims Tribunal: Its contribution to the Law of State Responsibility* 196-97 No. 33 (Richard Lillich and Daniel Magraw editors, 1998).

7. On this point, Dolzer notes that, “‘creeping expropriation’ suggests a deliberate strategy on the part of the state, which may imply a negative moral judgement”. See Dolzer, “Indirect Expropriation of Alien Property”, *ICSID Review, Foreign Investment Law Journal*, (1986) pp. 41-59 at 44.
8. Ian Brownlie, “Public International Law”, *Oxford University Press*, 6th Edition, 2003 at 509.
9. M. Sornarajah, “The International Law on Foreign Investment” (1994) at 283, *Cambridge University Press*.
10. It is an accepted principle of customary international law that where economic injury results from a *bona fide* non-discriminatory regulation within the police powers of the State, compensation is not required. A state measure will be discriminatory if it results “in an actual injury to the alien [...] with the intention to harm the aggrieved alien” to favour national companies. See Dolzer and Stevens, *op. cit.* No. 5. The Restatement Third recognises the non-discrimination rule: “One test suggested for determining whether regulation and taxation program are intended to achieve expropriation is whether they are applied only to alien enterprises” “Restatement of the Law Third, the Foreign Relations of the United States”, *American Law Institute*, Vol. 1, 1987, Section 12. The Iran-US Claims Tribunal recognised in the *Amoco* case that Iran owed compensation for expropriatory measures, and also acknowledged the rule of non-discrimination. The Award specifically states that: “discrimination is widely prohibited by customary international law in the field of expropriation”, although the Tribunal found no discrimination in this case. *Amoco*, see *op. cit.*, No. 6.

As mentioned above, there is no generally accepted and clear definition of the concept of indirect expropriation and what distinguishes it from non-compensable regulation, although this question is of great significance to both investors and governments. As **Dolzer and Stevens** wrote:

“To the investor, the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations (that require compensation) may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host State or from an insurance contract). For the host State, the definition determines the scope of the State’s power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due. It may be argued that the State is prevented from taking any such measures where these cannot be covered by public financial resources.”¹¹

As **Higgins** wrote in her study on the taking of property by the state, the issue can be further refined as the determination of who is to pay the economic cost of attending to the public interest involved in the measure in question. Is it to be the society as a whole, represented by the state, or the owner of the affected property?¹²

Nouvel has pointed out that in the case of nationalisation or direct expropriation, the dispossession to the detriment of a private person coincides with the appropriation to the profit of a public person; the measures tantamount to expropriation do not have this linkage. In the latter case, the reduction of the value of private property is not necessarily accompanied by an increase in public wealth.¹³

2. Legal instruments and other texts

Protection against indirect expropriation has been included in various forms of international instruments. Literally all relevant treaties and draft treaties provide for indirect expropriation or measures tantamount to expropriation. However, most of them stay mute on the treatment of the non-compensable regulatory measures, with the exception of: the European Convention on Human Rights and Fundamental Freedoms (hereafter the European Convention on Human Rights), the recently concluded US-Free

11. Dolzer and Stevens, *op. cit.*, No. 5 at 99.

12. R. Higgins “The Taking of Property by the State: Recent Developments in International Law” *Recueil des cours – académie de Droit international*, 1982, Vol. 176 at 276-77.

13. Yves Nouvel, “Les mesures équivalant à une expropriation dans la pratique récente des tribunaux arbitraux”, *Revue Générale du Droit International Public*, 2002-1, pp. 80-102 at 89.

Trade Agreements and the new model US and Canada BITs. The OECD Draft Convention on the Protection of Foreign Property and the draft OECD Multilateral Agreement on Investment, while themselves silent on the non-compensable regulatory measures, were accompanied by commentaries which did address the issue. Other texts which addressed it are the Harvard Draft Convention on International Responsibility, and the Third Restatement of Foreign Relations of the United States which, while the work of scholars, not state practice, constitute an influential element of doctrine.

2.1. Legal texts which include indirect expropriation without addressing non-compensable regulation

Bilateral Investment Treaties contain brief and general indirect expropriation provisions which focus on the effect of the government action and do not address the distinction between compensable and non-compensable regulatory actions. For example, treaties entered by France refer to “measures of expropriation or nationalisation or any other measures *the effect of which would be direct or indirect dispossession*”. The UK treaties provide that expropriation also covers measures “*having effect equivalent to nationalisation or expropriation*”. Other treaties, such as some of those concluded by Sweden, refer to “any direct or indirect measure” or “any other measure having the same nature or the same effect against investments”. The former United States Model BIT mentions “*measures tantamount to expropriation or nationalisation*”. Several United States treaties are more specific on these measures: “any other measure or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control of economic value...”¹⁴

The 1992 **World Bank Guidelines** section IV(1) on “Expropriation and Unilateral Alterations or Termination of Contracts”, state that : “A state may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take *measures which have similar effects*, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation.”

The 1994 **Energy Charter Treaty** in its Article 13 provides that: “investments of investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or *measures having effect equivalent to nationalization or expropriation*” except where such measure complies with the rules of customary international law in this matter (public purpose, due process, non-discrimination and compensation).

14. See Dolzer and Stevens, *op. cit.*, No. 5.

Article 1110 of **NAFTA** protects against the expropriation of foreign investments with the following language:

1. No Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment, except:
 - a) for a public purpose;
 - b) on a non-discriminatory basis;
 - c) in accordance with due process of law and Article 1105(1);¹⁵ and
 - d) on payment of compensation in accordance with [subsequent paragraphs specifying valuation of expropriations and form and procedure of payment].

2.2. Legal texts which address non-compensable regulation

The relevant principles for the purposes of the **European Convention of Human Rights** are included in Article 1 of Protocol 1, concluded in 1952 and entered into force in 1954. Though this article, does not say so explicitly, it strongly implies that the duty to compensate is not applicable to normal regulation:¹⁶

“Every natural or legal person is entitled to the peaceful enjoyment of its possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties” [italics added].

In 1961, the **Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens**, drafted by Sohn and Baxter, assumed a taking to occur in the case of any “unreasonable interference with the use, enjoyment or disposal of property as to justify an interference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference”. In its Article 10(5) it recognised the existence of a category of non-compensable takings:

“An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution

15. Article 1105(1) provides: “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.”

16. The jurisprudence attached to the Convention by the European Court of Human Rights has consistently taken this line.

of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.”

Article 3 of the **1967 OECD¹⁷ Draft Convention on the Protection of Foreign Property**,¹⁸ states that “no Party shall take any measures depriving, directly or indirectly, of his property a national of another Party...” unless four conditions are met according to recognised rules of international law.¹⁹ An accompanying note on the nature of obligation and its scope states the duty to compensate in a broad way:

“Article 3 acknowledges, by implication, the sovereign right of a State, under international law, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social or economic ends. To deny such a right would be attempt to interfere with its powers to regulate – by virtue of its independence and autonomy, equally recognised by international law – its political and social existence. The right is reconciled with the obligation of the State to respect and protect the property of aliens by the existing requirements for its exercise – before all, the requirement to pay the alien compensation if his property is taken.”

However, subsequent notes make clear that the concept of “taking” is not intended to apply to normal and lawful regulatory measures short of direct taking of property rights, but rather, to *misuse* of otherwise lawful regulation to deprive an owner of the substance of his rights:

4(a) “... By using the phrase ‘to deprive [...] directly or indirectly [...]’ in the text of the Article it is, however, intended to bring within its compass *any* measures taken with the *intent* of wrongfully depriving the national concerned of the substance of his rights and *resulting* in such loss (e.g. prohibiting the national to sell his property of forcing him to do so at a fraction of the fair market price)” (*emphasis in original*).

17. The OECD Code of Liberalisation of Capital Movements, through its provisions on the free disposal of blocked accounts and other non-resident owned assets, includes a dimension of preventing confiscation measures, in addition to the liberalisation disciplines *per se* of the Code. However, the Code is silent on the issue of the “right to regulate” in the context of this note.

18. OECD Draft Convention on Foreign Property, 12 October 1967, pp. 23-25.

19. The measures in question must be taken: i) in the public interest; ii) under due process of law; iii) not be discriminatory; and furthermore, iv) just and effective compensation must be paid.

4(b) “... Thus in particular, Article 3 is meant to cover ‘creeping nationalisation’ recently practiced by certain states. Under it, measures otherwise lawful are applied in such a way:

[...] as to deprive ultimately the alien of the enjoyment of value of his property, without any specific act being identifiable as outright deprivation. As instances may be quoted excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licences.”

The commentary to the American Law Institute’s **Restatement Third of Foreign Relations Law of the United States**,²⁰ was designed to assist in determining, *inter alia*, how to distinguish between an indirect expropriation and valid government regulation:

“A state is responsible as for an expropriation of property when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property or its removal from the state’s territory... A state is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory...” [italics added].

The **MAI Negotiating Text** was almost identical to the NAFTA provision. However, the MAI Commentary noted that by extending protection to “measures having equivalent effect” to expropriation, the text was intended to cover “creeping expropriation”. MAI negotiators addressed the distinction between indirect expropriation and general regulations in the Report by the Chairman of the Negotiating Group (Chairman’s Report)²¹ which was put forward at the later stage of the negotiations. In its Annex 3, Article 3 (Right to Regulate) and an interpretative note to Article 5 (Expropriation and Compensation)²² it is stated:

Article 3 “Right to Regulate”

“[a] a Contracting Party may adopt, maintain, or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns provided that such measures are consistent with this agreement.”

20. “Restatement of the Law Third, the Foreign Relations Law of the United States,” American Law Institute, Vol. 1, 1987, Section 712, Comment g.

21. The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group) DAF/MAI(98)17, 4 May 1998, available at www1.oecd.org/daf/mai/pdf/ng/ng9817e.pdf.

22. *Idem*, pp. 13-15.

Interpretative note to Article 5 “Expropriation and Compensation”

“This Article [...] [is] intended to incorporate into the MAI existing international norms. The reference [...] to expropriation or nationalisation and ‘measures tantamount to expropriation or nationalisation’ reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments.”

A Declaration adopted by the OECD Council of Ministers on 28 April 1998²³ states that “the MAI would establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation”.²⁴

3. Criteria determining whether an indirect expropriation has occurred

As discussed above, few legal texts attempted to address directly how to distinguish legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation, requiring compensation. Scholars recognised the existence of the distinction but did not shed much light on the criteria for making the distinction. This may reflect reluctance to attempt to lay down simple, clear rules in a matter that is subject to so many varying and complex factual patterns and a preference to leave the resolution of the problem to the development of arbitral decisions on a

23. See OECD document C/MIN(98)16/FINAL.

24. For a discussion on regulatory expropriations in the MAI, see the article by R. Geiger “Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment”, *N.Y.U. Environmental Law Journal*, 2002, Vol. 11, No. 1, pp. 94-109 at 104.

case-by-case basis.²⁵ The two most prominent sources of such decisions were the Iran-United States Claims Tribunal²⁶ and decisions arising under Article 1, Protocol 1 of the European Convention for the Protection of Human Rights. The recent period has seen a further body of jurisprudence, from cases based on NAFTA and bilateral investment agreements. At the same time, a new generation of investment agreements, including investment chapters of Free Trade Agreements has developed, which include criteria to articulate the difference between indirect expropriation and non-compensable regulation.

3.1. Jurisprudence

Although there are some “inconsistencies”²⁷ in the way some arbitral tribunals have distinguished legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation, a careful examination reveals that, in broad terms, they have identified the following criteria which look very similar to the ones laid out by the recent agreements: i) the degree of interference with the property right, ii) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations.

25. Christie wrote in 1962 that “it is evident that the question of what kind of interference short of outright expropriation constitutes a ‘taking’ under international law presents a situation where the common law method of case by case development is pre-eminently the best method, in fact probably the only method, of legal development”. G. Christie, “What Constitutes a Taking of Property under International Law?”, *British Yearbook of International Law*, 1962, pp. 307-338. Somarajah noted that the difficulty is “in the formulation of a theory that could be used as a predictive device so that there could be guidance as to whether the taking is a compensable or not. Here, though several efforts have been made at devising a theory capable of making the distinction, none has been successful”. See *op. cit.*, No. 9. Dolzer acknowledged after an extensive review of judicial precedent and state practice that “one cannot but admit at this stage that the law of indirect expropriation can be established, at this moment, on the basis of primary sources of international law, only in a very sketchy and rough manner”. See *op. cit.*, No. 7.
26. The Iran-United States Claims Tribunal was established in 1981 in order to adjudicate claims by nationals of each country following the Iranian revolution. Its creation was pursuant to the Algiers Declarations which resolved the hostage crisis between Iran and the United States.
27. There is a view that the “inconsistent” case law which has been developed may simply reflect the different approaches of different treaties. According to this view, for example, the practice of the European Court of Human Rights on what “indirect expropriation” means could well be expected to differ from that of NAFTA tribunals, given the different wording, overall purpose and history of the treaties they have to refer to (European Convention of Human Rights on the one hand, and NAFTA on the other hand).

3.1.1. Degree of interference with the property right

Severe economic impact. Most international decisions treat the severity of the economic impact caused by a government action as an important element in determining whether it rises to the level of an expropriation requiring compensation. International tribunals have often refused to require compensation when the governmental action did not remove essentially all or most of the property’s economic value. There is broad support for the proposition that the interference has to be substantial in order to constitute expropriation, i.e. when it deprives the foreign investor of fundamental rights of ownership, or when it interferes with the investment for a significant period of time. Several international tribunals have found that a regulation may constitute expropriation when it substantially impairs the investor’s economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Without such substantial impairment, mere restrictions on the property rights do not constitute takings. The European Court of Human Rights (ECtHR)²⁸ has found an expropriation where the investor has been definitely and fully deprived of the ownership of his/her property. If the investor’s rights have not disappeared, but have only been substantially reduced, and the situation is not “irreversible”, there will be no “deprivation” under Article 1, Protocol 1 of the European Convention of Human Rights.²⁹

28. The European Court of Human Rights is the Court established by the Council of Europe under the Protection of Human Rights and Fundamental Freedoms Convention, to determine questions brought before it by individual petitioners or signatory states concerning violations of human rights by signatory states. It does not distinguish between foreign and domestic owners, but its distinctions as to compensable and non-compensable takings on a human rights basis is relevant.

29. See cases: *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser.A) at 29 (1976); *Poiss v. Austria*, 117 Eur. Ct.H.R. (ser. A)84, 108 (1987); *Matos e Silva, Lda v. Portugal* App. No. 15777/89, 24 Eur. Ct. H.R. rep. 573, 600-01 (1996). See for discussion H. Ruiz Fabri, “The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for “Regulatory Expropriations of the Property of Foreign Investors”, *N.Y.U. Environmental Law Journal*, Vol. 11, No. 1, 2002, pp. 148-173.

The first case under **the Iran-United States Claims Tribunal**^{30, 31} was *Starrett Housing*,³² which dealt with the appointment of Iranian managers to an American housing project. The Tribunal concluded that an expropriation had taken place:

“[It] is recognised by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.”

In the *Sea-Land*³³ case one of the issues was alleged expropriation of a bank account. The Tribunal did not find any substantial deprivation of or interference with the claimant's rights to his account and rejected the claim by noting that the “account remains in existence and available in rials, at Sea-Land's disposal”.

In the *Tippetts*³⁴ case, the Tribunal found an indirect expropriation because of the actions of a government-appointed manager, rather than because of his appointment *per se*,³⁵ and equated that deprivation of property rights with a taking of property.³⁶ The Tribunal said:

“While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under

30. Sornarajah suggests that “although the awards of the Iran-United States Claims Tribunal have been a fruitful recent source for the identification of indirect takings, they dealt with takings that took place in the context of a revolutionary upheaval and the propositions the tribunal formulated may not have relevance outside the context of the events that attended the Iranian upheaval following the overthrow of the Shah of Iran”. See *op. cit.* No. 9 at 282. For instance, these actions and the context in which they occurred are, in many ways, different from the sorts of environmental and land-use regulations that have been the subjects of NAFTA claims.

31. For details on these cases see Seddigh and G. H. Aldrich, “What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claim Tribunal”, *The American Journal of International Law*, Vol. 88, pp. 585-609.

32. *Starrett Housing Corp. v. Iran*, 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983).

33. *Sea-Land Service Inc. v. Iran*, 6 Cl. Trib. Rep. 149 (1984). See Seddigh and Aldrich p. 656, *op. cit.*, No. 31.

34. *Tippetts v. TAMS-AFFA Consulting Engineers of Iran*, 6 Cl. Trib. 219 (1984).

35. While *Tippetts* was able to work with the Iranian appointed manager for some months and re-established its rights as a partner, its personnel left Iran following the seizure of the American Embassy and the new manager broke off communications with *Tippetts* by refusing to respond to its letters and telexes.

36. In this case, the Tribunal said that it “prefers the term ‘deprivation’ to the term ‘taking’, although they are largely synonymous, because the latter may be understood to imply that the government has acquired something of value, which is not required”.

international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that the deprivation is not merely ephemeral...”

In the **NAFTA** context, in the *Pope & Talbot v. Canada* case,³⁷ the Tribunal found that although the introduction of export quotas resulted in a reduction of profits for the Pope & Talbot company, sales abroad were not entirely prevented and the investor was still able to make profits. It stated: “... mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required.”³⁸

In *S.D. Myers v. Canada*,³⁹ a United States company, which operated a PCB remediation facility in the United States, alleged that Canada violated NAFTA Chapter 11 by banning the export of PCB waste to the United States. The Tribunal also distinguished regulation from expropriation primarily on the basis of the degree of interference with property rights: “expropriations tend to involve the deprivation of ownership rights; regulations [are] a lesser interference”.⁴⁰

In *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States*,⁴¹ CEMSA, a registered foreign trading company and exporter of cigarettes from Mexico, was allegedly denied the benefits of the law that allowed certain tax refunds to exporters and claimed expropriation under NAFTA Article 1110. The Tribunal found that there was no expropriation since “the regulatory action has not deprived the Claimant of control of his company, interfered directly in the internal operations of the company or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of business activity... Of course, he was effectively precluded from exporting cigarettes... However, this does not amount to Claimant’s deprivation of control of his company”.

In *GAMI v. The United Mexican States*,⁴² the case concerned the impact of Mexico’s expropriation of several sugar mills on GAMI, a minority shareholder

37. *Pope & Talbot Inc. v. Canada*, see *op. cit.*, No. 6.

38. In addition, the Tribunal stated that: “Regulations can indeed be characterised in a way that would constitute creeping expropriation... Indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation”, see Award, par. 99.

39. *S.D. Myers Inc. v. Government of Canada*, see *op. cit.*, No. 6.

40. The Tribunal added that: “the distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.”

41. In this case, Marvin Feldman, a United States citizen, submitted claims on behalf of CEMSA. ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, pp. 39-67 at 59.

42. *Gami v. The Government of the United Mexican States*, Award, 15 November 2004.

in some of those mills. GAMI proceeded on the basis that “Mexico’s conduct impaired the value of its shareholding to such an extent that it must be considered tantamount to expropriation”.⁴³ The Tribunal found that:

“With knowledge of the magnitude of diminution one might be in a position to consider whether a line is to be drawn beyond which the loss is so great as to constitute a taking. But GAMI has staked its case on the proposition that the wrong done to it did in fact destroy the whole value of its investment. GAMI seeks to lend credibility to its posture by agreeing to relinquish its shares in GAM as a condition of the award it seeks. It suggests that any residual value is therefore of no moment. This posture is untenable. The Tribunal cannot be indifferent to the true effect in the real value of the investment of the allegedly wrongful act. GAMI has not proved that its investment was expropriated for the purposes of Article 1110.”⁴⁴

The **European Court of Human Rights**, in the most widely cited case under Article 1, Protocol 1 of the European Convention of Human Rights (see above), *Sporrong and Lönnroth v. Sweden*⁴⁵ (1982), did not find indirect expropriation to have occurred as a result of land use regulations that affected the claimant’s property because:

“... although the right [of peaceful enjoyment of possessions] lost some of its substance, it did not disappear [...] The Court observes in this connection that the [claimants] could continue to utilise their possessions and that, although it became more difficult to sell properties [as a result of the regulations], the possibility of selling subsisted.”

Another relevant decision is the *Revere Copper*⁴⁶ case (1980). The case arose from a concession agreement – which was to last for twenty five years – made by a subsidiary of the Revere Copper company with the government of Jamaica. The government, despite a stabilisation clause in the agreement ensuring that taxes and other financial liabilities would remain as agreed for the duration of the concession, increased the royalties. The company found it

43. *Idem*, par. 35.

44. *Idem*, par. 133.

45. In this case, long-term expropriation permits (23 and 8 years) had been granted by the city of Stockholm in respect of the applicant’s properties. These did not of themselves expropriate the property, but gave local authorities the power to do so, should they so decide in the future. *Sporrong and Lönnroth* complained that it was impossible for them to sell these properties and that it amounted to an interference with their right to peaceful enjoyment of possessions. The Swedish government, by contrast, emphasised the public purpose of the permits system and the intentions of the city of Stockholm to make improvements for the general good. See R. Higgins, *op. cit.*, No. 12 at 276-77.

46. *Revere Copper & Brass Inc. v. Overseas Private Investment Corporation*, 56 International Legal Materials 258.

difficult to continue operations, closed operations and claimed compensation under its insurance contract. The Arbitral Tribunal,⁴⁷ assuming that the contract was governed by international law, found that there had been a taking by the government and observed:⁴⁸

“In our view, the effects of the Jamaican Government’s actions in repudiating its long term commitments to RJA [the subsidiary of RC], have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated...”

Although the insurance agency (OPIC) argued that RJA still had all the rights and property and that it could operate as it did before, the Tribunal responded that “this may be true [...] but [...] we do not regard RJA’s ‘control’ of the use and operation of its properties as any longer ‘effective’ in view of the destruction by Government action of its contract rights”.

Several **BIT Tribunals**, in particular in recent years, have retained the criterion of the severity of the impact to qualify an act by state as an expropriation.

In the case *CME v. the Czech Republic*.⁴⁹ CME, the Claimant, had purchased a joint venture media company in the Czech Republic and alleged, *inter alia*, breach of the obligation of the [host country] not to deprive the investor of its investment⁵⁰ because of the actions of the national Media Council. The Tribunal, citing *inter alia*, the *Tippets* and *Metalclad* cases, found that an expropriation had occurred because “the Media Council’s actions and omissions...caused the destruction of the [joint-venture’s] operations, leaving the [joint venture] as a company with assets, but without business”.⁵¹ It stated also that although “regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the host state”⁵² the administrative measures taken by the host country did not fall under this category. It therefore concluded that,

“Expropriation of [the company’s] investment is found a consequence of the [host country’s] actions and inactions as there is no immediate prospect at hand that the [joint venture] will be reinstated in a position to enjoy an exclusive use of the license...”⁵³

47. The Tribunal was set up under the American Arbitration Association.

48. For discussion see R. Higgins, pp. 331-37, *op. cit.*, No. 12; Sornarajah, p. 301, *op. cit.*, No. 9 at 301; and R. Dolzer, *op. cit.*, No. 7 at 51-52.

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

50. Article 5 of the 1991 Bilateral Investment Treaty between the Netherlands and the Czech Republic.

51. See CME, par. 591, p. 166.

52. *Idem*, par. 603, p. 170.

53. *Idem*, par. 607, p. 171.

In *Generation Ukraine v. Ukraine*,⁵⁴ a series of acts or omissions by the Kyiv City State Administration, culminating with its failure to provide lease agreements for a construction project of an office building did not constitute a creeping expropriation since according to the Tribunal:

“... the conduct of the Kyiv City State Administration [...] does not come close to creating a persistent or irreparable obstacle to the Claimant’s use, enjoyment or disposal of its investment”.⁵⁵

The Tribunal explained further:

“A plea of creeping expropriation must proceed on the basis that the investment existed in a particular point in time and that subsequent acts attributable to the State have eroded the investor’s rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation. It is conceptually possible to envisage a case of creeping expropriation where the investor’s interests in its investment develop in parallel with the commission of the acts complained of. But such a plea, in order to be successful, would demand a high level of analytical rigorousness and precision that is absent from the submissions before this Tribunal.”⁵⁶

In *Occidental Exploration and Production Company v. the Republic of Ecuador*,⁵⁷ Occidental claimed that Ecuador authorities’ refusal to refund to Occidental the value added tax, which it was entitled under Ecuadorian law, constituted an expropriation. The Tribunal made reference to the *Metalclad*⁵⁸ and *CME* cases⁵⁹ and held that “Ecuador did not adopt measures that could be considered as amounting to direct or indirect expropriation” since:

“In fact, there has been no deprivation of the use [...] of the investment, let alone measures affecting a significant part of the investment. The criterion of ‘substantial deprivation’ under international law identified in *Pope & Talbot* is not present in this case.”⁶⁰

54. The Claimant, a US corporation, sought damages in excess of USD 9.4 billion, for alleged harm to its investment in commercial property in Kyiv, Ukraine, namely the “Parkview Office Building Project.” The Claimant contended that it was encouraged by the Ukrainian Government in late 1992 to invest in Ukraine; that it established a local investment company and that, after obtaining approval of the project, it found itself blocked by interference from local administrative authorities over the course of the next six years. Such interference included, *inter alia*, the alleged final expropriatory act or measure: the Kyiv City State Administration’s “failure to produce revised land lease agreements with valid site drawings”. *Generation Ukraine Inc. v. Ukraine*, Award, par. 20.1, 20.21, 16 September 2003.

55. *Idem*, par. 20.32.

56. *Idem*, par. 20.26.

57. *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004. at 80-92.

58. *Metalclad Corporation v. United Mexican States* (Tribunal Decision 30 August 2000).

59. See *op. cit.*, No. 54.

60. See *op. cit.*, No. 62, par. 89.

In *CMS v. Argentina*⁶¹ the indirect expropriation claim concerned the suspension by Argentina of a tariff adjustment formula for gas transportation applicable to an enterprise in which the claimant had an investment. The Tribunal described its task as follows:

“[...] the essential question is [...] to establish whether the enjoyment of the property has been effectively neutralised. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation.”

Although the Tribunal recognised that the measures under dispute had an important effect on the Claimant’s business, it found no substantial deprivation, and thus no breach of the expropriation article in the US-Argentina BIT, had occurred, noting that “the investor is in control of the investment; the government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment”.⁶²

In the first case under the **Energy Charter Treaty**, *Nykomb Synergetics Technology Holding AB, Stockholm v. The Republic of Latvia*⁶³ the Claimant contended that the non-payment of double tariffs constituted an indirect expropriation, since it allegedly resulted in a substantial loss of sales income making the enterprise economically non-viable and its investment worthless. The Tribunal found that:

“[...] ‘regulatory takings’ may under the circumstances amount to expropriation or the equivalent of an expropriation. The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail. In the present case, there is no possession taking of [Windau] or its assets, no interference with the shareholder’s rights or with the management’s control over and running of the enterprise – apart from ordinary regulatory provisions laid down in the production license, the off-take agreement, etc.”

Duration of the regulation. The duration of the regulation could be another criterion of whether the regulation has had a severe enough impact on property to constitute a taking.^{64, 65}

61. *CMS Gas Transmission Company v. Argentine Republic*, Award, 12 May 2005, at par. 262.

62. *Idem*, par. 263.

63. *Nykomb Synergetics Technology Holding AB, Stockholm v. The Republic of Latvia*, Award, 16 December 2003, at 4.3.1.

64. J.M. Wagner, “International Investment, Expropriation and Environmental Protection”, *Golden Gate University Law Review* (1999), Vol. 29, No. 3, pp. 465-538.

65. Prof Christie, in its 1962 article, discusses when a “temporary seizure” ripens into an expropriation, *op. cit.* No. 25.

The Iran-United States Claims Tribunal has acknowledged this was an issue but it has had little difficulty in finding that the appointment of "temporary" managers may constitute a taking of property, when the consequent deprivation of property rights is not "merely ephemeral" (in *Tippetts, Phelps Dodge* and *Saghi* cases).

A widely cited example where the temporal factor has played an important role is the 1979 case of *Hauer v. Land Rheinland-Pfalz*,⁶⁶ The facts relate to a German winegrower who had to apply for a state permit for planting new vines. While the application was pending, the European Commission issued an order prohibiting the planting of that type of vine for three years. The plaintiff brought her claim before the European Court of Justice which found that there was no violation of Hauer's property rights emphasising in particular that the EEC order was to be valid only for a transitory period of three years.

In *S.D. Myers v. Canada*,⁶⁷ the NAFTA Tribunal accepted that "in some contexts and circumstances it would be appropriate to view a deprivation as amounting to an expropriation even if it were partial and temporary". However, it concluded that Canada's initiative "was only valid for a time". Under these circumstances, "an opportunity was delayed" but no indirect expropriation could be found.

Economic impact as the exclusive criterion. There is no serious doubt that the severity of the impact upon the legal status and the practical impact on the owner's ability to use and enjoy his/her property is one of the main factors in determining whether a regulatory measure effects an indirect expropriation. What is more controversial "is the question of whether the focus on the effect will be the only and exclusive relevant criterion – 'sole effect doctrine' – or whether the purpose and the context of the governmental measure may also enter into the takings analysis".⁶⁸ The outcome in any case may be affected by the specific wording of the particular treaty provision. From the doctrine and the case examination, it seems however that the balanced approach is pre-dominant.

A few cases have focused on the effect of the owner as the main factor in discerning a regulation from a taking. In the *Tippetts* case, the Iran-United States Tribunal held that:

"the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."

66. See R. Higgins, *op. cit.*, No. 12; Dolzer, *op. cit.*, No. 7; Ruiz Fabri, *op. cit.*, No. 29.

67. See *op. cit.*, No. 6.

68. Dolzer, see *op. cit.*, No. 2. at 79.

In the *Phelps Dodge* case,⁶⁹ a transfer of management was made pursuant to a pre-revolutionary law designed to prevent the closure of factories, ensure payments due to the workers, and protect any debts owed to the Government, which in this case included loans made by a bank that had been nationalised in 1979. Citing Tippetts, the Iran-United States Tribunal stated that:

“The Tribunal fully understands the reasons why the respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss.”

In the *Metalclad* case,⁷⁰ in the context of the NAFTA, 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 that an ecological decree promulgated after the claim was made, violated Article 1110 requiring compensation for expropriation. The Tribunal found a violation of NAFTA Article 1110 and stated that in order to decide on an indirect expropriation, it “need not decide or consider the motivation, nor intent of the adoption of the Ecological Decree”. The Tribunal stated:

“Expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”

The case *Compañía del Desarrollo de Santa Elena v. Costa Rica*,⁷¹ although referred to a direct expropriation, not an indirect taking, has attracted particular attention because the panel expressly stated that the environmental purpose had no bearing on the issue of compensation. In this case, the claimant (Company Santa Elena) was formed primarily for the purpose of purchasing Santa Elena – a 30 kilometre terrain in Costa Rica – with the intention of developing it as a tourist resort. In 1978, Costa Rica issued an expropriation decree for Santa Elena aiming at declaring it a preservation site. Twenty years of legal proceedings between the Parties finally ended with a decision by an ICSID panel. While this case concerns a direct expropriation

69. *Phelps Dodge*, 10 Iran-United States Cl. Trib. Rep. at 130.

70. See *op. cit.*, No. 63.

71. *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1. (17 February 2000).

where the issue was the day of the taking for purposes of determining compensation, the panel, citing the Tippetts case, indicated that a compensable expropriation could occur through measures of a state which deprives the owner of “access to the benefit and economic use of his property” or “has made those [property] rights practically useless”. The panel held that:

“While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid.⁷² The international source of the obligation to protect the environment makes no difference.”

It also added that:

“Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.”

3.1.2. Character of governmental measures, i.e. the purpose and the context of the governmental measure

A very significant factor in characterising a government measure as falling within the expropriation sphere or not, is whether the measure refers to the State’s right to promote a recognised “social purpose”⁷³ or the “general welfare”⁷⁴ by regulation. “The existence of generally recognised considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no ‘taking’.”⁷⁵ As one commentator has noted, “non-discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the functioning of the state”.⁷⁶

72. For this reason, the Tribunal did not analyse the detailed evidence submitted regarding what Costa Rica referred to as its international obligations to preserve the unique Santa Elena ecological site.

73. The Iran-US Claims Tribunal: Its contribution to the Law of State Responsibility, see *op. cit.*, No. 6 at 200.

74. See B.H. Weston, *op. cit.*, No. 3 at 116.

75. Christie, see *op. cit.*, No. 25 at 338.

76. M. Sornarajah, *op. cit.*, No. 9.

In the context of the jurisprudence of the **European Court of Human Rights** the State may affect control on activities by individual by imposing restrictions which may take the form of planning controls, environmental orders, rent controls, import and export laws, economic regulation of professions, [and] the seizure of properties for legal proceedings or inheritance laws”.⁷⁷

In the context of the Article 1 of Protocol 1 of the European Convention of Human Rights, the European Court has given States a very wide margin of appreciation concerning the establishment of measures for the public interest and has recognised that it is for national authorities to make the initial assessment⁷⁸ of the existence of a public concern warranting measures that result in a “deprivation” of property. The Court held that the state’s judgement should be accepted unless exercised in a manifestly unreasonable way.

In addition, the Court has adopted a common approach to “deprivations” and “controls” of use of property. In either case, there has to be a reasonable and foreseeable national legal basis for the taking, because of the underlying principle in stability and transparency and the rule of law.⁷⁹ In relation to either deprivation or control of use, the measures adopted must be proportionate. The Court examines whether the interference at issue strikes a reasonable balance between the demands of the general interest of the community and the private interests of the alleged victims of the deprivation and whether an unjust burden has been placed on the claimant. In order to make this assessment, the Court proceeds into a factual analysis insisting that precise factors which are needed to be taken into account vary from case to case. In the *James* case⁸⁰ for example, the Court said that:

“The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being ‘in the public interest’. In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being in the ‘public interest’, even if they involve the compulsory transfer of property from one individual to another.”

77. See D.J. Harris *et al.*, referring to the jurisprudence of the European Court of Human Rights in the “*Law of the European convention on Human Rights*”, (1995) at 535.

78. The state margin of appreciation is justified by the idea that national authorities have better knowledge of their society and its needs, and are therefore “better placed than [an] international [court] to appreciate what is in the public interest”. See *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 9, 32 (1986).

79. See H. Mountfield, “*Regulatory Expropriations in Europe: the Approach of the European Court of Human Rights*”, N.Y.U. Environmental Law Journal, Vol. 11, No. 1, 2002, pp. 136-147.

80. This case concerns a reform undertaken by the United Kingdom regarding the right of individuals with long leases to acquire the freehold of their leasehold property. This reform, according to *James*, the Claimant, “deprived” the freeholders of their property since they could neither refuse to sell nor set the price for it. See *op. cit.* No. 82.

In the *Sporrong and Lönnroth v. Sweden* case, the Court stated that Article 1 contains “three distinct rules”:

“The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence in the same paragraph. The Third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.”

The European Court of Human Rights found no expropriation as a result of the first test, yet found compensation to be required as a result of the second test. Under the “fair balance test”, it found that over the years the state had failed to take proper account of individual interests involved. Since the state had neither shortened the temporal effect of the rules nor paid compensation, the court rules that the State had placed “an individual and excessive burden” on plaintiffs and therefore acted in violation of Article 1.

In the **NAFTA** context, in the *S.D. Myers* case,⁸¹ the Tribunal found that the expression “tantamount to expropriation” in NAFTA’s Article 1110(1), was understood as “equivalent to expropriation” and added:

“Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure.”

In *Marvin Roy Feldman Karpa v. United Mexican States*⁸² the Tribunal explained that:

“... the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type

81. See *op. cit.* No. 6.

82. See *op. cit.* No. 41, par. 103.

cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary law recognises this”.

In the case of *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*,⁸³ the investor, Técnicas Medioambientales Tecmed, S.A., filed a claim with ICSID 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 and was an expropriatory act. The Tribunal in order to determine whether the acts undertaken by Mexico were to be characterised as expropriatory, citing the ECHR’s practice, considered “whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account that the significance of such impact plays a key role in deciding the proportionality”.⁸⁴ It added that: “there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realised by an expropriatory measure.”⁸⁵

“Police Powers” of the State. The notion that the exercise of the State’s “police powers” will not give rise to a right to compensation has been widely accepted in international law. However, the “police powers” doctrine is viewed by some not as a criterion which is weighed in the balance with other factors, but as a controlling element which exempts automatically the measure from any duty for compensation.

One commentary on the law on expropriation and the State’s “police powers” is the commentary to the American Law Institute’s Restatement (Third) of Foreign Relations Law of the United States⁸⁶ which was designed to assist, *inter alia*, in determining how to distinguish between an indirect expropriation and valid governmental regulation: “... a state is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of the states, if it is not discriminatory...”

In the context of the **Iran-United States Claims Tribunal**, the only award in which an allegation of taking was rejected on the grounds of police power regulations was *Too v. Greater Modesto Insurance Associates*,⁸⁷ where the

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

84. *Idem*, par. 122.

85. *Idem*.

86. Restatement of the Law Third, *op. cit.*, No. 20, Section 712, Comment g.

87. Award, 29 December 1989, 23 Iran-United States Cl. Trib. Rep.378. See also Seddigh and G. H. Aldrich, *op. cit.*, No. 31.

claimant sought compensation for the seizure of his liquor licence by the United States Internal Revenue Service. The Tribunal said:

“... A State is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price...”

The Tribunal in the *Lauder v. The Czech Republic*⁸⁸ case said about the interference with property rights that, “... Parties to [the Bilateral] Treaty are not liable for economic injury that is the consequence of *bona fide* regulation within the accepted police powers of the State”.

In the case of *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*,⁸⁹ although the Tribunal found an expropriation, it has stated that: “the principle that the State’s exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.”

3.1.3. Interference of the measure with reasonable investment-backed expectations

Another criterion identified is whether the governmental measure affects the investor’s reasonable expectations. In these cases the investor has to prove that his/her investment was based on a state of affairs that did not include the challenged regulatory regime. The claim must be objectively reasonable and not based entirely upon the investor’s subjective expectations.

In the 1934 *Oscar Chinn*⁹⁰ case, the Permanent Court of International Justice (P.C.I.J.) did not accept the contention of indirect taking⁹¹ noting that, in those circumstances, a granting of a *de facto* monopoly did not constitute a violation of international law and that “favourable business conditions and good will are transient circumstances, subject to inevitable changes”.⁹²

“No enterprise [...] can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large

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

89. See *op. cit.*, No. 88.

90. See *op. cit.*, No. 6.

91. The P.C.I.J. employed “effective deprivation”, as the standard for determining if the interference was sufficiently serious to constitute a compensable taking.

92. H. Seddigh, “What level of Host State Interference Amounts to a Taking under Contemporary International Law? *Journal of World Investment*, 2001, Vol. 2, No. 4, pp. 631-84 at 646.

profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.”

The Iran-US Claims Tribunal in *Starett Housing Corp. v. Iran*⁹³ took into account the reasonable expectations of the investor:

“Investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of economic and political system and even revolution. That any of these risks materialised does not necessarily mean that property rights affected by such events can be deemed to have been taken.”

The Tribunal in *Metalclad v. The United Mexican States* stated that: “... Metalclad was led to believe, and did believe, that the federal and state permits allowed for the construction and operation of the landfill”⁹⁴. It held that expropriation includes deprivation in whole or in significant part of the use or “reasonably to-be-expected economic benefit of property”⁹⁵.

In *Marvin Roy Feldman Karpa (CEMSA) v. The United Mexican States*⁹⁶ the NAFTA Tribunal noted as part of its reasoning denying the expropriation claim:

“Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue...”

In *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*,⁹⁷ the Tribunal attempted to determine whether the Mexican government’s measures were “reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation”. “... Even before the Claimant made its investment, it was widely known that the investor expected its investments in the Landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill. To evaluate if the actions attributable to the Respondent – as well as the Resolution⁹⁸ – violate the Agreement, such expectations should be considered

93. See *op. cit.*, No. 32.

94. See *Metalclad v. Mexico*, *op. cit.*, No. 63, par. 100.

95. *Idem*, par. 103.

96. See *op. cit.*, No. 41.

97. See *op. cit.*, No. 88.

98. Resolution was the decision not to re-new the license.

legitimate and should be evaluated in light of the Agreement and of international law.”⁹⁹ Based on this and the fact that the “Resolution” was not proportionate to the “infringements”¹⁰⁰ by Tecmed, the Tribunal found that the “Resolution” and its effects amounted to an expropriation.

In *Occidental v. Ecuador*,¹⁰¹ the Tribunal acknowledge the reasonable expectations by the investor as a factor for determining an expropriatory act:

“... there has been no deprivation of the use or *reasonably expected economic benefit* of the investment...” [emphasis added].

3.2. State practice

As a response to the growing jurisprudence in this field, the recently concluded **US-Free Trade Agreements with Australia**,¹⁰² **Chile**,¹⁰³ **Dominican Republic-Central America**,¹⁰⁴ **Morocco**¹⁰⁵ **and Singapore**¹⁰⁶ and the **new US model BIT**¹⁰⁷ provide explicit criteria of what constitutes an indirect expropriation. In the Annexes on Expropriation, they state that:

The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

- i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- ii) the extent to which the government action interferes with distinct, reasonable, investment-backed expectations; and
- iii) the character of the government action.

99. See *op. cit.*, No. 88, par. 50.

100. All the infringements committed were either remediable or remediated or subject to minor penalties”. *Idem* par. 148.

101. See *op. cit.* No. 62.

102. US-Australia Free Trade Agreement signed on 1 March 2004, [Annex 11-B, Article 4(b)].

103. The US-Chile Free Trade Agreement was signed on 6 June 2003 (Annex 10-D).

104. US – Dominican Republic-Central America Free Trade Agreement signed on 5 August 2004, (Annex 10-C). The countries Parties to the Agreement are: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States.

105. US-Morocco Free Trade Agreement signed on 15 June 2004 (Annex 10-B).

106. US Trade representative Robert Zoellick to Singapore Minister of Trade and Industry, George Yeo on 6 May 2003.

107. For the text of the model BIT see www.state.gov/documents/organization/38710.pdf.

In addition, they address indirect expropriation and the right to regulate: Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.

The updated **Canada’s model Foreign Investment Promotion and Protection Agreement (FIPA)**¹⁰⁸ stipulates that it:

“incorporates a clarification of indirect expropriation which provides that, except in rare circumstances, non-discriminatory measures designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation and are not subject, therefore, to any compensation requirements.”

It defines as an example of the “rare circumstances”, “when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith”.

4. Summing up

- Expropriation (direct and indirect) requires compensation, based on clearly set rules of customary international law. However, while determination of a direct expropriation is relatively straightforward to make, determining whether a measure falls into the category of indirect expropriation has required tribunals to undertake a thorough case-by-case examination and a careful consideration of the specific wording of the treaty.
- The line between the concept of indirect expropriation and non-compensable regulatory governmental measures has not been systematically articulated. However, a close examination of the relevant jurisprudence reveals that, in broad terms, there are some criteria that tribunals have used to distinguish these concepts: i) the degree of interference with the property right, ii) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and iii) the interference of the measure with reasonable and investment-backed expectations.
- Tribunals, instead of focusing exclusively on the “sole effect” on the owner, have also often taken into account the purpose and proportionality of the governmental measures to determine whether

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

compensation was due. Thus a number of cases were determined on the basis of recognition that governments have the right to protect, through non-discriminatory actions, *inter alia*, the environment, human health and safety, market integrity and social policies without providing compensation for any incidental deprivation of foreign owned property.

- Up to now only a handful of international agreements articulated this difference. Recently, new generation of investment agreements, including investment chapters of Free Trade Agreements, have introduced specific language and established criteria to assist in determining whether an indirect expropriation requiring compensation has occurred. These criteria are consistent with those emerging from arbitral decisions.
- At the same time, prudence requires to recognise that the list of criteria which can be identified today from state practice and existing jurisprudence is not necessarily exhaustive and may evolve. Indeed, new investment agreements are being concluded at a very fast pace and the number of cases going to arbitration is growing rapidly. Case-by-case consideration which may shed additional light will continue to be called for.

Chapter 3

Fair and Equitable Treatment Standard in International Investment Law*

The obligation of the parties to investment agreements to provide to each other's investments "fair and equitable treatment" 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.

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, 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.

This document 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, its relationship with the minimum standard of international customary law and the elements of its normative content as identified by arbitral tribunals.

* This survey was prepared by Catherine Yannaca-Small, Investment Division, OECD Directorate for Financial and Enterprise Affairs, and benefited from discussions, comments and a variety of perspectives in the OECD Investment 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.

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

1. See UNCTAD, *Bilateral Investment Treaties in the Mid 1990s*, 1998. See also 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.*, No. 1.

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 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 law³ and general principles of international law⁴ 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 (Section 1), its relationship with the minimum standard of international customary law (Section 2) and the elements of its normative content as identified by arbitral tribunals (Section 3).

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

1.1. 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.
3. "Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention", OECD (1967), pp. 13-15.
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.

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.

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

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.

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”.

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 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.

1.2. 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

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. Vandeveldt 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 Vandeveldt “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.*, No. 3.

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 Chile¹⁴ and China¹⁵ 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 century¹⁷ 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 **Dominican Republic-Central America**,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.

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

13. See UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, 1998, *op. cit.*, No. 1, p. 54.

14. Model Treaty, Article 4 on the Treatment of Investments (1994), see UNCTAD, *op. cit.*, No. 1, p. 54.

15. Article 3 of the Model Treaty, see UNCTAD, *op. cit.*, No. 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 1 March 2004.

19. US-Dominican Republic Central America Free Trade Agreement signed on 5 August 2004. The countries Parties to the Agreement are: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States.

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

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

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

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

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.

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.

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

25. See 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.

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.

The **Colonia Protocol on Reciprocal Promotion and Protection of Investments** signed by MERCOSUR member States²⁹ 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 transition³¹ 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”.

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.

2. 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.

2.1. Fair and equitable treatment as a part of the minimum standard³² 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

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 États 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”.

responsibility on the part of the State.³³ Fair and equitable has been identified by some as one of the elements³⁴ of the minimum standard of treatment of foreigners and of their property, required by international law. This view has

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 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.

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* cases³⁷ 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).

As noted in Section 1, 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.

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 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. 60 ff.

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.*, No. 34.

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 NAFTA Free Trade Commission (FTC)** issued a binding interpretation on 21 July 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.

39. See *op. cit.*, No. 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.*, No. 34.

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.

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

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

42. *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, par. 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, 1 January 1994, at 149.

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

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.

46. Second Submission of the United Mexican States in the Matter of ADF Group Inc. v. United States of America, 22 July, p 5.

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 www.state.gov/documents/organization/38710.pdf.

49. FTAs with Australia, Central America, Chile, Morocco and Singapore, see *op. cit.*, No. 19-23.

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:

“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 Investment⁵² 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

50. For the text of the new FIPA model, see www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf.

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).

Jurisprudence.

Cases arising under Bilateral Treaties⁵⁴

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 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 **Eletronica 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 US 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 US 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.

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.

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

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”⁵⁹ and 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 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

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, par. 6.10., p. 30.

60. *Idem*, par. 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) (25 June 2001) [rectification denied], available at www.worldbank.org/icsid/cases/genin.pdf.

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 **minimum** 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

In *Occidental Exploration and Production Company (OPEC) v. The Republic of Ecuador*,⁶⁴ OPEC, a US company, claimed that the Ecuador authorities’ refusal to refund to OPEC value added tax, which it was entitled to under Ecuadorian law, violated the fair and equitable treatment provisions of Article II(3)(a) of

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.”

64. *Occidental Exploration and Production Company (OPEC) v. The Republic of Ecuador* (Case No. UN 3467) Final Award, 1 July 2004, available at www.asil.org/ilib/ilib0713.htm.

the US-Ecuador BIT.⁶⁵ This Article provides that in no case shall the investment be accorded treatment less favourable than that required by international law. The Tribunal examined “whether the fair and equitable treatment mandated by the Treaty is a more demanding standard than that prescribed by customary international law” and concluded that in this case, the BIT standard was not different from the minimum standard required under customary international law.⁶⁶

In *CMS Gas Transmission Company v. The Argentine Republic*,⁶⁷ the Tribunal considered whether the standard of fair and equitable treatment is separate and more expansive than that of customary international law, or whether it is

65. Occidental Exploration and Production Company (“OPEC”), a US company registered in California, entered into a participation contract in 1999 with Petroecuador, a state-owned Ecuadorian corporation, to explore for and produce oil in the Republic of Ecuador (“Ecuador”). OPEC applied regularly to the “Servicio de Rentas Internas” (“SRI”) for reimbursement of Value Added Tax (“VAT”) paid by OPEC on purchases necessary for its exploration and production activities under the contract with Petroecuador. In 2001, SRI concluded that VAT reimbursement had already been accounted for in the participation formula under the contract with Petroecuador, and therefore denied all further applications by means of Resolutions to OPEC and other companies in the oil sector. It further required the return of the amounts previously reimbursed. As a result of these measures, OPEC filed lawsuits in Ecuadorian tax courts claiming that SRI’s Resolutions denying them VAT reimbursement were in contravention of Ecuadorian legislation. OPEC also contended that the measures adopted by SRI were in violation of the Bilateral Investment Treaty between the United States of America and the Republic of Ecuador (hereinafter the “BIT”). It therefore initiated international arbitration proceedings under the UNCITRAL Arbitration Rules.

66. Award see *op. cit.*, No. 64, par. 188-190.

67. *CMS Gas Transmission Company v. The Argentine Republic* (Case No. ARB/01/8) Award, 12 May 2005. The background to the case concerns Argentina’s energy privatization incentives in the early 1990s, which included allowing tariffs to be calculated in dollars and then converted into pesos at the prevailing exchange rate, and to adjust tariffs every six months to reflect changes in inflation. TGN was one of the state-owned companies that was privatized. CMS’s acquisition of TGN represented almost 30% TGN’s shares. Following a severe economic crisis towards the end of the 1990s, the Argentine government called for a meeting with the representatives of the gas companies in order to call for a temporary suspension of the US PPI adjustment of the gas tariffs. They entered into an agreement with the Argentine government for the temporary suspension, with the understanding that this suspension would not be permanent nor affect the companies’ rights under their license agreements. Soon afterwards it was apparent that the agreement would not be implemented and the temporary suspension would not be lifted. Also, in 2001, the Argentine government introduced decree No. 1570/2001, which limited the right to withdraw deposits from bank accounts. Default was declared and several presidents succeeded one another in a matter of a few days. Argentina then enacted Emergency Law 25.561 on 6 January 2002, which introduced a reform of the foreign exchange system. CMS claimed that the aggregate of these measures harmed its investment, creating a cause of action by virtue of the BIT and the ICSID Convention.

identical with the customary international law minimum standard. It concluded that it was not different from the customary international law minimum standard:

*“the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.”*⁶⁸

NAFTA cases

In the **Mondev** case,⁶⁹ 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 award⁷⁰ 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

68. *Idem*, par. 284.

69. 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 USD 50 million in damages. The claimant alleged violations of NAFTA Articles 1102 (National Treatment), 1105 (Minimum Standard) and 1110 (Expropriations and Compensation).

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

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.”⁷¹

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”.⁷²

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”.⁷³

In another NAFTA case, **United Parcel Service of America Inc. v. Government of Canada**,⁷⁴ in the award on jurisdiction (22 November 2002), the Tribunal recognized the obligatory nature of the FTC’s interpretation on Chapter 11 Tribunals.⁷⁵ 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”.⁷⁶

In **ADF Group Inc. v. United States of America**,⁷⁷ 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

71. *Idem*, par. 125.

72. *Idem*, par. 117.

73. *Idem*, par. 119.

74. 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 less 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).

75. “... And in any event the FTC’s interpretation is binding on Chapter 11 Tribunals including this one”. *Award on Jurisdiction*, par. 96.

76. *Idem*, par. 97.

77. 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.*, No. 43. For the NAFTA countries’ position in this case see par. 34-37.

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."*⁷⁸

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"?⁷⁹ 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 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."*⁸⁰

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".⁸¹ The Tribunal dismissed the Investor's claims on this point.

In the **Loewen Group, Inc. and Raymond L. Loewen v. United States of America**⁸² 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

78. *Idem*, par. 179, p. 86.

79. *Idem*, par. 186, p. 90.

80. *Idem*, par. 183, p. 88.

81. *Idem*, par. 184, p. 89.

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

was liable under NAFTA for damages that allegedly resulted from a jury verdict against the company in a Mississippi state court in 1995-1996.⁸³ 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:⁸⁴

“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”.⁸⁵ 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 thus, presumably, does not fall below a minimum standard”.⁸⁶ 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”.⁸⁷ **Kohona** suggests that the phrase “just and equitable treatment

83. 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).

84. *Idem*, par. 128.

85. *Idem*, par. 137.

86. See Fatouros, *op. cit.*, No. 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’”.

87. 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.*, No. 7.

in accordance with international law” which occurs, for instance in certain Australian bilateral investment treaties, amounts to the international minimum standard.⁸⁸ **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”).⁸⁹ **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*”.⁹⁰

Juillard,⁹¹ 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:⁹²

“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.”*

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

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

89. 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.

90. G. Sacerdoti, *op. cit.*, No. 34.

91. See Juillard, *op. cit.*, No. 33, pp. 132-34.

92. American Law Institute's Restatement (Second) of Foreign Relations Law of the United States, 1965, par. 165.2.

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.⁹³

2.2. 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 expressly 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 two NAFTA Tribunals in the *Metalclad* and *S.D. Myers* cases.

State practice. In a 1984 study,⁹⁴ 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 law⁹⁵ even if this is not explicitly stated and is a general clause which can be used for all aspects of the treatment of

93. 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.*, No. 7.

94. See *op. cit.*, No. 4.

95. A large number and a wide variety of international legal rules are generated by means other than 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.

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 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*,⁹⁶ 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.^{97, 98}

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

97. 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.

98. 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.”

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",⁹⁹ 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 1117.¹⁰⁰ 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 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*,¹⁰¹ 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

99. *Idem*, at par. 101.

100. 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".

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

with treatment according to international law.¹⁰² 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 [...] the ‘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.¹⁰³ 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.¹⁰⁴

2.3. 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**.¹⁰⁵ In this case, Pope & Talbot challenged the implementation of the Canada-US Softwood Lumber Agreement, and the allocations of export quota that had been 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

102. 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 with 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.”

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

104. See J.C. Thomas, *op. cit.*, No. 10.

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

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.¹⁰⁶

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**,¹⁰⁷ 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**,¹⁰⁸ 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,

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

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

108. F.A. Mann, see op. cit., No. 103.

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 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”.¹⁰⁹

Mann¹¹⁰ 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 Stevens¹¹¹ 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”.

109. 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 ILaw Journal*, Vol. 16, No. 2, Fall 2001.

110. F.A. Mann, “The Legal Aspects of Money” (1982) p. 510, as quoted by J.C. Thomas, *op. cit.*, No. 10, p. 58.

111. See *op. cit.*, No. 34.

According to an **UNCTAD**¹¹² 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.

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**¹¹³ notes that “the plain meaning approach is no doubt, entirely consistent with canons of interpretation in international law” according to the Article 31, par. 1 of the Vienna Convention on the Law of Treaties (1969).¹¹⁴

3. 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

112. “Fair and equitable treatment”, UNCTAD series on issues in international investment agreements, 1999.

113. Vasciannie, *op. cit.*, No. 7.

114. 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”.

principle plays in the protection of international investment and constraints on state sovereignty.¹¹⁵

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.¹¹⁶ On this point Professor **Muchlinski**¹¹⁷ 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**¹¹⁸ 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 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 four categories:¹¹⁹ a) Obligation of vigilance and protection, b) Due process including non-denial of justice and lack of arbitrariness, c) Transparency and respect of investor’s legitimate expectations and d) Autonomous fairness elements.

115. Patrick G. Foy and Robert J.C. Deane, see *op. cit.*, No. 109.

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

117. Peter Muchlinski, “Multinational Enterprises and the Law” (1995), p. 625.

118. P. Juillard, see *op. cit.*, No. 33.

119. 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.

3.1. 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 investment¹²⁰ 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

120. “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 – À 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.*, No. 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.

obligation of vigilance has been considered a standard deriving from customary international law.¹²¹

In **Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka**¹²² (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.

121. 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 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.

122. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, see *op. cit.*, No. 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 an 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”.

In the case of **American Manufacturing & Trading (AMT), INC. v. Republic of Zaire**¹²³ (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**,¹²⁴ the claimant had entered into a lease agreement with the State-owned Egyptian Hotels Company (“EHC”) for the management and 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”.

123. *American Manufacturing & Trading, Inc. (AMT) (US) v. Republic of Zaire*, see *op. cit.*, No. 58.

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

3.2. Due process/denial of justice/arbitrariness

The majority of the cases arise out of denial of justice¹²⁵ in the matter of procedure, some deficiency in the vindication and enforcement of the investor's rights. The principle of "denial of justice"¹²⁶ has been considered as being part of customary international law and is used in three senses.¹²⁷ In the broadest sense, it "seems to embrace the whole field of State responsibility, and has been applied to all types of wrongful conduct on the part of the State towards aliens"¹²⁸ it includes therefore acts or omissions of the authorities of any of the three branches of government, i.e. executive,

125. 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).

126. 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).

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

128. *Idem*.

legislative or judiciary.¹²⁹ 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”.^{130, 131} The majority of the cases examined approach fair and equitable treatment in the intermediate sense and many also address

129. 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.*, No. 120, p. 379. Hackworth in its *Digest of International Law* indicated 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.*, No. 120, p. 380.

130. See Garcia-Amador, *op. cit.*, No. 127.

131. 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.*, No. 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, par. 102-103.

in their analysis the concept of arbitrariness.¹³² A significant number of the recent cases supporting this interpretation refer to the ELSI case (see below).

Cases arising under BITS. In the case concerning **Electronica Sicula (ELSI) (US v. Italy)**¹³³ (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 measures¹³⁴ 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 arbitrary¹³⁵ 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.”

132. 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. cit.*, No. 121, pp. 358-9. *The Restatement (Third) of the Foreign Relations Law of the United States* defines “an arbitrary act” as “an act that is unfair and unreasonable, and inflicts serious injury to established rights of foreign nations...”, par. 712 reporter’s note 11 (1986).

133. *Electronica Sicula S.P.A. (ELSI) (US v. Italy)*, see *op. cit.*, No. 56.

134. 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.

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

Citing the ICJ's judgement in the *Asylum* case,¹³⁶ the Chamber stated that: "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law"¹³⁷ [...] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."

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".¹³⁸

In *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia*¹³⁹ (see above), the ICSID tribunal connected the standard under Article II(3)(a) of the Us-Estonia 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.¹⁴⁰ 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 wilful 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'".¹⁴¹

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

137. 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.*, No. 56.

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

139. *Alex Genin, v. Republic of Estonia*, see *op. cit.*, No. 61.

140. 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.

141. Citing the *ELSI* case.

In **Compagnie Générale des Eaux (Vivendi) v. Argentine Republic**,¹⁴² 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.

In **Middle East Cement Shipping and Handling Co S.A. (Greece) v. Egypt**,¹⁴³ Middle East Shipping instituted ICSID arbitration proceedings against Egypt under the Greece-Egypt BIT to recover losses related to a concession agreement.¹⁴⁴ 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

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

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

144. 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.

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**,¹⁴⁵ 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).¹⁴⁶ 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 diligence and provides a ‘minimum international standard which forms part of customary international law’.¹⁴⁷ 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’.”¹⁴⁸

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

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

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

148. UN Conference On Trade & Development: Fair And Equitable Treatment, Vol. III at 10,15, UN Doc. UNCTAD/ITE/IIT/II, UN Sales No. E.99.II.D.15 (1999) (English version).

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.

Cases arising under 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...”*¹⁴⁹

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”.¹⁵⁰

In the *Mondev International LTD v. US*¹⁵¹ case (see above), after having shown the importance of the specific context in which an Article 1105(1) claim

149. 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.

150. 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.*, No. 10 pp. 67-68.

151. *Mondev International LTD v. United States of America*, see *op. cit.*, No. 69-73.

is made, the Tribunal went on to apply the standard of denial of justice¹⁵² 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 case¹⁵³ 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.”¹⁵⁴

152. 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.

153. *Elettronica Sicula*, op. cit., No. 56, ICJ Report, p. 15 at p. 76 (par. 128), citing the judgment of the Court in the *Asylum* case, which referred to arbitrary action being “substituted for the rule of law”.

154. 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.

In **ADF Group Inc. v. United States of America**¹⁵⁵ (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 US measures [of domestic content and performance requirements in governmental procurement] are 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 US 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 US measures here in question under US 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 US measures with relevant provisions of NAFTA Chapter 11 and applicable rules of international law. The Tribunal would emphasize, too, that even if the US 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”.¹⁵⁶

155. *ADF Group Inc. v. United States of America*, see *op. cit.*, No. 42.

156. “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).”

In the **Loewen Group, Inc and Raymond L. Loewen v. United States of America**,¹⁵⁷ the Tribunal made also an attempt to define the “unfair and inequitable treatment” in the context of denial of justice.¹⁵⁸

“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.”

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** case¹⁵⁹ Waste Management, Inc., a US 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 2 June 2000 dismissing the investor’s claim for lack of jurisdiction. Waste Management resubmitted its case and after

157. *The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, see *op. cit.*, No. 82-85.

158. “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, par. 79).”

159. 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 USD 60 million.

having accepted jurisdiction, the Tribunal issued on 30 April 2004, an unanimous award¹⁶⁰ 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".¹⁶¹

3.3. Transparency, respect of the investor's legitimate expectations and good faith

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. An additional element linked sometimes to transparency, is the respect of the investor's legitimate expectations. Good faith was considered by one tribunal as an element defining "fair and equitable treatment" and including the abovementioned elements of transparency and respect of basic expectations.

In *Metalclad Corporation v. United Mexican States*,¹⁶² 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".¹⁶³ 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.

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

161. *Idem*, par. 98.

162. *Metalclad v. Mexico*, see *op. cit.*, No. 96-97.

163. *Metalclad*, Award, at par. 99.

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”.¹⁶⁴ (This decision of the tribunal was rejected in judicial review.)

In **Maffezini (Argentina) v. Kingdom of Spain**,¹⁶⁵ 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”.

In the **TECMED S.A. v. The United Mexican States**¹⁶⁶ case (see above), the Tribunal interpreted the “fair and equitable treatment standard” as resulting from the good faith principle.¹⁶⁷ It is not clear however, whether the Tribunal considered good faith as a source of obligation *per se*, i.e. a general

164. *Idem*, at par. 76.

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

166. See *op. cit.*, No. 107.

167. 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.

obligation¹⁶⁸ 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* case¹⁶⁹ – 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 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

168. 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, par. 46; p. 473, par. 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 (11 June). 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. *Idem*, at 296, par. 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.’” *Idem*, at 297, par. 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.” *Idem*, 32. All above as cited in the *US Rejoinder Memorial on Jurisdiction, Admissibility and the Proposed Amendment in the Methanex case*, 27 June 2001, pp. 25-26.

169. 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.*, No. 69-73.

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',¹⁷⁰ 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'.¹⁷¹

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".

Since the TECMED Tribunal award, three Tribunals have embraced its reasoning and adopted the same elements to define the fair and equitable treatment standard.

In *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile*¹⁷² the Tribunal held that Chile breached its obligations under the fair and equitable treatment provisions of the 1992 BIT between the Government of Malaysia and the Government of the Republic of Chile in regard to MTD's real estate project, in Santiago, Chile.¹⁷³ MTD based part of its claims on provisions of other BITs and contended that these provisions apply by operation of the most favored nation ("MFN") clause of the Malaysia-Chile BIT. The first paragraph of

170. *Neer v. Mexico*, case (1929) R.I.A.A.

171. Referring to the *ELSI* case, see *op. cit.*, No. 56.

172. The foreign investment at issue relates to the design of a mixed-use planned community based on a Malaysian model to be built in Pirque, an area in Santiago, Chile. MTD Equity, a Malaysian company, entered into a foreign investment contract that would provide for the development of land and for the creation of a Chilean corporation, MTD Chile S.A. which would be majority owned by MTD Equity. After the foreign investment contract was signed and approved by the Chilean Foreign Investment Commission in March 1997, and after MTD invested several millions in capital contributions, problems occurred related to obtaining zoning for the project. In November 1998, the MINVU rejected the project on the grounds that it conflicted with existing urban development policy and that the Mayor of Pirque no longer supported the project. On 8 October 1999, MTD brought a claim against Chile pursuant to the Malaysia-Chile BIT before ICSID.

173. *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID case No. ARB/01/7 (Award), 21 May 2004.

Article 3(1) of the Malaysia-Chile BIT provides that: “Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State.” MTD claimed that the provisions of the Croatia BIT and the Denmark BIT with Chile, dealing with Chile’s obligation to award permits subsequent to the approval of foreign investment and to fulfill contractual obligations were part of the duty to provide fair and equitable treatment and that as such it could invoke them pursuant to the MFN clause of BIT.

The Tribunal concluded that “under the BIT, the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments. The Tribunal considered that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the Croatia BIT is in consonance with this purpose. The Tribunal held that:

“In terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – ‘to promote’, ‘to create’, ‘to stimulate’, rather than prescriptions for a passive behaviour of the State or avoidance of prejudicial conduct to the investors.”¹⁷⁴

Making reference to the way the TECMED Tribunal described the concept of fair and equitable treatment – see above – it concluded that this is the standard it would apply as well.¹⁷⁵

In *Occidental Exploration and Production Company (OPEC) v. The Republic of Ecuador*¹⁷⁶ the Tribunal referred to the preamble of the US-Ecuador BIT which notes the agreement of the parties that such treatment “is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources”, and concluded that “the stability of the legal and business framework is thus an essential element of fair and equitable treatment”.¹⁷⁷ The Tribunal noted that “the tax law was changed without providing clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes¹⁷⁸”, and cited the *Metalclad* and *TECMED* awards in which the Tribunals concluded that there was a violation of fair and equitable treatment because the governments have acted in an inconsistent, non-transparent and unpredictable manner. It then concluded that: “such

174. *Idem*, par. 113.

175. *Idem*, par. 114 and 115.

176. See *op. cit.* No. 64.

177. *Idem*, par. 183.

178. *Idem*, par. 184.

requirements were not met by Ecuador. Moreover, this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not.”¹⁷⁹

In *CMS Gas Transmission Company v. The Argentine Republic*,¹⁸⁰ the Tribunal upheld CMS's claim for violations of fair and equitable treatment under Article II(2) of the US-Argentina BIT noting that fair and equitable treatment is inseparable from stability and predictability. The Tribunal noted in this regard that there was no need to prove bad faith on the part of Argentina, rather, an objective assessment of whether the legitimate expectations of the investor were met could be made, and in this case, as in the *Metalclad* and *TECMED* cases, the legitimate expectations that the host State act in a consistent manner were not met. It referred to the preamble of the Treaty and stated that its language makes it clear that:

*“one principal objective of the protection envisaged is that fair and equitable treatment is desirable to maintain a stable framework for investments and maximum effective use of economic resources. There can be no doubt therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.”*¹⁸¹

*“It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.”*¹⁸²

3.4. Autonomous fairness elements

In *Pope & Talbot Inc. v. Canada*,¹⁸³ 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),¹⁸⁴ examined the compatibility of its Second Award with the FTC's interpretation and conceded that “it might

179. *Idem*, par. 186.

180. See *op. cit.*, No. 67.

181. *Idem*, par. 274.

182. *Idem*, par. 277.

183. *Pope & Talbot Inc. v. Canada*, See *op. cit.*, No. 105.

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

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”.¹⁸⁵

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.

4. 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

185. *Idem*, par. 56.

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.

Chapter 4

Most-Favoured-Nation Treatment in International Investment Law*

Most-Favoured-Nation (MFN) treatment is one of the oldest standards of international economic relations. It is central to WTO disciplines and is as well a significant instrument of economic liberalisation in the investment field by spreading more favourable treatment from one investment agreement to another. The wording of MFN clauses varies, however, and their interpretation and application requires a careful analysis, on a case-by-case basis, in accordance with Articles 31 and 32 of the Vienna Convention. The ejusdem generis principle provides that an MFN clause can attract the more favourable treatment available in other treaties only in regard to the “same subject matter”, the “same category of matter”, or the “same class of matter”. Past arbitral findings show, however, that the application of this principle has not always been simple or consistent. The present survey reviews the jurisprudence and invites practitioners to pay particular attention to the formulation of the MFN clauses in investment agreements, taking into account established treaty interpretation rules.

* This survey was prepared by Marie-France Houde, Investment Division, OECD Directorate for Financial and Enterprise Affairs, and Fabrizio Pagani, Legal Directorate, and benefited from discussions, comments and a variety of perspectives in the OECD Investment 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.

1. Introduction

Bilateral and regional investment agreements have proliferated in the last decade and new ones are still being negotiated. Most-Favoured-Nation (MFN) clauses link investment agreements by ensuring that the parties to one treaty provide treatment no less favourable than the treatment they provide under other treaties in areas covered by the clause. MFN clauses have thus become a significant instrument of economic liberalisation in the investment area. Moreover, by giving the investors of all the parties benefiting from a country's MFN clause the right, in similar circumstances, to treatment no less favourable than a country's closest or most influential partners can negotiate on the matters the clause covers, MFN avoids economic distortions that would occur through more selective country-by-country liberalisation. Such a treatment may result from the implementation of treaties, legislative or administrative acts of the country and also by mere practice.

The present document provides a factual survey of jurisprudence and related literature on MFN treaty clauses in investment agreements with a view to contributing a better understanding of the MFN interfaces between such agreements.

- Section 2 defines the MFN clause, traces back its origins and provides some examples of such provisions in the two major types of model investment agreements in existence (the “North American model” and the “European model”).
- Section 3 summarises the relevant aspects of the extensive work carried out by the International Law Commission (ILC) between 1968 and 1978 on MFN clauses.
- Section 4 describes recent arbitral awards on the scope of application of MFN treatment clauses resulting from disputes under investment treaties.
- Section 5 provides a summing up.

2. Definition, origins and examples of MFN clauses

2.1. Definition

To provide MFN treatment under investment agreements is generally understood to mean that an investor from a party to an agreement, or its

investment, would be treated by the other party “no less favourably” with respect to a given subject-matter than an investor from any third country, or its investment.¹ MFN treatment clauses are found in most international investment agreements. Although the text of the MFN clause, its context and the object and purpose of the treaty containing it need to be considered whenever that clause is being interpreted, it is the “multilateralisation” instrument *par excellence* of the benefits accorded to foreign investors and their investments.

While MFN is a standard of treatment which has been linked by some to the principle of the equality of States,² the prevailing view is that a MFN obligation exists only when a treaty clause creates it.³ In the absence of a treaty obligation (or for that matter, an MFN obligation under national law), nations retain the possibility of discriminating between foreign nations in their economic affairs.

2.2. Origins⁴

MFN treatment has been a central pillar of trade policy for centuries. It can be traced back to the twelfth century, although the phrase seems to have first appeared in the seventeenth century. MFN treaty clauses spread with the growth of commerce in the fifteenth and sixteenth centuries. The United States

1. The International Law Commission (ILC) has defined MFN treatment as follows: “Most-favoured-nation treatment is a treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State or to a third State or to persons or things in the same relationship with that third State”, Article 5 of the Draft articles on most-favoured-nation clauses (ILC Draft), in *Yearbook of the international Law Commission*, 1978, Vol. II, Part Two, p. 21.
2. See, especially, the comments of some socialist countries in “Comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations on the draft articles on the most-favoured-nation clause adopted by the International Law commission at its twenty-eighth session”, in *Yearbook of the International Law Commission*, 1978, Vol. II, Part Two, p. 162 ff.
3. See Article 7 of the ILC Draft, the related comments and the doctrine here referred to, *Ibidem*, p. 24 ff. See also *Oppenheim’s International Law*, edited by R. Jennings and A. Watts, and Vol. I, Harlow, 1992, p. 1 326 f.
4. For a thorough history of the MFN clause up to the Second World War, including the work done by, or under the auspices of, the League of Nations, see the First Report of the ILC’s Special Rapporteur, *Yearbook of the International Law Commission*, 1969, Vol. II, p. 157 ff.

included an MFN clause in its first treaty, a 1778 treaty with France.⁵ In the 1800s and 1900s the MFN clause was included frequently in various treaties, particularly in the Friendship, Commerce, and Navigation treaties. MFN treatment was made one of the core obligations of commercial policy under the Havana Charter where members were to undertake the obligation “to give due regard to the desirability of avoiding discrimination as between foreign investors”.⁶ The inclusion of MFN clauses became a general practice in the numerous bilateral, regional and multilateral investment-related agreements which were concluded after the Charter failed to come into force in 1950.

Its importance for international economic relations is underscored by the fact that the MFN treatment provisions of the GATT (Article I *General Most-Favoured-Nation Treatment*) and the GATS⁷ (Article II *Most-Favoured-Nation Treatment*) provide that this obligation shall be accorded “immediately and unconditionally” (although in the case of the GATS, a member may maintain a measure inconsistent with this obligation provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions).

2.3. Examples of MFN Clauses in Investment Agreements

A stock taking of MFN clauses in investment treaties will not yield a uniform picture. In fact the universe of MFN clauses in investment treaties is quite diverse. Some MFN clauses are narrow, others are more general. Moreover, the context of the clauses varies, as does the object and the purpose of the treaties which contain them. Following is a representative sample of these clauses.

5. Treaty of Amity and Commerce, 6 February 1778, France-United-States, Article 3, 8 Stat. 12 (“The Subjects of the most Christian King shall pay in the Ports, Havens, Roads, Countries, Islands, Cities or Towns, of the United States or in any part of them, no other or greater Duties or Imposts ... than those which the Nations most favoured are or shall be obliged to pay; and they shall enjoy all the Rights, Liberties, Privileges, Immunities and Exemptions in Trade, Navigation and Commerce ... which the said Nations do or shall enjoy.”); see also *idem*, Art. 4 (similar provision with respect to US nationals in France).
6. United Nations Conference on Trade and Employment, Final Act and Related Documents, April 1948, Article 12 (*International Investment for Economic Development and Reconstruction*), par. 2(a)(ii).
7. Of all the WTO Agreements, the General Agreement on Trade in Services (GATS) is generally considered as dealing more directly with investment issues. Mode 3 applies to the supply of trade in services through “commercial presence”, which is in essence an investment activity.

Germany has concluded the largest number of BITs. Article 3(1) and (2) of the **German 1998 Model Treaty** combines the MFN obligation with the national treatment obligation by providing that:

- “1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.
- 2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to investors of any third State.”

This general MFN provision is not restricted in its scope to any particular part of the treaty containing it. It may also be noted that the 1998 German model BIT contains another MFN provision which only relates to full protection and security and to expropriation which are the matters dealt with by Article 4. Article 4(4) specifically provides that:

“Investors of either Contracting State shall enjoy most-favoured-nation treatment in the territory of the other Contracting State in respect of the matters provided for in this Article.”

The same approach is followed by the **Netherlands Model BIT** which in addition combines in its Article 3 the MFN obligation with other standards of treatment, i.e. national treatment (whichever of these two treatments is more favourable), fair and equitable treatment and full protection and security. The non-discriminatory treatment is formulated in Article 3(1) and 3(2) as follows:

- “1) Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.
- 2) More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.”

Article 3 of the 1996 **Albania/United Kingdom BIT** provides that:

“National Treatment and Most-Favoured-Nation Provisions

- 1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
- 2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards the management, maintenance, use,

enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

- 3) *For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs 1) and 2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.”*

Articles 1 to 11 cover all the provisions of the Agreement, except the final clauses.

The typical formulation of an MFN clause in the **US and Canadian BITs** covers both the establishment and post establishment phases. It also lists the various operations covered⁸ and is explicit in stating that the right only applies “in like circumstances”, unlike other BITs (particularly the “European model BIT”) which make no reference to the comparative context against which treatment is to be assessed. Recent examples are to be found in the investment chapter of US-Chile Free Trade Agreement⁹ and the US-Singapore Free Trade Agreement¹⁰ concluded in 2003, and the 1997 Canada-Chile Free

8. The final draft text of the US-Central America Free Trade Agreement (CAFTA) resulting from the negotiations concluded in December 2003 and dated 28 January 2004 contains an interpretation footnote on the scope of application of the MFN treatment clause in the Investment Chapter of the Agreement (Chapter 10) which reads:

“The Parties note the recent decision of the arbitral tribunal in *Maffezini (Arg.) v. Kingdom of Spain*, which found an unusually broad most-favoured-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision of Jurisdiction §§38-64 (25 January 2000), reprinted in 16 ICSID Rev.-F.I.L.J. 212(2002). By contrast the Most-Favoured-Nation Treatment Article of this Agreement is expressly limited in scope to matters “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.”

This footnote would be deleted in the final text of the Agreement but the Parties agreed that it is to be included in the negotiating history as a reflection of the Parties’ shared understanding of the Most-Favoured-Treatment Article and the *Maffezini* case.

The draft text of CAFTA is currently subject to legal review for accuracy, clarity and consistency. Under the Trade Act of 1992, the Administration must notify Congress at least 90 days before signing the Agreement. The Administration expects to notify Congress in the near future of its intent to sign the CAFTA. See www.ustr.gov/releases/2003/12/03-82.pdf.

9. www.ustr.gov/new/fta/chile.htm. This agreement entered into force on 1 January 2004.
10. www.ustr.gov/new/fta/Singapore/final.htm. This agreement entered into force on 1 January 2004.

Trade Agreement, which are based on NAFTA language. In the **US-Chile FTA**, Article 10.3: Most-Favoured-Nation Treatment reads:

- “1) Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment in its territory.
- 2) Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.”

In the **US-Singapore FTA**, National Treatment and MFN treatment are part of a same article:

“Article 15.4: National Treatment and Most-Favoured-Nation Treatment

- 3) Each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. The treatment each Party shall accord under this paragraph is “most-favoured-nation treatment”.
- 4) Each Party shall accord to investors of the other Party and to their covered investments the better of national treatment or most-favoured-nation treatment.”

In the **Canada-Chile FTA**, Article G-03: Most-Favoured-Nation Treatment reads:

- “1) Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
- 2) Each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”

The texts of these agreements are alike in that they make clear that the intent to use the likeness of the circumstances in which the treatment is granted as the basis for comparison. Jurisprudence from MFN clauses with a different basis for comparison, and which focuses on categorizing industries affected by treatment, or categorizing the types of treaties that require the treatment, may be of little relevance to the analysis required by these agreements.

2.4. Restrictions and Exceptions

Many MFN clauses in investment treaties contain specific restrictions and exceptions, which exclude certain areas from their application. Such areas may include *inter alia* regional economic integration, matters of taxation, subsidies or government procurement and country exceptions. Depending on the way these exceptions are drafted, the fact that these limitations are specifically mentioned could be a factor in deciding whether certain other matters are within the scope of an MFN clause. Consider the following examples.

The **1998 German Model BIT** provides in its Article 3, points 3) and 4) that:

- “3) Such treatment shall not relate to privileges which either Contracting State accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.*
- 4) The treatment granted under this Article shall not relate to advantages which either Contracting State accords to investors of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation.”*

The **Dutch Model BIT** contains the following exception to the MFN obligation in the general treatment article (Article 3):

- “3) If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to nationals of the other Contracting Party.”*

In addition, Article 4 of the Model, which only deals with the treatment of taxes, includes in its second part, some exceptions to the MFN treatment and National treatment obligations provided by the first part of that article. This article applies to nationals of Contracting Parties or nationals of any third State which are “in the same circumstances”. The whole Article 4 reads as follows:

“With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State who are in the same circumstances, whichever is more favourable to the nationals concerned. For this purpose, however, any special fiscal advantages accorded by that Party, shall not be taken into account:

- a) under an agreement for the avoidance of double taxation; or*

- b) by virtue of its participation in a customs union, economic union or similar institution; or
- c) on the basis of reciprocity with a third State.”

The MFN limitations in the **Agreement between EFTA States and Singapore** state:

“Article 40

- 2. *If a Party accords more favourable treatment to investors of any other State or their investments by virtue of free trade agreement, customs unions or similar agreement that also provides for substantial liberalization of investments, it shall not be obliged to accord such treatment to investors of another Party or their investments. However, upon request from another Party, it shall accord adequate opportunity to negotiate the benefits granted therein...*

Article 41: Taxation

- 1. *Except as otherwise provided for in this Article, nothing in this Chapter shall create rights or impose obligations with respect to taxation measures.*
- 2. *Article 40 shall apply to taxation measures subject to deviations from national treatment that is necessary for the equitable or effective imposition or collection of direct taxes.*
- 3. *If a Party accords special advantages to investors and their investments of any other State by virtue of an agreement for the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of another Party and their investments.”*

The agreements concluded by Canada and the United States since the early 1990s have followed the practice of listing “country” exceptions or reservations to MFN treatment (and other standards) as “non-conforming measures” in separate annexes to the Agreement. For example, Article 15.12 (Non-Conforming Measures) of the **United States – Singapore Free Trade Agreement** reads as follows:

- 1. Articles 15.4 (National Treatment and Most-Favoured-Nation Treatment)... do not apply to:
 - a) any existing non-conforming measure that is maintained by a Party at:
 - i) the central level of government, as set out by that Party in its Scheduled to Annex 8A,
 - ii) a regional level of government, as set out by that Party in its Schedule to Annex 8A, or
 - iii) a local level of government;
 - b) the continuation or prompt renewal of any non-conforming measure referred to in sub-paragraph a); or

- c) an amendment to any non-conforming measure referred to in subparagraph a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 15.4, 15.8, and 15.9.
- 2. Articles 15.4, ... do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex 8B.
- 3. Neither Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex 8B, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.
- 4. Article 15.4 does not apply to any measures that is an exception to, or a derogation from, the obligations under Article 16.1.3 (General provisions) as specifically provided in that Article.
- 5. Articles 15.4 and 15.9 do not apply to:
 - a) government procurement; or
 - b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

In addition to the measures listed in Annexes I-II, Annex IV of NAFTA is specifically devoted to exceptions to Most-Favoured-Nation Treatment for treatment accorded pursuant to all prior bilateral or multilateral international agreements and for treatment accorded pursuant to all such future agreements with respect to certain sectors only.¹¹ The scope of the NAFTA and that of its investment chapter limit its MFN treatment obligation in other areas as well, including, for example, taxation¹² and financial services.¹³ The same kind of limitations to the scope of MFN protection appears in the US-Chile and US-Singapore free trade agreements and the recently concluded US-Australia free trade agreement.

Some US and Canadian BITs also contain limitations to the MFN clauses that preclude coverage of the advantages accorded by virtue of multilateral

- 11. These MFN exceptions apply notably to a) international agreements in force or signed prior to the entry into force of the NAFTA and b) international agreements in force or signed after the date of the entry into force of NAFTA in the areas of aviation, fisheries, maritime matters, telecommunications networks and transport services (except for measures covered by the Telecommunications chapter of NAFTA or to the production, sale, licensing or radio or television programming) as well as c) certain state measures or aid programmes.
- 12. See NAFTA Art. 2103 ("Except as set out in this Article, nothing in this Agreement shall apply to taxation measures").
- 13. See NAFTA Art. 1101(3) ["This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services)"].

agreements or negotiations (such as the GATT/Uruguay Round) to which their BIT partners may or may not have adhered. Language of this sort (the “GATT exception”) appeared for the first time in the Article XII(2)(b) 1990 US-Poland BIT.¹⁴ Another example is Article G-8 of the Canada-Chile Agreement which provides that the MFN clause in the investment chapter of that agreement “does not apply to any measure that is an exception to, or derogation from, a Party’s obligations under the TRIPS Agreement, as specifically provided for in that agreement”.

The Understanding reached by the United States, the European Commission and certain acceding and candidate countries regarding their BITs with the United States on 22 September 2003 describes the means, through individual protocols, of avoiding potential incompatibilities arising from MFN obligations in the BITs and the obligations of membership in the European Union.

Finally, it may be noted that some WTO members have listed substantive provisions in their bilateral investment treaties as involving exemptions to the MFN obligations of the GATS with a view of protecting a higher level of treatment in such BITs in relation to GATS commitments.¹⁵

14. Kenneth J. Vandeveld, *US Bilateral Investment Agreements, the Second Wave*, in *Michigan Journal of International Law*, Summer 1993, p. 15.

15. Costa Rica has reserved for all sectors, “measures granted under bilateral treaties for the promotion and protection of investment designed to encourage in a preferential manner the investments of certain countries covered by such agreements”. Jordan has notified that “measures extending preferential treatment are pursuant to bilateral investment treaties”. Kuwait extends the exemption to multilateral agreements related to the promotion and protection of investment by notifying “measures taken to promote and protect investments applied in conformity with bilateral, multilateral agreements and undertakings to which Kuwait is a party”. Poland has notified provisions on “commercial presence contained in promotion and protection of foreign investments agreements that go beyond limitations embodied in Poland’s schedule of specific commitments. Trinidad and Tobago pre-empted all existing and future bilateral investment and protection treaties. The United States has an MFN exemption for BIT entry and stay obligations pertaining to the movement of personnel.” Uruguay has notified as measure inconsistent with Article II “the provisions of bilateral investment promotion and protection agreements which guarantee investors from the other contracting party freedom to transfer and invest capital and any other sum related to investments, and also guarantee investors against the non-commercial risks to which their investment is exposed”. Singapore has also listed exemptions for preferential treatment resulting from Investment Guarantees Agreements.

Canada, Chile and Poland have, in addition, invoked an exemption for procedural measures in their BITs. Chile’s exemption concerning measures establishing dispute settlement procedures contained in existing or future bilateral treaties on the protection of investment applies in principle to all countries. Canada and Poland indicated that they “accept compulsory arbitration of investor/state investment disputes brought by or in respect of service suppliers of countries with which Canada/Poland have or may have agreements providing for such procedure”.

In some other cases, country exemptions to Article II of GATS refer to preferential treatment under sectoral or regional agreements. Bulgaria has notified an MFN exemption for present and future bilateral agreements concerning the provision

GATS Article V(1) (Economic Integration) does not prevent, however, any of its members from being a party to or entering into an agreement liberalising trade in services between or among the parties to such an agreement, provided that such an agreement meets the conditions set out in paragraph 1 of that Article. GATS Article V(6) further provides that a service supplier of any Member that is a juridical person constituted under the law of a party to an agreement meeting the conditions of paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement. Examples of the treatment accorded to enterprises of third party investors in accordance with these provisions is to be found in NAFTA Article 1101 and 1139, EC Treaty Articles 43-48, and Annex G of the draft Understanding between the EU and the USA concerning Certain Bilateral Investment Treaties, dated 22 September 2003.

3. International Law Commission Work^{16, 17}

In 1964 the International Law Commission (ILC) embarked on a multi-year project to prepare a set of draft articles on the MFN

legal services through established presence; Thailand for the investment provisions in the bilateral Treaty of Amity and Economic Relations with the United States; and Venezuela for bilateral agreements relating to petroleum-related services.

With regard to regional agreements, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Venezuela have notified entries for preferences accorded under the General Treaty of Central American Economic Integration; Côte d'Ivoire for preferences for insurance firms based in signatories of the CIMA and preferences for financial service providers based in WAEMU Member States; Cyprus for market access restrictions for firms based in the EU and EFTA countries; EC 12 for existing and future Euro-Med agreements; Finland, Iceland, Norway, Sweden for measures aimed at promoting Nordic co-operation; Pakistan for favourable treatment for financial institutions set up to undertake Islamic financing transactions; Senegal for preferences accorded to insurance and financial service providers based in signatories to ECOWAS, WAEMU and WAMU; South Africa for an exemption on exchange controls for persons based in the CMA; and the United Arab Emirates for preferential treatment for service providers based in members of the Gulf Co-operation Council.

16. The following section is drawn from the *Report of the International Law Commission to the General Assembly on the Work of Its Thirtieth Session*, [1978], Yearbook of the International Law Commission, A/CN.4/SER.A/1978/Add.1 (Part 2) ("ILC Report") and "Most-Favoured-Nation Clause", Yearbook of the International Law Commission, 1970, Vol. II, pp. 201-213.
17. The International Law Commission was established by the General Assembly in 1947 to promote the progressive development of international law and its codification. The Commission, which meets annually, is composed of 34 members who are elected by the General Assembly for five-year terms and who serve in their individual capacity, not as representatives of their Governments. Most of the Commission's work involves the preparation of drafts on topics of international law. Some topics are chosen by the Commission and others referred to it by the General Assembly or the Economic and Social Council. When the Commission completes draft articles on a particular topic, the General Assembly usually convenes an international conference of plenipotentiaries to incorporate the draft articles into a convention which is then open to States to become parties: www.un.org/law/ilc.

clause.¹⁸ The idea for the project originally arose in the context of the ILC's work on the law of treaties, and, as noted in the introduction to the draft articles, they should be interpreted in light of the Vienna Convention on the Law of Treaties (Vienna Convention).¹⁹ In determining to proceed with the project, the ILC acknowledged the importance of the role of the most-favoured-nation treatment obligation in the sphere of international trade.²⁰ However, the ILC specifically did not confine its studies to that sphere, but rather explored the application of the clause in as many spheres as possible.²¹

In 1978, the ILC adopted the Draft Articles on Most-Favoured-Nation Clauses and recommended to the General Assembly of the United Nations that they be used for a Convention on the subject. The General Assembly did not act upon this recommendation and took no substantive action on the draft articles.²² The ILC's work provides, nevertheless, a general analysis of MFN clauses and insight into the "*ejusdem generis*" principle, which has been used in their interpretation in several judicial and arbitral

18. See Introduction to the 1978 ILC Report, par. 15.

19. *Idem*, par. 59.

20. *Idem*, par. 17.

21. *Idem*, par. 61.

22. See the following acts of the General Assembly: Res. 33/139 (1978), 35/161 (1980), and 40/65 (1985), and Decision 43/429 (1988).

cases, including recent ones.^{23, 24} The present section summarises the most general aspects of this work.²⁵

3.1. General principles of an MFN clause²⁶

In examining the ILC's work, it is important to note first of all that the Draft Articles elaborated by the Commission were intended to be "without prejudice to any provision on which the granting State and the beneficiary State may otherwise agree" (Art. 29).²⁷ Thus, the content of the treatment due in each specific case is defined by the actual language of the MFN clause in question. This text must be interpreted in accordance with the principles of treaty interpretation, as codified in the Vienna Convention. Article 31.1 of the Vienna Convention states that "a treaty shall be interpreted in good faith in

23. The ILC's work has been regarded by some countries as reflecting international law. See, for example, the comments of Colombia, Netherlands, Sweden in "Comments of Member States, organs of the United Nations, specialised agencies and other intergovernmental organisations on the draft articles on the most-favoured-nation clause adopted by the International Law Commission at its twenty-eighth session", in *Yearbook of the International Law Commission*, 1978, Vol. II, Part Two, and Germany in "Analytical compilation of comments and observations from Governments, organs of the United Nations which have competence in the subject-matter and interested intergovernmental organizations: report of the Secretary-General", UN A/35/443, p. 9. However, it should be borne in mind that to grant MFN treatment is not an obligation of customary international law.

24. Some OECD member countries, without denying the relevance of the ILC exercise, stressed that the peculiarities of each MFN clause and of its context put into serious question the utility of codification through a Convention. See, for example, the comments by Luxembourg, in "Comments of member States, organs of the United Nations, specialised agencies and other intergovernmental organisations on the draft articles on the most-favoured-nation clause adopted by the International Law Commission at its twenty-eighth session", in *Yearbook of the International Law Commission*, 1978, Vol. II, Part Two, p. 168 ff., or by the UK in "Analytical compilation of comments and observations from Governments, organs of the United Nations which have competence in the subject-matter and interested intergovernmental organisations: report of the Secretary-General", UN A/35/443, p. 11. Other countries, for example the United States, supported the Commission's draft articles and favoured their adoption by the Commission, but they took position against their final codification through an international convention (see *ibidem*, p. 14).

25. While the ILC studied practically all aspects of the MFN treatment clauses including the issues of exceptions, and termination or suspension of MFN rights, the present section focuses on the general interpretation of MFN clauses.

26. Unless otherwise stated, paragraphs 24-47 reproduce the views of the ILC.

27. In this sense, see also *Oppenheim's International Law*, *op. cit.*, p. 1 328.

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.²⁸

In the ILC’s work, the MFN clause is described as taking the form of a treaty provision whereby a State (the granting State) undertakes an “obligation” towards another State (the beneficiary State) to accord MFN treatment in an agreed sphere of relations and that (beneficiary) State accepts it.²⁹ The clause may also determine the persons or things to whom and to which the MFN treatment is applicable. Ultimately, the extent of the benefits to which the beneficiary State may lay claim (for itself or for persons or things in determined relationship with it) is limited by the treatment extended by the granting State to a third State (or to persons or things in the same relationship with a third State).³⁰

The MFN clause may be invoked if the third State (or persons or things in the same relationship with the third State as are the persons or things mentioned in the clause with the beneficiary State) have been extended the favours that constitute the MFN treatment foreseen in the clause. The mere fact of a more favourable treatment is what is required to set in motion the operation of the clause. This treatment may be based upon a treaty, another agreement or a unilateral, legislative or other act or mere practice.³¹ The beneficiary State, on the strength of an MFN clause may invoke the clause to also demand the same benefits as were extended to the third State. Depending on the drafting of the MFN clause, the mere fact that the third State has not availed itself of the benefits which were extended to it by the granting State does not absolve the granting State from the obligation under the MFN clause.³²

When two treaties exist, one between the granting State and the beneficiary State containing the MFN clause, and the other between the

28. In Article 31.2, the word “context” is held to include the preamble and annexes of the treaty as well as any agreement or instrument made by the parties in connexion with the conclusion of the treaty. Article 31.3 further states that there shall be taken into account, together with the context, any subsequent agreement or practice relating to the treaty together with any relevant rules of international law. According to Article 31.4, a special meaning can also be given to a term “if it is established that the parties so intended”. Where the interpretation according to the provisions of Article 31 needs confirmation, or determination since the meaning is ambiguous or obscure or leads to a manifestly absurd or unreasonable result, recourse can be made to the supplementary means of interpretation under Article 32. These means include the preparatory works (*travaux préparatoires*) of the treaty and the circumstances of its conclusion. The Annex reproduces the text of Articles 31 and 32 in full.

29. Usually, the beneficiary State also makes an MFN pledge in a reciprocal way. See *Idem*, Article 4 and Commentary (5).

30. *Idem*, Article 8(2), and Commentary (1).

31. *Idem*, Article 8 Commentary (1).

32. *Idem*, Article 5, Commentary (5).

granting State and a third State, the treaty that contains the MFN treatment clause is considered to be the “basic” treaty.³³ As was held by the majority of the Court in the landmark *Anglo-Iranian Oil Company case*,³⁴ “this is the treaty which establishes the juridical link between the beneficiary State and a third party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent and isolated from the basic treaty, cannot produce any legal effect as between [...] the beneficiary State and [...] the granting State (it is *res inter alios acta*)”.³⁵ The beneficiary is entitled, to the extent provided by the MFN provision under its own treaty, to claim all rights and favours extended by the granting State to the third State. This extension can be seen as “ingenious” legal shorthand to treaty process.³⁶

The granting State and the beneficiary State can however limit in the basic treaty the extent of the favours that can be claimed by the beneficiary. If the clause contains a restriction, the beneficiary State cannot claim any favours beyond the limits set by the clause, even if this treatment does not reach the level of the favours extended by the granting State to a third State.³⁷

3.2. The *ejusdem generis* principle

The *ejusdem generis* principle is the rule according to which a MFN clause can only attract matters belonging to the same subject matter or the same category of subject as to which the clause relates.

33. *Idem*, Article 8, Commentary (1).

34. *Anglo-Iranian Oil Co. case (Preliminary objection)*, Judgment of 22 July 1952 (I.C.J. Reports 1952, p. 109). The decision of the Court contributed greatly to the clarification of the legal theory. Before the Court’s decision, several legal writers presented the operation of the MFN treatment clause as an exception to the rule *pacta tertiis nec nocent nec prosunt* (i.e. that treaties produce effects only as between the contracting parties). Legal theory is now unanimous in endorsing the findings of the majority of the Court in the *Anglo-Iranian case*. As the ILC said, rather than being an exception to this rule, it confirms it, see ILC Report, Article 8, Commentary (2).

35. *Idem*, Article 8, Commentary (2).

36. G. Schwarzenberger also wrote regarding the relation between the *pacta tertiis* rule and the MFN clause: “This drafting device [...] contributes greatly to the rationalization of the treaty-making process and leads to the automatic self-revision of treaties which are based on the most-favoured-nation standard. It makes unnecessary the incorporation in the treaty between grantor and the beneficiary of the most-favoured-nation treatment of any of the relevant treaties between the grantor and third States and their deletion whenever such treaties cease to be in force. So long as this last-mentioned aspect of the matter is kept in mind, most-favoured-nation clauses are correctly described as drafting (and deletion) by reference”. G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, London, 3rd ed, 1957, p. 243 and *Yearbook of the International Law Commission*, 1970, Vol. II, p. 204.

37. ILC Report, Article 8, Commentary (8).

Article 9 of the ILC Draft Articles provides that the beneficiary State of a MFN clause should acquire, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject matter of the MFN clause, and only with respect to persons or things which are specified in the clause or implied from its subject matter to benefit from it. Draft Article 10 goes on to suggest that the rights acquired should be those that the granting State extends to a third State within the limits of the subject matter of the MFN clause and only if the beneficiary persons or things belong to same category of persons or things which benefit from the treatment extended to the third party and have the same relationship with that State.³⁸

a) *What subject matter?*

The Commentary to Draft Articles 9 and 10 underlines that the rights of the beneficiary are limited, with respect to the subject matter, in two ways, namely by the clause itself, which refers to a certain matter, and secondly by the rights conferred by the granting State on the third State. Although the meaning of the rule is clear, its application is not always easy. The Commission considered the following cases.

In the **Anglo-Iranian Oil Company case (1952)**³⁹ – which resulted from the nationalisation by the Government of Iran of the oil industry – the United Kingdom invoked the MFN clauses of the agreements concluded with Iran in 1857 and 1903 to seek the treatment foreseen in the Treaty of Friendship, Establishment of Commerce of 1934 between Iran and Denmark and similar agreements concluded with Switzerland and Turkey in 1934 and 1937 that guaranteed the persons and property of the parties treatment in accordance with international law. The Court dismissed the claim on the basis that it had no jurisdiction.⁴⁰

In the case concerning **Rights of Nationals by the United States of America in Morocco (1952)**⁴¹ – which dealt in particular with the extent of the consular jurisdiction which the United States could exercise in the French Zone of

38. *Idem*, p. 26.

39. ICJ Reports, 1952, p. 93 and www.icj-cij.org/icjwww/idecisions/isummaries/ifussummary.

40. The Court found that it would have had jurisdiction only when a dispute related to the application of a treaty or convention concluded by Iran after its Declaration of acceptance of the jurisdiction of the Court, under Article 36(2) of its Statute. This Declaration was made on 19 September 1932, i.e. after the UK/Agreements of 1857 and 1903. This case was, nevertheless, mentioned by the ILC because it analysed MFN clauses by comparing the rights of a beneficiary State under a basic agreement with a granting State, with those provided by the granting State to third States.

41. Morocco Case (France v. U.S.A.), ICJ Pleadings, 1952, Vol. I.

Morocco and the question of fiscal immunity of US citizens – the International Court of Justice concluded that the United States was not entitled, by virtue of the MFN treatment clauses in its 1836 treaty with Morocco, to exercise consular jurisdictional rights in the French zone of Morocco other than those strictly included in that Agreement. The Court held in this connection that the United States had acquired additional consular jurisdiction by the effect of such MFN clauses, but that those MFN-derived benefits had come to an end with the termination by Great Britain of all its rights and privileges of a capitulatory character by the Franco-British Convention of 1937. The Court also concluded that the MFN clause did not provide the basis for fiscal immunity, given that no other State enjoyed it for the benefit of its nationals.⁴² The Court's comments seemed to imply, however, that the scope of the MFN clause in a treaty was confined to the matters dealt with in that Convention.

In the **Ambatielos case** (1952,⁴³ 1953,⁴⁴ 1956⁴⁵), the Greek government, relying upon Article X (MFN clause) and article XV (National treatment) of the Treaty of Commerce and Navigation concluded by Greece and the United Kingdom in 1886 and a Declaration annexed to the Treaty of Commerce and Navigation of 1926, invoked provisions embodied in earlier treaties between the United Kingdom and third States (Denmark, Sweden and Bolivia) to claim that Ambatielos, a Greek ship-owner, had suffered a denial of justice in regard to a dispute it brought before the English courts. By its Judgments of 1 July 1952 and 19 May 1953, the International Court of Justice found that it had jurisdiction to decide whether the United Kingdom was under the obligation to submit to arbitration the difference as to the validity of Ambatielos' claim, in so far as it was based on the Anglo-Hellenic Treaty of 1886. At the same time, the Court held that it had no jurisdiction to go into all the merits of the

42. The United States invoked the Peace Treaty between Morocco and the United States of 1836. That treaty dealt with a variety of matters including navigation, trade and consular jurisdiction. It explicitly provided for the United States consular jurisdiction in all disputes between United States citizens or protégés. The United States claimed additional rights to consular jurisdiction on the basis of an MFN clause in that Treaty, for all cases in which a United States citizen or protégé was merely a defendant. The third party treaties of Morocco, invoked by the United States, were the General Treaty with Great Britain of 1856 and the Treaty of Commerce and Navigation with Spain of 1861. These treaties granted jurisdiction in all cases in which the respective nationals were merely defendants. The Court found that "the United States acquired by virtue of the most-favoured nation clauses, civil and criminal jurisdiction in all cases in which the United States were defendants," but that those jurisdictional benefits were extinguished upon termination by Spain and Great Britain of their respective treaties with Morocco. See www.icj-cij.org/icjwww/idecisions/ismmaries/ifussummary520827.htm. The full text of the treaty is available at www.yale.edu/lawweb/avalon/diplomacy/barbary/bar1836t.htm.

43. ICJ Reports 1952.

44. ICJ Reports 1953.

45. United Nations, *Reports of International Arbitral Awards*, Vol. XII, United Nations, 1963.

case. The case was subsequently submitted to a Commission of Arbitration which ultimately rejected the claim, in its Award of 6 March 1956, on the basis that the provisions contained in other Treaties invoked by the Greek government provided for “privileges, favours or immunities” no more favourable than those resulting from the national treatment clause. However, the ILC referred to this case because the Commission of Arbitration said:

“The most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.” Regarding the specifics of the case, it held that: “... It is true that the administration of justice”, when viewed in isolation is a subject-matter other than “commerce and navigation”, but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation. [...] Therefore it cannot be said the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the application of the most-favoured-nation clause, when the latter includes “all matters relating to commerce and navigation”.⁴⁶

The International Law Commission also relied on decisions of national courts.⁴⁷ In a 1913 **French case**,⁴⁸ the French Court of Cassation decided against the invocation of certain procedural requirements for bringing suit found in a French-Swiss Convention on jurisdiction and execution of judgment, in favour of German nationals as a result of an MFN clause in an 1871 Franco-German commercial treaty applying to the “admission and treatment of subjects of the two nations.” The Court concluded that “these MFN provisions pertain exclusively to the commercial relations between France and Germany, considered from the point of view of the rights under international law, and that they do not concern the rights under civil law and that “the most-

46. The submissions of the parties and the opinions expressed in this case also provide useful insights into the operation of the MFN clause and the *ejusdem generis* rule. For instance, in invoking this principle, the counsel for the United Kingdom stated that “the clauses conferring most favoured nation rights in respect of a certain matter, or class of matter, can only attract the rights conferred by other treaties in regard to the same matter of class of matter. [...] This furnishes the conclusive answer to any suggestion that Article X can attract any provisions in other treaties except provisions about commerce and navigation. It cannot attract provisions dealing with the administration of justice and related matters”. The Counsel of Greece argued on the other hand that access to the courts and administration of justice in commercial matters is not outside the “genus” of the favours referred to in the MFN clause of the Greek/UK treaty. They are part of “in all matters relating to commerce”. See Yearbook of the International Law Commission, 1970, Vol. II, par. 69.

47. See “Digest of decisions of national courts relating to the most-favoured-nation clause”, prepared by the UN Secretariat for the ILC, A/CN.4/269, 29 March 1973.

48. This description is drawn from the ILC Report, Article 10, Commentary (4).

favoured-nation clause may be invoked only if the subject of the treaty stipulating it is the same as the particularly favourable treaty the benefit of which is claimed”.

In *Lloyds Bank v. de Ricqlès and Gaillard* (1930),⁴⁹ the Commercial Tribunal of the Seine dismissed a claim by Lloyds Bank, which having been ordered to give security for costs, invoked Article I of the Anglo-French Convention regulating commercial maritime relations of 28 February 1882 to benefit from the provisions of a Franco-Swiss Treaty of 15 June 1889, which gave Swiss nationals the right to sue in France without being required to give security for costs. Lloyds argued that Article I of the Anglo-Convention engaged the parties to give each other “immediately and unconditionally the benefit of every favour, immunity or privilege in matters of commerce and industry which have been conceded by one [of] the parties to any third nation whatsoever, whether within or beyond Europe”. The Tribunal held that a party to a convention of a general character such as the Anglo-French Convention could not claim the MFN clause the benefits of a special convention such as the Franco-Swiss Convention, which dealt with one particular subject, namely freedom from the obligation to give security for costs.⁵⁰

In reference to this case, the International Law Commission suggested that, under the reasoning of this case, there would be a dilemma facing the drafters of an MFN clause of either drafting the clause in too general terms, risking the loss of its effectiveness through a strict interpretation of the *ejusdem generis* rule, or of drafting it too explicitly, enumerating its specific domains, in which cases the risk consists in the possible incompleteness of the enumeration.⁵¹

The ILC Commentary stated that it is only the subject-matter of the clause, not the treaty or agreement containing the clause that must belong to the same category. In other words, it is not necessary that the treaty or agreement including the clause be of the same category as that of the benefits that are claimed under the clause. To hold otherwise would seriously diminish the value of the MFN clause. However, the text of the treaty including the MFN clause does serve as part of the context for its interpretation under Article 31(1) of the Vienna Convention on the Law of Treaties.

In its Commentary (11) to Draft Articles 9 and 10, the Commission observed that, since the effect of the MFN process is, by means of the provisions of one treaty, to attract those of another, unless this process is

49. This summary of the case is based on the ILC Report, Article 10, Commentary (5).

50. In other words, in this case as well as the previous one, the Tribunals adopted the view that MFN clauses could not be invoked to compare treatment provided under two treaties dealing with different subjects.

51. *Idem*, Commentary (6) to articles 9 and 10.

strictly limited to cases where there is a substantial identity between the subject matter of the two sets of clauses concerned, the result could be to impose upon the granting State obligations it never contemplated.

b) What categories of persons or things?

A similar reasoning was proposed by the Commission for gauging the application of the MFN treatment to particular categories of persons or things. In essence, the beneficiary State may claim MFN treatment only for the category of persons or things that receives or is entitled to receive certain treatment or certain favour, under the right of a third State. Furthermore, the persons or things in respect of which the MFN treatment is claimed must be in the same relationship with the beneficiary State as are the comparable persons or things with the third States.⁵² There are cases where the MFN clause is silent on the persons or things that may benefit from it. In such case, the ILC suggests, the subject matter of the clause – for instance customs duties, commerce, shipping – would implicitly determine the class of persons or things that can benefit from it – importers, merchants, vessels.⁵³

4. Recent cases

Among the numerous cases brought to ICSID in recent years,⁵⁴ two cases, **Maffezini v. Kingdom of Spain** and **Tecnicas MedioAmbientales Tecmed S.A. v. the United Mexican States** stand out as raising issues concerning the MFN clause. One issue is whether an MFN clause applies to dispute settlement mechanisms and questions of jurisdiction. Five new cases have emerged since *Maffezini v. Kingdom of Spain* and *Tecnicas MedioAmbientales Tecmed S.A. v. the United Mexican States*, four under BITs and one under the Energy Charter Treaty (ECT). None of the investor-State claims brought under NAFTA Chapter Eleven has resulted in a finding of a breach of the MFN clauses.

4.1. BITs

***Maffezini v. Spain* (2000)**

*Maffezini v. Kingdom of Spain*⁵⁵ concerned a dispute arising from the treatment allegedly received by the Argentine investor Emilio Agustin

52. *Idem*, Commentary (15) to articles 9 and 10.

53. *Supra* note 18, p. 27.

54. By the latest account, 32 new cases have been registered by the Centre in 2003 and 13 in 2004, as compared to 15 such claims in 2002 and only 12 and 5 in 2001 and 2000.

55. Emilio Agustin Maffezini v. Kingdom of Spain (ICSID No. Apr/97/7), Decision on Jurisdiction of 25 January 2000 and Award of the Tribunal of 13 November 2000. These decisions are available at www.worldbank.org/icsid/cases.

Maffezini from Spanish entities, in connection with his investment in an enterprise for the production and distribution of chemical products in the Spanish region of Galicia. Spain (the Respondent) objected to the tribunal's jurisdiction since Mr. Maffezini (the Claimant) had failed to comply with an exhaustion of local remedies requirements set forth in the Argentine-Spain BIT. Mr. Maffezini admitted that the dispute had not been referred to the Spanish courts prior to its submission to ICSID, but he argued that the MFN clause in the Argentine-Spain BIT would allow him to invoke Spain's acceptance of ICSID arbitration contained in the Chile-Spain BIT and that none of the exceptions from MFN in the Argentine-Spain BIT applied to the dispute settlement provisions at issue in the case.

On 25 January 2000, the Tribunal decided that,⁵⁶ by virtue of the MFN clause of the 1991 Argentine-Spain Bilateral Investment Treaty, the claimant had the right to import the more favourable jurisdictional provisions of the 1991 Chile-Spain Agreement and, as a result, to resort to international arbitration without being obliged to submit its dispute to Spanish courts for a period of eighteen months beforehand.⁵⁷ Paragraph 2 of Article IV of the Argentina/Spain BIT provides that after guaranteeing a fair and equitable treatment for investors (paragraph 1):

*"In all matters subject to this Agreement, this treatment shall be no less favourable than that extended by each Party to the investments made in its territory by investors of a third country."*⁵⁸

In this connection, the Tribunal referred to the *ejusdem generis* principle⁵⁹ and the reasoning found in the *Ambatielos* case (namely that the MFN clause can apply to provisions concerning the "administration of justice"). The Tribunal also stated that today's dispute settlement arrangements are "inextricably related" to the protection of foreign investors as shown below:

"Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most-favoured-nation clause, the Tribunal considers that there are good reasons to conclude that today dispute

56. Decision on Jurisdiction of 25 January 2000, www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf.

57. The Tribunal noted that the Argentine-Spain BIT provides domestic courts with the opportunity to deal with a dispute for a period of eighteen months before it may be submitted to arbitration. Article 10(2) of the Chile-Spain BIT, however, imposes no such condition. It provides merely that the investor can opt for arbitration after the six-month period allowed for negotiations has expired. See *Supra* note at paragraph 39.

58. *Idem*, at paragraph 38. The Spanish original of the clause reads as follows: "En todas la materias regidas por el presente Acuerdo, este tratamiento no sera menos favorable que el otorgado por cada Parte a las inversiones realizadas en su territorio por inversores de un tercer pais."

59. *Idem*, at paragraph 56.

settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad.⁶⁰ It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.

International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are closely linked to the material aspects of the treatment accorded...”

The Tribunal concluded that:

“... if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most-favoured-nation clause as they are fully compatible with the *ejusdem generis* principle...”⁶¹

Under the broad MFN clause of the Argentine-Spain treaty, which expressly referred to “all matters subject to the Agreement”⁶² the Tribunal did not accept the respondent’s claim that “under the principle *ejusdem generis* the most-favoured-nation clause can only operate in respect to [...] substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions”.⁶³

In rendering its decision, the Tribunal observed that in some BITs the MFN clause explicitly embraces the provisions on dispute settlement.⁶⁴ In other treaties it refers to all rights contained in the agreement without mentioning dispute settlement.⁶⁵

60. Footnote omitted.

61. *Supra*, note 56 at 56.

62. The Tribunal also referred to the 1992 Agreement between Chile and the Belgian-Luxembourg Economic Union as an example of other MFN treaty clauses applying to “all rights contained in the present Agreement”. *Supra* Note 56 at 53, footnote 21.

63. *Idem*, at 15.

64. The Tribunal cited in this connection the investment treaties concluded by the United-Kingdom.

65. *Idem* at par. 52, 53.

However, the Tribunal stated the following limits to its interpretation of the clause:

“... As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might not have envisaged as fundamental conditions for their acceptance of the agreement in questions, particularly if the beneficiary is a private investor...”

Here it is possible to envisage a number of situations not present in the instant case. First, if one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most-favoured-nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law. Second, if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy. Third, if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties. Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals. It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.”⁶⁶

66. At pp. 23-24. Footnotes omitted.

Tecmed v. Mexico (2003)^{67, 68}

In this case, decided on 29 May 2003, the Respondent was found to have breached its obligations under the 1996 Mexico/Spain BIT as set forth in Articles 4(1) (Fair and Equitable Treatment) and 5(1) (Nationalisation and Expropriation) in respect to the Mexican government's failure to re-license the Spanish investor Tecmed's hazardous waste "Cytrar" in the state of Sonora. In considering the challenges made to the Arbitral Tribunal's jurisdiction and the timely submission by the Claimant of some of its claims, however, the Tribunal was called upon to decide whether the "most favourable conditions" foreseen in Article 8(1) of the Agreement entitled the claimant to a retroactive application of its claim in view of a more favourable treatment in connection with that matter which would be afforded to an Austrian investor under the Austria/Mexico BIT of 29 June 1998. This article reads:⁶⁹

*"If the provisions of law of one of the Contracting Parties or obligations under international law at the margins of the present Agreement, current or future, between the Contracting Parties, result in a general or specific regulation according to which it should be given to investments of investor of the other Contracting Party, a treatment more favourable than that it is envisaged in the present Agreement, such regulation shall prevail over the present Agreement, to the extent that it is more favourable."*⁷⁰

In arguing for this result, the claimant referred to the Maffezini judgment. The Tribunal did not examine the provisions of the Austria/Mexico BIT or the MFN provisions of the Mexico-Spain BIT and, referring to paragraphs 62 and 63 of Maffezini, discussed above, it specifically ruled that:

"... matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than

67. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States [ICSID Case No. ARB(AF)/00/2] www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf.

68. It has also been reported that the German investor claimant in Siemens AG v. Argentine Republic, ICSID case No. ARB/02/08 may also use the Maffezini construction in this case. See "Investor-State Arbitration: A Hot Issue in Latin America, Guido Santiago Tawil, M. & M. Bomchil, Buenos Aires. Horacio D. Rosatti makes a similar observation on the implications of the Maffezini case in "Bilateral Investment Treaties, Binding International Arbitration and the Argentine Constitutional System", in *La Ley*, 15 October 2003.

69. Article 8(1) is a separate article from the MFN treatment clause in Article 4(2) of the Agreement.

70. The Spanish original of the clause is as follows: "1. Si de las disposiciones legales de una de las Partes Contratantes, o de las obligaciones emanadas del Derecho Internacional al margen del presente Acuerdo, actuales o futuras, entre las Partes Contratantes, resultare una reglamentación general o especial en virtud de la cual deba concederse a las inversiones de inversores de la otra Parte Contratante un trato más favorable que el previsto en el presente Acuerdo, dicha reglamentación prevalecerá sobre el presente Acuerdo, en cuanto sea más favorable."

matters of procedure or jurisdiction, due to their significance and importance, **go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties** (emphasis added). These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor, and particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favoured national clause.”⁷¹

Similarly, the Tribunal found that Title II(4) and (5) of the Appendix to the Mexico/Spain Agreement (relating to dispute settlement):

“... contains requirements relating to the substantive admissibility of claims by the foreign investor, i.e. its access to the substantive protection regime contemplated under the Agreement. Consequently, such requirements are necessarily a part of the essential core of negotiations of the Contracting Parties; it should therefore be presumed that they would not have entered into the Agreement in the absence of such provisions. Such provisions, in the opinion of the Arbitral Tribunal, therefore fall outside the scope of the most-favoured-nation clause contained in Article 8(1) of the Agreement.”⁷²

In considering the substantive merits of the case, the Tribunal found no violation of the MFN clause of the Agreement.⁷³

Siemens A.G. v. Argentina (2004)⁷⁴

On 3 August 2004, an ICSID Tribunal upheld jurisdiction in a claim filed in May 2002 by Siemens A.G. under the Argentina-Germany bilateral investment treaty for expropriation and alleged breaches by Argentina of said treaty with respect to the termination of an agreement with a local Siemens subsidiary. Argentina objected to ICSID jurisdiction on the ground, *inter alia*, that the claimant had not complied with the requirement in the treaty that claimants pursue domestic court remedies for 18 months before resorting to international arbitration. The claimant argued that, under the MFN clause of the treaty, it was

71. Paragraph 69 ends with a footnote making a cross reference to paragraphs 25-26 and 62-63 of the Maffezini Decision on Jurisdiction.

72. *Idem*, p. 24, paragraph 74.

73. “The Claimant has failed to furnish convincing or sufficient evidence to prove, at least *prima facie*, that the Claimant’s investment received, under similar circumstances, less favourable treatment than that afforded to nationals of the State receiving the investment of a third State, or that said investment was subject to discriminatory treatment upon the basis of considerations relative to nationality or origin of the investment or the investor.” *Ibid*, p. 73, paragraph 181.

74. Siemens A.G. v. The Argentine Republic (ICSID No. ARB/02/8), available at http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf.

entitled to the treatment provided by the dispute-settlement provision of the Argentine-Chile BIT, which did not impose any such requirement. The Tribunal accepted this argument and rejected Argentina's objections to the application of the MFN clause.⁷⁵ The Tribunal considered that the MFN clause should be interpreted in accordance with the plain meaning of its terms in their context and in the light of the object and purpose of the treaty which, as expressed in its title and preamble, was "to protect" and "to promote" investment.⁷⁶ The tribunal held that, on a plain and contextual reading, the terms "treatment" and the phrase "activities related to the investment" found in the treaty's MFN clause "are sufficiently wide to include dispute settlement".⁷⁷ It also considered that the treaty provision requiring that local remedies be pursued for 18 months did not require the exhaustion of local remedies "as this rule has been understood under international law".⁷⁸

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (2004)⁷⁹

On 21 May 2004, an ICSID Tribunal found that Chile had breached its obligations under the fair and equitable treatment provisions of the Chile-Malaysia bilateral investment treaty (BIT) in regard to a real estate project by MTD Equity, a Malaysian company, in Santiago, Chile. The claimants based part of their claims on the argument that, by operation of the MFN clause of the Chile-Malaysia treaty, they were entitled to benefit from the treatment of the provisions of the Chile-Croatia BIT and the Chile-Denmark BIT regarding the granting of permit awards. The Tribunal considered that "the legal basis of the claim valid based on the wide scope of the MFN clause"⁸⁰ in the Chile-Malaysia BIT. It also agreed that "to include as part of the protections of the Chile-Malaysia treaty those included in the Chile-Denmark BIT and the Chile Croatia BIT "is in consonance" with the objective of the Chile-Malaysia BIT "to protect investments and create conditions favorable to investments".⁸¹ It concluded, however, the treatment foreseen in the Chile-Croatia BIT and the Chile- Denmark BIT did not provide an entitlement to a change in Chilean

75. *Supra* Note, paragraph 110.

76. *Supra* Note, paragraphs 80-81.

77. *Supra* Note, paragraph 103.

78. *Supra* Note, paragraph 104.

79. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (ICSID Case No. ARB/01/7), available at www.worldbank.org/icsid/cases/awards.htm.

80. *Supra* Note, paragraph 187. The first paragraph of the MFN clause of the Chile-Malaysia BIT – Article 3(1) – reads as follows : "Investments made by investors of either Contracting Pary in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favorable than that accorded to investments made by investors of any third State".

81. *Supra* Note, paragraph 104.

laws and regulations.⁸² The Respondent was found to have breached its BIT obligations on the ground that Foreign Investment Committee's approval of MTD's investment was made in full knowledge that this was against the urban policy of the Government, constituting a breach of the fair and equitable treatment obligation of the Chile-Malaysia treaty.⁸³

Salini Costruttori and Italstrade v. Jordan-Argentina (2004)⁸⁴

On 9 November 2004, an ICSID Tribunal upheld jurisdiction in a claim filed in August 2002 by Salini Costruttori S.P.A. and Italstrade S.P.A. under the Jordan-Italy bilateral investment treaty (BIT) for alleged non performance of Jordan's obligations under a dam construction project. Jordan objected to ICSID jurisdiction on the ground that contractual disputes were governed by the dispute settlement provisions of the contract and that claimants could not, by virtue of the MFN clause of the Jordan-Italy BIT, avail themselves of the more advantageous dispute settlement provisions in other BITs such as that of Article IX of the Jordan-US BIT⁸⁵ (Article IX gave to US investors in Jordan "the right to submit investment disputes to ICSID regardless of any clause in the investment agreement providing for a different dispute settlement mechanism").⁸⁶ The Tribunal rejected the latter claimants' argument. It observed that the circumstances of this case were different than that of the *Maffezini v. Spain* case.⁸⁷ Indeed, the MFN clause in the Jordan-Italy BIT does not include any provision providing extending its scope of application to dispute settlement. Furthermore, it considered that the Claimants had submitted nothing from which it might be established that the common intention of the Parties was to have the MFN clause apply to dispute settlement... On the contrary the common intent of the Parties to exclude contractual claims from ICSID jurisdiction was clear.⁸⁸ From this the Tribunal concluded that the MFN clause of the Italy-Jordan BIT did not apply in so far as dispute settlement causes are concerned.⁸⁹ It upheld jurisdiction on other grounds.⁹⁰

82. *Supra* Note, paragraph 206.

83. *Supra* Note, paragraph 189.

84. *Construttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan*, (ICSID Case No. ARB/02/13), available at www.worldbank.org/icsid/cases/awards.htm.

85. *Supra* Note, paragraph 23.

86. *Supra* Note, paragraph 21.

87. *Idem*.

88. *Supra* Note, paragraph 118.

89. *Supra* Note 1, paragraph 119.

90. *Supra* Note, paragraph 179.

Camuzzi International S.A. v. The Republic of Argentina (2005)⁹¹

On 10 June 2005, an ICSID Tribunal upheld jurisdiction in a claim filed in April 2003 by Camuzzi International S.A. under the Argentina-Belgium-Luxembourg Economic Union bilateral investment treaty (the treaty) for alleged breaches by Argentina of Camuzzi's shareholder's interests in three local transport and distribution electrical companies as a result of the economic measures adopted by Argentina under the "Public Emergency Law of 2002". Argentina objected to ICSID jurisdiction on a number of grounds. Unlike the *Siemens A.G. v Argentina* case,⁹² however, Argentina did not object to Camuzzi's claim that under the MFN clause of the treaty (Article 4), Camuzzi did not need to comply with the requirement to pursue domestic court remedies for 18 months before resorting to international arbitration. The claimant argued that under this MFN clause – which covered "all matters subject to the treaty"⁹³ – it was entitled to the treatment provided by the dispute-settlement provision of the Argentine-United States BIT, which did not impose such requirement. The Tribunal concurred with this argument, stating that the waiting period of 18 months foreseen in Article 12(2) and 12(3) of the treaty was not applicable in this case⁹⁴ and allowed the case to proceed on the merits.⁹⁵

4.2. NAFTA

Two claimants under NAFTA's investment chapter have relied on MFN provisions. In the final awards of both cases, however, the tribunals rejected the applicability of these MFN provisions. As a result, neither case illuminates the principle subject of this article, i.e., the operation of MFN clauses.

ADF v. United States of America (2002)

The ADF case is the only completed NAFTA claim in which the claimant alleged a breach of the MFN treatment clause, Article 1103. According to the Tribunal's 9 January 2003 award, ADF's Article 1103 claim was an attempt to mitigate the impact of the NAFTA Free Trade Commission's (FTC's) Interpretation on the Article 1105 claim.⁹⁶ However, the Tribunal dismissed the Article 1103 claim. It found that, pursuant to Article 1108(7)(a), the MFN article did not apply to ADF's claim because the case involved government

91. *Camuzzi International S.A. v. The Republic of Argentina* (ICSID No. ARB/03/7), available at <http://ita.law.uvic.ca/documents/Camuzzi2jurisdiction.pdf>.

92. See summary above.

93. *Supra* Note, paragraph 19.

94. *Camuzzi International S.A. v. The Republic of Argentina* (ICSID No. ARB/03/7) paragraph 28 and paragraph 34(iii).

95. *Supra* Note, paragraph 66.

96. *ADF Group Inc. v. United States of America* (Award, 9 January 2003), paragraph 136. www.state.gov/documents/organization/16586.pdf.

procurement.⁹⁷ As a result, the tribunal did not engage in a rigorous analysis of ADF's Article 1103 claim.

Pope & Talbot Inc. v. Canada (2001, 2002)

In *Pope and Talbot*, the claimant did not allege a breach of Article 1103, but rather a breach of Article 1105. However, the Final Merits Award of *Pope and Talbot* rendered on 10 April 2001 suggested that an MFN clause could lead to import into the NAFTA what the tribunal described as more favourable “fair and equitable treatment” provisions contained in some BITs.⁹⁸ The Tribunal then observed that this formulation entitles investors to fair and equitable treatment without regard to any limitations inherent in international law since these agreements provided that “investors must at all times be accorded fair and equitable treatment [...] and shall in no case be accorded treatment less than required by international law”. The Tribunal then considered that, because NAFTA investors could benefit from this more favourable treatment by virtue of Article 1103, it would make no sense for NAFTA Parties to deny those rights under Article 1105 only to find them revived pursuant to Article 1103. The Tribunal also stated that the NAFTA Parties were unlikely to have intended, in article 1105, to treat each other's investors less favourably than those from other countries.⁹⁹ On that basis, the Tribunal found a violation of Article 1105.

97. *Idem*, paragraph 196.

98. See *Pope & Talbot Inc. v. Government of Canada (Tribunal Decision – 10 April 2001)*, paragraphs 111, 115. The Tribunal appears to have relied on the BITs of “at least Canada and the United States”. However it did not cite in the award any provisions of Canadian BITs or any secondary sources that cite Canadian FIPA provisions while the US BITs that it cited predated the NAFTA. www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf. Since both the USA and Canada have taken exceptions from MFN for all prior agreements, (NAFTA Annex IV), it is not clear how prior BITs of the United States could be relevant to interpreting the MFN clause in relation to Canada.

99. *Idem*, paragraphs 105-118.

Shortly after the issuance of the Merits Award, the NAFTA Free Trade Commission (FTC) issued a binding interpretive note on Article 1105.¹⁰⁰ This was followed some months later by the Tribunal's issuance of the Damages Award. In that award, the Tribunal accepted, as a working basis,¹⁰¹ the FTC interpretation, which clarified that Article 1105 does not require treatment in addition to or beyond that which is required by customary international law minimum standard of treatment, but maintained its prior award in favour of the claimant, concluding that Article 1105 was breached even under the FTC's interpretation. The Tribunal, however, found it "unnecessary to consider issues relating to Articles 1102 or 1103 which had been raised following upon the Interpretation".¹⁰²

The Pope & Talbot Tribunal's reasoning in the merits phase has not been followed in subsequent NAFTA cases.¹⁰³

4.3. ECT

*Plama Consortium Limited v. the Bulgaria (2005)*¹⁰⁴

On 8 February 2005, an ICSID Tribunal upheld jurisdiction in a claim filed in December 2002 by Plama Consortium Limited under the ICSID arbitration provisions of the Energy Charter Treaty (ECT) and the MFN provision of the Bulgaria-Cyprus bilateral investment treaty for alleged breaches by Bulgaria of the ECT for misconduct as regard a Nova Plama oil refinery in Northern Bulgaria. While the Tribunal rejected Bulgaria's objections as to the jurisdictional issues raised with respect to the ECT, it accepted Bulgaria's

100. Paragraph 2 of the FTC's Interpretation provides that 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 customary international law minimum standard of treatment. Paragraph 3 states that 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.

101. While the Tribunal noted that "it might appear" that its own interpretation was different from the one adopted by the FTC, 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. See *Pope & Talbot Inc. v. Government of Canada* (Tribunal Decision – 31 May 2002, at 47, 56 and 69 www.dfait-maeci.gc.ca/tna-nac/documents/damage_award.pdf).

102. *Idem*, at 66.

103. In the *Loewen* case, the Tribunal said that, to the extent that the Pope & Talbot Tribunal had suggested an interpretation of Article 1105 different from that adopted by the FTC, it should be disregarded [*The Loewen Group, Inc and Raymond L. Loewen v. United States of America*, ICSID case No. ARB (AF)98/3), Final Award, 23 June 2003, see www.state.gov/documents/organization/22094.pdf].

104. *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) available at www.worldbank.org/icsid/cases/plama-decision.pdf.

contention that the MFN provision of the Bulgaria-Cyprus treaty did not entitle the claimant to invoke ICSID jurisdiction under broader investor-state arbitration clauses in other BITs – such as the Bulgaria-Finland BIT – as compared to the dispute settlement provisions in the Bulgaria-Cyprus treaty which are concerned only with disputes relating to expropriation. The Tribunal based its finding, *inter alia*, on available evidence to the effect that “at the time of the conclusion of the treaty, Bulgaria and Cyprus limited specific investor-state dispute settlement to the provisions set forth in the BIT and had no intention of extending those provisions through the MFN provision”.¹⁰⁵ The Tribunal also took the view that the “intention to incorporate dispute settlement (in the scope of application of the MFN) must be clearly and unambiguously expressed”¹⁰⁶ and concluded accordingly that the MFN provision of the Bulgaria-Cyprus BIT to ICSID arbitration cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration.

5. Summing up

The main points in the present survey may be summarised as follows:

- MFN treatment has long been a core standard of international economic relations. It provides for equal competitive opportunities between nations in respect to the matters to which the particular MFN clause applies, be they in the field of trade, investment, or any field of economic co-operation. Although its application to international investment is more recent than that for international trade, it is widely accepted, together with national treatment, as one of the most important standards of treatment for investors and their investments.
- Despite their prevalence in investment treaties, MFN clauses do not have a universal meaning. Indeed, the formulation and application of MFN clauses varies widely among investment treaties. In some cases, the scope of application of the clauses extends to the entire content of the treaty; in others, the clause is limited to only some of the matters addressed by the treaty. The proper application and interpretation of a particular MFN clause in a particular case requires a careful examination of the text of that provision undertaken in accordance with the treaty interpretation rules as set out in the Vienna Convention
- The *ejusdem generis* principle has been applied in the jurisprudence of international tribunals and national courts and by diplomatic practice. According to this principle, an MFN clause can attract the more

105. *Supra* Note, paragraphs 195-197.

106. *Supra* Note, paragraph 204.

favourable treatment available in other treaties only in regard to the same “subject matter”, the same “category of matter” or the same “class of matter”. While the principle is clear, its application is not always simple or consistent. This principle can provide some useful guidance. However the interpretation and application of a particular MFN clause must be undertaken, as noted above, based on the text of the provision and according to the general rules of interpretation as embodied in the Vienna Convention.

ANNEX 4.A1

*Vienna Convention on the Law of Treaties*¹⁰⁷

Article 31. General Rule of Interpretation

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - any agreement relating to the treaty which was made by one or more parties in connexion with the conclusion of the treaty;
 - Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its

107. Concluded in Vienna on 23 May 1969. Came into force on 27 January 1990. Ratified by 70 countries.

conclusion, in order to determine the meaning when the interpretation according to article 31, or to determine the meaning when the interpretation according to article 31:

- a) leaves the meaning ambiguous or obscure; or
- b) leads to a result which is manifestly absurd or unreasonable.

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