

**THE
FAIR AND EQUITABLE TREATMENT
STANDARD**

IN INTERNATIONAL INVESTMENT TREATIES

Candidate number: 830004

Supervisor: Ivar Alvik

Delivered on 31 August 2005

Number of words: 17 313

24/02/2006

Content

1	INTRODUCTION.....	1
1.1	Fair and equitable treatment	1
1.2	Main elements in investment treaties	2
1.3	The fair and equitable treatment and breach of another treaty provision.....	4
1.4	Sources	4
1.5	Related issues.....	5
1.5.1	<i>State Responsibility</i>	5
1.5.2	<i>Human Rights.....</i>	6
1.6	Outline of the Thesis	6
2	THE INTERNATIONAL MINIMUM STANDARD OF TREATMENT	7
3	THE RELATIONSHIP BETWEEN THE FAIR AND EQUITABLE TREATMENT STANDARD AND THE INTERNATIONAL MINIMUM STANDARD.....	11
4	”FAIR AND EQUITABLE TREATMENT” AS TREATY STANDARD	16
4.1	The ordinary meaning of the terms.....	16
4.1.1	<i>“Fair and equitable”, “reasonable and equitable” and “equitable”</i>	16
4.1.2	<i>Reference to “international law” or “customary international law”</i>	18
4.2	Context, object and purpose	19
4.3	Supplementary means of interpretation	20
4.4	Inter-temporal dimension	20
4.5	NAFTA – The interpretation by the FTC.....	21

5	CORE ELEMENTS	23
5.1	Is it a unified standard?.....	23
5.2	Denial of justice.....	27
5.2.1	<i>Discriminatory and Arbitrary</i>	30
5.2.2	<i>Transparency</i>	32
5.3	Due diligence	33
5.4	Good faith	35
5.5	The legitimate expectations of the investor.....	36
5.6	Is fair and equitable treatment really a non-contingent standard?	39
6	DO THE DEVELOPMENTS OF THE FAIR AND EQUITABLE TREATMENT STANDARD REPRESENT AN EVOLUTION OF THE INTERNATIONAL MINIMUM STANDARD?	41
7	FINAL REMARKS.....	43
8	REFERENCES.....	46
8.1	Literature.....	46
8.2	Treaties	49
8.3	Soft Law Instruments	49
8.4	Documents	50
8.5	Case-law	51
8.5.1	<i>International Court of Justice</i>	51
8.5.2	<i>Arbitral awards.....</i>	52

1 Introduction

1.1 Fair and equitable treatment

Most investment protection treaties include a provision on fair and equitable treatment¹. The provision is included to ensure an investor from one of the contracting states a minimum level of treatment in the territory of the other, unrelated to the treatment of national investors². The fair and equitable treatment standard is intrinsically connected to the international minimum standard (hereinafter “minimum standard”) in customary international law (hereinafter; “customary law”³).

In most countries fairness and equity are considered to be fundamental values of the legal system. A provision like fair and equitable treatment, with the aim to safeguard a foreign investor against subjective arbitrariness and the authorities’ misuse of power, might seem superfluous in this setting. However, the standard is presumed to reflect a *common international level* of treatment which the Parties to a treaty accept as a matter of positive law⁴.

The provision has proven difficult to interpret, and case law on the matter has been substantial during the last five years⁵. The fair and equitable treatment standard illustrate a political, ethical and legal problem inherent in investment protection treaties; the balancing the foreign investor’s interests with the sovereign right of the host state to regulate and govern in its own territory. The wider interpretation of the standard, the more the sovereign power and legislative will of the states are limited.

There are principally three interconnected themes of discussion in relation to the provision; what level of treatment is guaranteed by the fair and equitable treatment standard? What is its relationship to the minimum standard of treatment under

¹ In a study of 335 bilateral investment treaties from the early 1960s to the early 1990s, only 28 did not expressly include the standard. *See* Khalil, referred in Vasciannie (2000) p. 126. A provision on “equitable” treatment was included in a treaty for the first time in the 1948 US-Italy FCN

² *See*, however, item 5.2 where this starting point is somewhat nuanced.

³ Except in item 4.1.2

⁴ Vasciannie (2000) p.101

⁵ One of the first arbitration on the provision was in 2000 (art. 1105 of NAFTA). In 2004 the standard was mentioned in 14 of 17 disputes (arbitration on jurisdiction and merits), reported by Investment Treaty Arbitration on <http://ita.law.uvic.ca/>

customary law? And what impact does the development regarding the fair and equitable treatment standard have on customary law.

There have been various attempts to codify the fair and equitable treatment standard. Some of these attempts have remained drafts, others are non-binding documents and some have become multilateral treaties⁶. It will lead to far to present the attempts here, but a survey by OECD⁷ is enclosed in Annex I.

1.2 Main elements in investment treaties

To illustrate the “framework” in which the fair and equitable treatment standard is most often set, I will shortly present the main elements commonly included in an investment protection treaty.

The scope of application is normally much more comprehensive than the ordinary meaning of “investment” would entail, and the phrase is traditionally defined in very wide-ranging terms⁸. The treaty normally defines “investors” as nationals and companies, and states are in principle free to choose the criteria of nationality⁹. Under most treaties there is an obligation to *promote* investments of the other Party’s investors; however, *admission* of foreign investment is ultimately a matter for each state to decide upon and regulate in the exercise of its sovereignty, and the treaties do normally not deal with questions of establishment¹⁰.

The treaties normally contain provisions on *transfers* and *expropriation*¹¹. The limitations on expropriation (public purpose and in accordance with law), and the right to compensation, have traditionally been considered a part of the minimum standard customary law. There is however a substantial discussion as to how far this right goes. The expropriation clause is usually quite comprehensive, including measures

⁶ Schreuer (2005) p. 357 with further references

⁷ OECD DAF/IME(2003)4/REV3 pp. 3-5

⁸ “every kind of asset”, adding a broad, non-exhaustive list of what this might include

⁹ Whether the *investor* or the *investment* is the object of the fair and equitable treatment standard depend the language of the specific treaty, see e.g. *Siemens* para 91-92 and *Plama* para 190

¹⁰ Shihata p. 1372, Vasciannie p. 112 and Abs-Shawcross p. 119. An exception is the US treaties, which usually include pre-establishment provisions

¹¹ The provision on expropriation is probably, together with the non-discrimination issue and the dispute settlement provision, the subject that is most contentious, but also the most important element in a BIT

“tantamount” to expropriation, and giving guidance to “prompt, adequate and effective” compensation¹².

A key article in the treaties is the *investor-state disputes settlement* provision, which gives the investor the possibility to pursue his claims directly towards the host state, and contains an unconditional prior consent to arbitration from the contracting states¹³.

There are usually also provisions on *state-state dispute settlement*.

The treaties also include *general treatment-articles*. They are commonly grouped into two categories; the non-contingent; *fair and equitable treatment* and *full protection and security*, and the contingent, like the article on *national treatment* and the article on *most favoured national treatment*¹⁴. Fair and equitable treatment and full protection and security are usually included in the same provision, and there is an inherent connection between the two¹⁵. They have both been considered as part of customary law¹⁶.

Most of the provisions, like expropriation, have specific conditions on *compensation* set out in the article itself, or a clear relationship to the often included “compensation for loss” article. The fair and equitable treatment standard does not refer to specific compensation standards, and the appropriate measure of compensation has been discussed by several tribunals¹⁷.

An issue that has frequently been discussed in relation to investment disputes is which acts or omissions that can be attributed to the host state. I will not go further into this discussion in the present paper, but will use the term “state” concerning all entities which actions will be attributed to the state¹⁸.

¹² “The Hull Formula”, *see e.g.* Dolzer & Stevens (1995) p. 97

¹³ *E.g.* *Maffezini* para 94 “dispute settlement arrangements are inextricably related to the protection of foreign investors”

¹⁴ *See*, however, item 5.6

¹⁵ *E.g.* *OEPC* para 187 and *AAPL* dissenting opinion

¹⁶ *E.g.* *AMT* para 6.06 and *CAFTA* art. 10.5,2(b)

¹⁷ *E.g.* *CMS* para 409 (the Tribunal chose the “discounted cash flow method” in assessing the damage). The assessment of the pecuniary compensation should, if no other indication has been given, apply the general principles of state responsibility, *see e.g.* Brownlie (2003) chapter 21, item 11 and 12 (*e.g.* referring the *Chorzow Factory* (Indemnity) case (1928); “...payment of a sum corresponding to the value which a restitution in kind would bear”)

¹⁸ *See* item 1.5.1

1.3 The fair and equitable treatment and breach of another treaty provision

Which consequences a breach of another treaty provision has on the fair and equitable treatment provision has been analysed by several tribunals and commentators. Mann argued that the fair and equitable treatment standard has an overarching character, thus the “provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty”¹⁹. This might be considered as an overgeneralisation²⁰, but there have been several instances in which the Tribunals have found that the breach of another provision entails a breach of the fair and equitable treatment standard. In *AMT*²¹ the tribunal shows a pragmatic approach to this issue, by stating that it has reached its result on the process of the “two-fold reasoning based on the double legal foundation”. Judge Assante, in his dissenting opinion in *AAPL*²² illustrated a different approach in finding that the treatment article had to yield to the special provision of Article “... which specifically governs the particular facts before the Tribunal”²³. In the North American Free Trade Agreement (NAFTA) this has been clarified by the Free Trade Commission (FTC) interpretation²⁴, stating that “a breach of Article 1105 (1) is not established by a breach of another provision of NAFTA”²⁵. Breach of another treaty provision will however be an element in the consideration of the fair and equitable treatment standard, e.g. discriminatory measures that also constitute breach of the national treatment provision²⁶. I will not go further into this discussion here.

1.4 Sources

There is no global, horizontal instrument on foreign direct investments. However, a substantial number of bilateral, regional and sector specific treaties have been

¹⁹ Mann (1981) p 243. Cited in e.g. *Myers* para 265

²⁰ *See Myers* para 266

²¹ Para 6.14

²² p. 369

²³ *Generalia specialibus non derogant* (special rules prevail and exhaust all the possible grounds of liability)

²⁴ *See annex III and item 4.5*

²⁵ This clarification is also made in the 2004 US Model BIT

²⁶ *See item 5.2.1*

adopted²⁷. This has led to fragmentation and a diversity of languages, which complicates the matter of finding one single standard²⁸. I have used the 1996 Norwegian Model BIT as a point of departure for the interpretation of the language.

The judicial decisions analysed in this thesis are based on NAFTA, and various bilateral investment treaties (BITs). They are all based on investor-state dispute settlement procedures; i.e. between an investor of one of the contracting parties and another contracting party (host state). The decisions are all of recent date²⁹.

Customary law has an important role in establishing the content of the standard. I have based some of this thesis on literature from the last century, seeking to clarify the content of the minimum standard of treatment in international law. These theories substantiate the foundation of a customary law, and are thus relevant. Hence, what might be considered as outdated theories are actually the fundament upon which the treatment standard of foreigners today is based. Being a legal standard it is however constantly developing, and the level of treatment it entails today may be very different from the level it reflected decades ago³⁰. In finding the present content of the standard I have used an OECD document as a central source³¹. Recent articles on the issue have also been of assistance.

1.5 Related issues

1.5.1 *State Responsibility*

The work of the International Law Commission (ILC) on the law of State Responsibility was previously focused on the substantive rules on the treatment of foreigners, and much of the early work of the ILC can be relevant when analysing the minimum standard, and hence the fair and equitable standard. However, the ILC now focus more

²⁷ 2,200 bilateral investment treaties, 200 regional cooperation arrangement, and some 500 multilateral conventions and instruments, World Bank Report (2005) p. 175

²⁸ See chapter 4

²⁹ One of the first rulings to apply the standard of fair and equitable treatment under a treaty governing investment matters was the award of 30 August 2000 by an ICSID tribunal in the arbitration between the Metalclad Corporation (US based) and the United Mexican States, under chapter 11 of the NAFTA.

³⁰ See e.g. item 5.1

³¹ OECD is currently seeking to clarify the meaning of various standards of the investment treaties, e.g. the fair and equitable treatment, see OECD DAF/IME(2003)4/REV3

on “secondary rules”³², whereas I will concentrate my analysis on the “primary rules”³³ concerning the fair and equitable treatment standard. Hence the recent work of the ILC will not be discussed in this thesis.

1.5.2 *Human Rights*

The fair and equitable treatment standard has several common features to the International Human Rights, both procedural³⁴ and material³⁵. There have been attempts to synthesize the concept of human rights and the principles governing the treatment of aliens, by giving both nationals and aliens the same international standard, ensuring “fundamental human rights”³⁶. Human Rights and the fair and equitable treatment standard have an overlapping content and ideology, but the instruments are not the same and the tribunals have different jurisdiction, which might lead to a gap in the interpretation of even the standards that seem to be the same. This is, however, a complex issue, which it will lead too far to examine here.

1.6 Outline of the Thesis

The fair and equitable treatment standard is closely connected to the minimum standard of treatment in customary law. I will therefore begin by presenting the development of the minimum standard and look closer into the relationship between the standards. I will then seek to find the normative content of the fair and equitable treatment standard by treaty interpretation³⁷, evaluate whether it is a unified standard and present its core elements, as they have crystallised through arbitration. Towards the end of the thesis I will consider the implications these clarifications may have on the development of minimum standard in customary law.

³²“the conditions on which a breach of a primary rule may be held to have occurred and the legal consequences of this breach”, cf. Cassese (2001) p. 185

³³ “substantive obligations”, *ibid*

³⁴ The individual’s right of dispute resolution against a state

³⁵ Due process etc. *See* Akehurst’s (1997) p. 261; “indeed, the whole human rights movement may be seen as an attempt to extend the international minimum standard from the aliens to nationals, even though the detailed rules in declarations and conventions on human rights sometimes differ considerably from those in the traditional minimum international standard.”

³⁶ Brownlie p. 504, referring to Garcia Amador, special rapporteur of the ILC second report, Draft chapter on “violation of fundamental human rights”, art.1, Yrbk. ILC (1957), ii. 112. *See also* Harris p. 569

³⁷ based on the language of the 1996 Norwegian Model BIT

2 The International Minimum Standard of Treatment

The Minimum standard was introduced by western capital-exporting countries during the 19th Century, when the improvement of communication methods led to enormous emigration and shifting of population, and international investments were extending over “the entire surface of the earth” followed by citizens from the investing countries³⁸. Being treated as a national of the host country would not suffice to protect their interests “in countries whose methods of administering justice are very greatly at variance with the methods to which the people of the great body of civilized states are accustomed”³⁹. The most powerful nations during this period saw the minimum standard as customary law, which can be illustrated by the Foreign Secretary Lord Palmerston’s speech in the House of Commons in 1850⁴⁰:

“We shall be told perhaps, as we have already been told, that if the people of the country are liable to have heavy stones placed upon their breasts, and police officers dance upon them; if they are liable to have their heads tied to their knees, and to be left for hours in that state; or to be swung like a pendulum, and to be bastinadoed as they swing, foreigners have no right to be better treated than the natives, and have no business to complain if the same things are practiced upon them. We may be told this, but it that is not my opinion, nor do I believe it is the opinion of any reasonable man.”

The minimum standard of treatment was seen as the floor below which treatment of investors could not fall, and should provide a basic and general standard detached from the Host State’s domestic law⁴¹. It ensured the rule of law, as understood in Western countries, regarding the protection of the life, liberty, dignity, and property of foreign nationals. In *Hopkins*⁴² the US-Mexican Claims Commission noted that:

“... it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal law... The citizens of a nation

³⁸ Root (1910) p. 518

³⁹ *Ibid*, p. 521

⁴⁰ regarding the Don Pacifico case, *ibid* p. 522 and Harris (2004) p. 569

⁴¹ Dolzer and Stevens (1995) p. 58

⁴² *The United States of America on behalf of George W. Hopkins, Claimant v. the United Mexican States*, cited in *Myers* para 260. The Commission was established in 1924 to consider claims from US nationals that had suffered injuries during a decade of revolutionary activity in Mexico. It was given the jurisdiction to decide claims submitted to it in accordance with the principles on international law, justice and equity, *see e.g.* Thomas (2002) pp. 30-31.

may enjoy many rights which are withheld from aliens, and, conversely, under international law, aliens may enjoy rights and remedies which the nation does not accord to its own citizens.”

This notion was, however, not universally shared. The Latin American countries opposed the view and argued that a state’s only duty was to treat foreigners in the same way as it treated its own nationals (national treatment standard)⁴³. It was nevertheless seen as customary law and acted upon by the most powerful capital-exporting states from the 19th Century onwards⁴⁴.

During the fifties and sixties, however, the establishment of new states and the global development towards self-determination and de-colonisation, in combination with an international super-power based on communism, led to some insecurity regarding the minimum standard⁴⁵. The capital-exporting countries still required respect for a certain minimum standard⁴⁶, but the voice of the capital-importing countries grew stronger in the international community, and they argued that permanent sovereignty gave the host country full control of foreign investments.

The Declaration and Programme of Action on the Establishment of a New International Economic Order (NIEO) was adopted in the UN General Assembly in 1974⁴⁷. Many industrialised states argued that the Resolutions were incompatible and highly damaging to the standards of protection of foreign investment established in customary law, e.g. by its statement;

“... each state is entitled to exercise effective control over [its natural resources] and their exploitation with means suitable to its own situation, including the right to nationalisation or transfer of ownership to its nationals ...”

⁴³ Akehurst (2004) p. 260. Under the **Calvo Doctrine**, argued by the Argentine jurist C. Calvo (1824-1906) as a reaction to the interventions of Western capital-exporting countries, *see* Cassese (2001) pp. 28-29. “A “Calvo clause” is a clause in a contract between a state and an alien whereby the latter agrees to resort to local remedies and not invoke the protection of the state of which it is a national”, *see* Harris (2004) p. 650

⁴⁴ Thomas (2002) p. 38

⁴⁵ *Ibid* p. 38 and Abs-Shawcross (1960) p. 119

⁴⁶ “It is a well established principle of international law that a State is bound to respect and protect the property of nationals of other States ... Three basic principles flow from this ruled; fair and equitable treatment, the most constant protection and security, rights relating to property by an alien shall not be impaired by unreasonable or discriminatory measures”, *see* 1967 OECD Draft Convention on the Protection of Foreign Property p. 119

⁴⁷ G.A. Res. 3201 and 3202 (S. VI) adopted 1 May 1974. *See also* Denza and Brooks (1987) p. 909

Later the same year the Charter of Economic Rights and Duties of States was adopted⁴⁸, which tilted the balance somewhat towards the industrialised states. But the language of some of the provisions was still highly controversial (e.g. the regulation of expropriation and nationalisation). The US, UK and most of the European Community states voted against the Charter, and most of the other capital-exporting countries abstained.

The erosion of the standards of treatment of foreign investor and uncertainty of the level of treatment in international law, which followed from the adoption of the NIEO and the political situation in general during this period, made foreign investors hesitant to invest capital in developing countries. Against this background some Western countries developed their first Model Investment Protection Treaties, and the developing countries granted specific protection to investment through BITs to attract capital⁴⁹.

There is still some opposition to the existence of a minimum standard, at least in literature⁵⁰. However, the number of treaties concluded worldwide containing a fair and equitable treatment provision - which occasionally even make specific reference to the minimum standard⁵¹ - illustrates a widespread and quite coherent state practice. These treaties have also been entered into by Latin-American, East-European and developing countries. As will be illustrated later in this thesis, the states seem to feel that they are legally obliged to follow a minimum standard of treatment in relations to foreign investors in their territory⁵². The question is thus; what is the content of the treatment standard in customary law?

The traditional view among the Western nations was that a foreigner was entitled to be treated as a citizen of the host country, but that the level of treatment could not go below a certain threshold⁵³;

⁴⁸ G.A. Res. 3281 (XXIX) adopted 12 December 1974

⁴⁹ E.g. van Houtte (2002) p. 256

⁵⁰ E.g. Vasciannie (2000) p. 139

⁵¹ E.g. US-Chile FTA art.10.4

⁵² Evidenced by transmittal statements etc., see chapter 3. See also e.g. Akehurst's (1997) p. 260; "The majority of states accept that the national state *can* claim if the foreign country's laws or behaviour falls below the minimum international standard."

⁵³ Root (1910) p. 521

“The rule of obligation is perfectly distinct and settled. Each country is bound to give the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: *provided the protection which the country gives to its own citizens conforms to the established standard of civilization* [emphasis added]”

The normative content of the “established standard of civilization”⁵⁴ is not quite clear, but some guidance can be found in case law from the early 20th Century⁵⁵. Among the often cited cases is the *Neer* claim where the General Claims Commission set up by the United States and Mexico expressed the law as follows⁵⁶:

... 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.*” [Emphasis added]

Whether this still is the test of customary law regarding the level of treatment of investors and their investment, and of the fair and equitable treatment standard, remains the most important question. In order to untangle this complex issue I will commence with the question that has been central to the tribunals in finding the correct level of treatment in the fair and equitable treatment standard; what is the relationship between the minimum standard and the fair and equitable treatment standard?

⁵⁴ Another language of the standard is “a moral standard for civilized states”, see Brownlie (2003) p. 502

⁵⁵ *Neer* claim (1926), United Nations, *Reports of International Arbitral Awards (RIAA)* iv. 60. Further reference is made to *Roberts* claim (1926) *RIAA* iv. 41; the *Hopkins* claim (1926), *RIAA* iv. 411 and *British claims in the Spanish Zone of Morocco* (1925), *RIAA* ii. 617 at 644, all cited in Brownlie (2003) p. 503

⁵⁶ In the *Neer* claim the US claimed that Mexico had failed to exercise due diligence in finding and prosecuting the murderer of a US national. The Commission unanimously rejected the claim, but indicated the standard it would have to apply

3 The relationship between the fair and equitable treatment standard and the International Minimum Standard

There are basically three alternative interpretations of the relationship between the international minimums standard and the fair and equitable treatment standard in international investment treaties. Some argue that they are referring to the same level of treatment⁵⁷. This view could have two implications; fair and equitable treatment equals the *Neer* standard or it equals a more contemporary and evolved minimum standard. A second approach is to see the fair and equitable treatment standard as an autonomous standard, disconnected from the minimum standard. The standard will thus be established by treaty interpretation; i.e. the “plain meaning approach”⁵⁸. The third way is to see the minimum standard as the foundation, upon which the fair and equitable treatment standard is built, as additional requirements.

I find it plausible that the two standards refer to the same level of treatment. This understanding is however based on two assumptions; that the foundation is an *evolved* minimum standard⁵⁹, and that it allows for nuances, reflecting the language of the specific treaty applied in each case⁶⁰. In this chapter I will present the various approaches and explore the practical implications of the conclusion.

When the fair and equitable treatment standard was introduced in the 1963 OECD Draft it was clearly stated in the Commentary that the level of treatment required conformed “in effect to the “minimum standard” which forms part of customary law”⁶¹. This appears to have been the settled meaning of the term until 1982 when it was argued by Mann⁶², in an article that has been often cited and sometimes criticised, that it is the

⁵⁷ E.g. CAFTA, annex III; fair and equitable treatment is seen as a part of the international minimum standard

⁵⁸ E.g. Vasciannie (2000) p. 103

⁵⁹ See chapter 5 and 7

⁶⁰ See chapter 4

⁶¹ OECD Draft Convention (1963) p. 244 see also Abs-Shawcross draft (1960) p. 119

⁶² Mann (1981) p. 241

express terms of the treaty that must govern and 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”.

Mann admitted that his conception of fair and equitable treatment was not universally shared⁶³. However, his views acquired support in academic writings; see e.g. Dolzer and Stevens⁶⁴ and UNCTAD⁶⁵ where it is argued that most investment instruments do not make an explicit link between the standards, which they could do “if they believed the standards to be interchangeable”. The view has also found support in case law; see e.g. *Tecmed*⁶⁶ where the Tribunal states that the scope of fair and equitable treatment “is that resulting from an autonomous interpretation, taking into account the text of ... the Agreement according to its ordinary meaning ...”.

The position that the “fair and equitable treatment standard” is not limited to the minimum standard as contained in the international customary law, but takes into account the full range of international law sources, including general principles and modern treaties and other conventional obligations seem to find most support in recent sources. This view was expressed in the 1984 OECD study⁶⁷, where all Member countries which commented on this point, agreed that “fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated”. Two NAFTA Tribunals (*Metalclad* and *Myers*) have also based their arbitration on that approach⁶⁸.

⁶³ Thomas (2002) p. 52

⁶⁴ Dolzer and Stevens (1995) p. 60

⁶⁵ UNCTAD (1999), as cited in OECD DAF/IME(2003)4/REV3 p. 24

⁶⁶ Para 155: “conflicts with what a reasonable and unbiased observer would consider fair and equitable”. However, the Tribunal goes on to judge the claim against “international law and the good faith principle”, para 166. See also OECD DAF/IME(2003)4/REV3. A comprehensive discussion on the standard can be found in *Pope & Talbot* where the Tribunal used the fairness element rather than the standard in the traditional minimum standard, see paras 105-118

⁶⁷ See “Intergovernmental Agreements Relating to Investment in Developing Countries” OECD, 1984, referred to in OECD DAF/IME(2003)4/REV3 p. 19

⁶⁸ *Ibid*

This view, however, can arguably be seen as being on collision course with the opinion given by several states in relations to implementation and usage of articles on fair and equitable treatment; namely that the provision provides for a minimum standard of treatment, based on long-standing principles of customary law, *see e.g.* Swiss Foreign Office Statement from 1979⁶⁹ and Canada's implementation statements regarding NAFTA⁷⁰. If the fair and equitable treatment standard is inherently seen as synonymous to the minimum standard, there is arguably no reason to make an explicit link in the treaty text. This seems to be the starting point in the 1963 OECD Draft Convention, which is the model for most investment treaties around the world⁷¹.

In *AAPL* Judge Assante, in his dissenting opinion, 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 minimum standard⁷².

Several writers have opposed the view originally presented by Mann, and find that the fair and equitable treatment is synonymous with the minimum standard, with statements like “the incorporation of customary law principles obligating the host government to accord fair and equitable treatment ...”⁷³ and “This is a reflection of the basic standard of treatment that enlightened international practice in countries owe to their alien guests.”⁷⁴ Even Mann seems to modify his views on the fair and equitable treatment as an autonomous standard in an article published a year after the above mentioned one, where he noted that⁷⁵

“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

⁶⁹ cited by Mann (1981) p. 244

⁷⁰ “... this article provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law ...”. (Supported by the US and Mexico, *see* submissions to *Pope & Talbot* Tribunal and *Metalclad* judicial review accordingly), *see* Thomas (2002) p. 57. *See also e.g.* US implementation of US-Armenia BIT, where the provision is described as incorporating customary law principles when presented to the senate for approval, *ibid* p. 50

⁷¹ *See* p. 11, above

⁷² *See* OECD DAF/IME(2003)4/REV3 p. 13

⁷³ Price, cited in Thomas (2002) p. 56. *See also* Gann p. 389 and Fatouros (1962) cited in OECD DAF/IME(2003)4/REV3

⁷⁴ Walker (1957) pp. 822-823. Has been cited e.g. by Gann, Thomas and Vasciannie

⁷⁵ Mann, “The Legal Aspects of Money” (1982) p. 510, as quoted by Thomas (2002) p. 58. However, the first article was reprinted in his book “Further studies in international law” in 1990 without any alterations

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".

It seems impossible to establish a certain and universal answer to the relationship between the fair and equitable treatment standard and the minimum standard, based on the contradictory opinions presented above. As indicated⁷⁶, I find the best view to be that they are reflecting the same standard, as this seems to be what most states originally intended⁷⁷. However, the answer might not have much practical effect; it is not clear whether, or to what extent, the relationship has consequences on the level of treatment entailed by a fair and equitable treatment provision when applied in a specific case.

The NAFTA FTC delivered its note of interpretation of regarding the minimum standard of treatment⁷⁸ subsequent to the Tribunal's Second Award in the *Pope & Talbot case*⁷⁹. The Tribunal then examined the compatibility of its Second Award with the FTC's interpretation and conceded that "it might appear" that its own interpretation was different from the one adopted by the Commission⁸⁰. The tribunal 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 law [was] different from those elements under ordinary standards applied in NAFTA countries"⁸¹. 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.

In the *CMS* the Tribunal was reluctant to conclude on the relationship between the minimum standard and the fair and equitable treatment standard and stated that⁸²

⁷⁶ See p. 11, above

⁷⁷ Cf. the 1963 OECD Draft Convention and several transmittal documents and comments as presented above

⁷⁸ See Annex II and item 4.5

⁷⁹ Award on Merits, 10 April 2001

⁸⁰ Award on Damages, 31 May 2002. In the second award the Tribunal concluded that the fair and equitable treatment standard went beyond the international minimum standard

⁸¹ *Ibid* para 56, see OECD DAF/IME(2003)4/REV3

⁸² Para 294

“While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, 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.”

The Tribunal referred to *Pope & Talbot*⁸³ and argued that “in spite the fact that the Tribunal opted for a NAFTA standard additional to or higher than that of customary law it still based its test on equity, justice and reasonableness”.

The arbitral tribunals seem, in their interpretation of the “fair and equitable standard”, increasingly to go beyond the specific discussion on the relationship to the minimum standard as defined by customary law, and rather focus on identifying the elements encompassed in the fair and equitable treatment standard, based on treaty interpretation and application of the standard by other tribunals. The core elements include elements of the *Neer* standard⁸⁴. On this background it appears to be at least a significant link and overlap between the standards, and the practical consequences might be found to be the same regardless of the “status” of the standard⁸⁵. It can thus be argued that the relationship between the minimum standard and the fair and equitable treatment standard becomes gradually less important, as this new standard emerges.

⁸³ Para 271

⁸⁴ However, the standards have been somewhat more elaborated through case law, and the threshold has arguably evolved. The foreign investor’s legitimate expectations are likely to be on a higher level than in 1926 when e.g. *Neer* was arbitrated, see chapter 5

⁸⁵ The conclusion might, however, have a significance in relations to what the impact of case law etc. on the fair and equitable treatment provision have on the minimum standard. I will revert to this in chapter 6

4 "Fair and equitable treatment" as treaty standard

The investor's claim to a certain level of treatment under the fair and equitable treatment provision is based on interpretation of the specific treaty. Under this item I will illustrate how specific factors in the treaty and its formation can be of guidance in establishing that level of treatment.

4.1 The ordinary meaning of the terms

4.1.1 "Fair and equitable", "reasonable and equitable" and "equitable"

A typical fair and equitable treatment provision is found in the 1996 Norwegian Model BIT⁸⁶:

"TREATMENT OF INVESTMENTS"

1. Each Contracting Party will accord in its territory for the investments made by investors of the other Contracting Party fair and equitable treatment."

The words "fair" and "equitable" are not defined in the Model BIT itself, and hence the ordinary meaning of the terms has to be established⁸⁷. "Fair" and "equitable" implies a proper balancing of conflicting interests in an even-handed, just and legitimate manner⁸⁸.

The language of the provision in the Norwegian treaties⁸⁹ varies, and in the most of the treaties the phrasing "fair and equitable treatment" is replaced by a provision employing the synonyms "reasonable and equitable treatment"⁹⁰. In an internal document from the Norwegian Ministry of Trade, the change is described as "mainly a rewriting of the

⁸⁶ Norway has not negotiated BITs since 1996. The Model BIT is currently being revised, and the present Model BIT would not be introduced as a Norwegian proposal if the negotiations were to be resumed.

⁸⁷ 1969 Vienna Convention on the Law of Treaties art. 31

⁸⁸ For a similar starting point, see *MTD* para 113

⁸⁹ See annex II

⁹⁰ China (-84), Poland (-90), The Czech Republic (-91), Slovakia (-91), Estonia, Latvia and Lithuania (all -92)

provision ... with a certain difference in nuance”⁹¹. One could argue that the Norwegian translations of fair and equitable (“rettferdig og rimelig”) and reasonable and equitable (“rett og rimelig”) have the same meaning in Norwegian, which indicates that the variation of language does not imply a variation of the standard. The negotiations are performed in English, and at the time of the Norwegian negotiations (the 1980s and 1990s) there were no judicial decision and scarce literature on the fair and equitable treatment standard. The application of the synonyms might thus be unintentional deviation.

This is not a problem related only to the Norwegian treaties. The formulation and location of the fair and equitable standard varies among the bilateral, regional and multilateral instruments, and it varies through time (same state, various languages⁹²) and geography (various languages from the different states).

Vandeveldel 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 treaties⁹³. On the other hand it has been reported that some countries, in relation to the United Nations Code of Conduct on Transnational Corporation, argued that “fair and equitable” would introduce the minimum standard while “equitable” would not⁹⁴.

In my view, a provision using synonyms cannot be found to have a different content than an article including “fair and equitable”, unless this conclusion is supported by the context or other means of treaty interpretation.

The language gives an idea of the standard; to treat the foreign investor in an unbiased and proper manner, but it does not do much for clarifying the level of treatment entailed in the provision.

⁹¹ Informal translation

⁹² E.g. the 1994 US Model BIT compared to the 2004 US Model BIT, *see* www.naftalaw.org. Furthermore the result of the negotiations can obviously vary (comp. US Model BIT to e.g. BIT with Panama)

⁹³ Vandeveldel (1988) p. 221

⁹⁴ UNCTAD (1999) p. 31

4.1.2 Reference to “international law” or “customary international law”

In the treatment article in the Norwegian Model BIT no reference is made, either to “international law” or to “customary international law”. According to the 1984 OECD study⁹⁵, however, the fair and equitable treatment standard is contained in clauses which specifically refer to international law in a considerable number of treaties.

Some argue that a provision with no reference to “customary international law” (or “international law”) cannot, under the principles of the Vienna Convention, be interpreted to denote the minimum standard⁹⁶; it must be presumed that the parties would have included such reference if their intention was to apply a standard already part of customary international law. It may, however, be argued that the term itself includes a reference to the existent standard⁹⁷. The 1963 OECD Draft made no such reference, but it is clear that it indicated the international law standard. Furthermore, it was concluded in the 1984 OECD study that a reference to international law should be implied even if such reference was not made⁹⁸. Hence it seems a very categorical approach to find that no reference in the text implies that the minimum standard is not part of the treaty standard.

There is a variation in language regarding customary international law, which may have implications on the interpretation; in some treaties fair and equitable treatment should be “... *no less than* required by international law”⁹⁹ in others the phrasing is “... treatment *in accordance with* international law, including fair and equitable treatment”¹⁰⁰. This can imply that the first standard give guidance to a higher level of treatment than the latter. However, this is rather vague, and one should find support in other sources than the mere language to establish that it is really the case.

There seem to be an overlapping use of the terms “international law” and “customary international law” in the treaties. However, based on the listing in Article 38 of the

⁹⁵ See footnote 67

⁹⁶ This seems to be the approach made by the Tribunal in the *MTD*, see para 110 following. However, the Tribunal used the standard of *TecMed* para 154 (see chapter 5). See also Schreuer (2005) p. 360.

⁹⁷ See chapter 3

⁹⁸ *Ibid*

⁹⁹ Emphasis added. See e.g. 1987 US Model BIT, Swiss BITs etc, referred in *Pope&Talbot* para 111

¹⁰⁰ Emphasis added. See e.g. NAFTA

Statutes of the International Court of Justice (ICJ)¹⁰¹ customary international law is only one of the components of international law, and hence has more limited scope. The variation in languages may have implications on the possibility of applying other sources of law, like other treaties between one of the Contracting Parties and third states and the general principles of law¹⁰², in order to establish the content of the fair and equitable treatment standard. In the 1984 OECD Study it seems clear that the member states meant to include all sources of international law¹⁰³. Regarding NAFTA, this insecurity is resolved by the interpretation of the FTC, see item 4.5.

4.2 Context, object and purpose

An important purpose of investment treaties is the “promotion and reciprocal protection of investments” and the desire e.g. “to encourage and create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party on the basis of equality and mutual benefit”¹⁰⁴. Hence, fair and equitable treatment should, as a starting-point, be understood as treatment contributing to encourage the promotion and protection of foreign investment¹⁰⁵.

The ambiguity of the language may lead to a situation where the object and purpose of the treaty play an important role. However, some caution might be advised when trying to interpret the fair and equitable treatment standard based solely on this foundation. Sir Ian Sinclair¹⁰⁶ argued that there is a risk;

“...that the placing of undue emphasis on the “object and purpose” of the treaty will encourage teleological methods of interpretation [which] in some of its more extreme forms, will even deny the relevance of the intention of the parties”

One cannot for example presume that the parties’ intention was to give general priority to the promotion and protection of investments over its sovereign powers.

¹⁰¹ Generally regarded as a complete statement of the sources of international law, see Brownlie p. 5

¹⁰² UNCTAD p. 12

¹⁰³ See chapter 3

¹⁰⁴ Title and preamble of the 1996 Norwegian Model BIT

¹⁰⁵ See *MTD* para. 113 for a similar interpretation (relating to NAFTA)

¹⁰⁶ “The Vienna Convention on the Law of Treaties”, (1984), 2nd edition at p. 130 as cited in the *Plama case* para 193

4.3 Supplementary means of interpretation

Documents that may possibly be relevant as supplementary means of interpretation¹⁰⁷ include negotiating texts, minutes of meetings and other documents that can shed light on the circumstances of the treaty's conclusion. However, these kinds of documents are often non-existent. In the *Methanex case*¹⁰⁸, the US arguments against releasing the documents requested by the claimants were that they

“were questionable due to their fragmentary nature, resulting from the absence of any verbatim transcript or agreed minute of the NAFTA parties' negotiations, combined with the speed at which the negotiations of NAFTA took place”

The situation for documents relating to bilateral treaties, of presumably less importance and with less negotiating resources than the NAFTA, is likely to be worse.

Implementing documents and preparatory work of one party may shed some light on the parties' intention, but one must show caution; a one-sided account of the treaty does not necessarily denote a “meeting of the minds” between the Parties on a specific item¹⁰⁹. Furthermore, the implementing documents are not always very clear regarding the specific content of a provision, see e.g. the Norwegian implementation of the BIT with China, which was enacted by the Parliament; the provision is only referred to as an obligation to give the investments a fair and equitable treatment¹¹⁰.

If the Parties have agreed on a particular interpretation, e.g. NAFTA FTC¹¹¹, this should be taken into account, together with the context, cf. Article 31(3)(a).

4.4 Inter-temporal dimension

When interpreting the fair and equitable treatment standard it could be a question of whether the relevant standard is “fair and equitable” as it was regarded at *the time that the treaty was concluded* or at *the time of the dispute*. If one should emphasize the will of the Parties the first approach might seem logical. However, fair and equitable treatment is a *standard* and should as such reflect the evolution of the law and its principles

¹⁰⁷ Cf. Vienna Convention article 32

¹⁰⁸ Part II Chapter H para 11

¹⁰⁹ It might however be used as an argument by an investor against a host state, showing *that party's* intent

¹¹⁰ Ot.prp. nr. 42 (1984-85) p. 2

¹¹¹ See item 4.5

outside the treaty¹¹². In *Mondev* it was concluded that it was customary law at the time when the treaty entered into force that was relevant when interpreting the standard. This seems a rather odd solution which would imply that a treaty entered into in 1926 would have adopted the *Neer* level of treatment and should be assessed from that starting point. This would not seem to be coherent with the treaty's object and purpose to contribute to a good investment climate. Furthermore, the legal situation will be complex and unpredictable if one has to establish the level of treatment accepted in international law at any given time in recent history. It might even arguably give investors better protection under customary international law than under the specific treaty¹¹³ and it would certainly give investors protected under more recent treaties better protection, even though the language of the provision is the same¹¹⁴. It does seem unlikely that the parties would intend such a result.

If parties want to “freeze” the treatment standard to a certain level, they should state this in the specific provision.

4.5 NAFTA – The interpretation by the FTC

In 2001 the NAFTA FTC issued an interpretation *inter alia* on the relationship between article 1105(1) and the minimum standard in customary law¹¹⁵. According to the FTC the provision does not go further than the minimum standard. NAFTA arbitral tribunals are bound by the interpretation made by the FTC¹¹⁶. The interpretation has been discussed by a number of tribunals, and it has been argued that the interpretation is an amendment of the standard, rather than an interpretation¹¹⁷. I will not go into this discussion, but will simply conclude that after the FTC interpretation it is clear that in

¹¹² E.g. statement by the ICJ in *Danube* para 140; “current standards must be taken into consideration”

¹¹³ This right would however not be directly enforceable by the investor, because customary law is not, as a starting point, included in the arbitral tribunal's jurisdiction

¹¹⁴ It would probably be possible to apply the MFN article, but I will not go into that discussion here

¹¹⁵ See Annex III

¹¹⁶ NAFTA Article 1131(2)

¹¹⁷ The interpretation was issued during a number of pending cases, in which all the claimants argued that that the FTC interpretation was specifically targeted against them (see US observation referred in *Methanex* part IV, C, para 18). Sir Robert Jennings' second opinion, a legal opinion for *Methanex*, has frequently been cited in support of it being an amendment.

relation to NAFTA “fair and equitable treatment” is not a freestanding obligation. It constitutes obligations only to the extent that they are recognized by customary law¹¹⁸.

The consequences the interpretation will have on tribunals in relation to cases based on other treaties are not clear. It has no direct bearing on other treaties, but the NAFTA cases have been the main source of clarification of the standard thus far, and a narrow understanding of the NAFTA provision may lead to a more limited standard in general. This will however be a matter of consideration in each specific case.

A result of the interpretation is that it is now clear that the standard employed by the NAFTA tribunals is that the decisions under the treaty are intended to clarify and mirror an evolution of customary law, see chapter 6¹¹⁹.

¹¹⁸See e.g. *Loewen* para 128. The term “international law” is thus interpreted to mean “customary international law”

¹¹⁹In *Mondev* para 122 it was stated that only the evolution up to 1994 was included, see also item 4.4

5 Core Elements

5.1 Is it a unified standard?

The point of departure is that fair and equitable treatment is a treaty standard which must be interpreted according to its language, context, object and purpose¹²⁰. However, if one can establish that the fair and equitable treatment standard has become a norm with some core elements included, variances in the text of each specific treaty may have less importance.

In this chapter I will seek to identify core elements, or sub-categories, of the fair and equitable treatment standard, by analysing some of the arbitration and literature that has been produced on the issue over the last five years. It may be too early to say that they are of universal application, and the first issue to discuss is whether it even is a unified standard¹²¹. The development is likely to continue, as this provision increasingly is being claimed by investors. Hence the discussion below represents stocktaking of the development at this stage¹²².

The fair and equitable treatment standard does not have an exact meaning, and the provision still seems rather open-ended. It has been argued that the exact meaning can only be defined when the standard is applied in a specific situation, balancing the various interests involved to a set of specific facts¹²³. This seems to be a common understanding among commentators and arbitral tribunals. In *Mondev*¹²⁴ the Tribunal argued that “What is fair and equitable cannot be reached in abstract; it must depend on

¹²⁰ See chapter 4

¹²¹ The elements will be presented regardless of what is found to be the connection to the minimum standard. I will discuss which implications the establishment of core elements under the fair and equitable treatment standard has on the customary law standard in chapter 6

¹²² See also Schreuer (2005)

¹²³ See e.g. U.N. Conference On Trade & Development, referred in OECD DAF/IME/(2003)4/REV3

¹²⁴ Para 118

the facts of the particular case”. This open approach has been seen as a problem by some jurists¹²⁵.

The language can even *prima facie* seem to imply that the test is simply whether the investment has been treated fairly and equitably¹²⁶, inviting an *ex aequo et bono* consideration. However, although fair and equitable might be considered as indicative of the extralegal concepts of fairness and equity, it should not be confused with the concept of *ex aequo et bono*¹²⁷. In *Mondev*¹²⁸ the Tribunal underscored the point that

“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 ... *It may not simply adopt its own idiosyncratic standard of what is “fair” or “equitable”, without reference to established sources of law.*” [emphasis added]

In UNCTAD¹²⁹ it is argued that even the “plain meaning approach” is not devoid of content, because a third party is called upon to apply an objective standard and guidance may be derived from international law in general. The Tribunals have to find an equitable solution within the framework of applicable law, applying the principle *equity infra legum*¹³⁰.

But even though it seems certain that the test is more than a discretionary consideration by the Tribunals, it might not seem feasible to reduce the nebulous image of the words “fair and equitable treatment” to any concrete, objective terms. The fair and equitable standard shall safeguard a level of treatment to investors through shifting times, in relations to heterogeneous societies, in a variance of social, technological and political organisations, and the standard hence needs a certain flexibility and elasticity. This is an inherent characteristic of a legal standard¹³¹; its scope and normative message are less defined than in than in more specific rules.

¹²⁵ E.g. Fatouros, cited in OECD DAF/IME/(2003)4/REV3

¹²⁶ See chapter 4. This approach can be found in *Pope & Talbot* and is supported by Mann (1981)

¹²⁷ See Schreuer (2005) p. 365

¹²⁸ Para 119, See also *ADF* para 184, see also *ibid*

¹²⁹ UNCTAD (1999) p. 11

¹³⁰ “... that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes”, ICJ *Mali vs Burkina Faso* (1986) para 28, as referred in Thomas (2002) p. 17. See also *North Sea Continental Shelf cases*, ICJ Reports 1969 p.47 para 85: “It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law”

¹³¹ “Introduction to the Philosophy of Law”, Pound (1922), cited in Knoph (1939) p. 4

Judge Higgins argues that "fair and equitable treatment" are "legal terms of art well known in the field of overseas investment protection" and that they have a well-known meaning¹³². This might be an overstatement, but the standard is definitely in the process of getting a clearer content.

Arbitration on the fair and equitable treatment standard has proliferated in the five years that have elapsed since *Metalclad*. The awards have primarily been issued relating to NAFTA, and it is not clear to what extent the NAFTA and BITs tribunals feel bound by the case law. They do, however, in most cases apply the precedents as a starting-point, or as an element of their deliberations. On this basis one can detect signs of an emerging legal norm, giving reference to explicit criteria and limitations within which each case should be considered, beyond the mere consideration of whether an investor has been treated fairly and equitably in a specific case.

The statements on the content of the standard are not quite concurrent, but the basic notion of what infringements the investor is protected against seem to correspond. Judge Schwebel defined "fair and equitable treatment" as "a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination, and proportionality"¹³³. In *Myers*¹³⁴ it is stated that "Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, obligations of good faith and natural justice." In UNCTAD¹³⁵ it is argued that one can extrapolate state action that may be inconsistent with fair and equitable treatment by identifying certain forms of behaviour that appear to be contrary to fairness and equity in most legal systems, such as if "a state acts fraudulently or in bad faith, or capriciously and wilfully discriminates against a foreign investor, or deprives an investor of acquired rights that leads to the unjust enrichment of the state ..."

A more recent account of elements that are being deduced from the fair and equitable treatment standard in case law is found in *Waste Management* (2004), in a passage that has been frequently cited by later tribunals¹³⁶:

¹³² Judge Higgins, *Oil Platforms case* para 39

¹³³ *MTD* para 109, referring to the Opinion of Judge Schwebel para 23

¹³⁴ Para 134

¹³⁵ UNCTAD (1999) p. 12. See also Schreuer (2005) p. 365

¹³⁶ *Waste Management* para. 98. Repeated in e.g. *Gami* para 89

“... 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 idiosyncratic, 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 this 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.*” [emphasis added]

Some *states* have also endeavoured to define the content of the standard, by making the provision on fair and equitable treatment in their investment treaties more precise and exhaustive. An example can be found in the Draft Central American Free Trade Agreement (CAFTA), which was recently approved by the U.S. House of Representatives¹³⁷. In the same way as other recent investment instruments in which USA is a party, the formulation of the provision on the fair and equitable treatment standard is very careful and narrow. The only element included in the listing is the principle of due process¹³⁸.

There have also been some attempts in recent *literature* to specify the core elements of the fair and equitable treatment standard. The OECD analyse the elements in five categories¹³⁹; (a) Obligation of vigilance and protection, b) Due process including non-denial of justice and lack of arbitrariness, c) Transparency, d) Good faith – which could include transparency and lack of arbitrariness and e) Autonomous fairness elements.¹⁴⁰ Schreuer has a less categorical approach; he summaries the standards the various Tribunals have employed in their efforts to define a general standard¹⁴¹; The high threshold formulated in *Neer*¹⁴², The ICJ’s standard in *ELSI*¹⁴³, “improper and discreditable”, discrimination, reference to international or comparative standards, “a

¹³⁷ 28 July 2005. The Agreement was approved by a narrow majority; 217 to 215, cf. “International Law in Brief”, 29 July 2005. For the language of CAFTA, see Annex IV

¹³⁸ See also US-Chile FTA

¹³⁹ The Tribunals, in the first four of these categories examined in the OECD survey, defined “fair and equitable” in accordance with international law, while one Tribunal adopted an autonomous definition, see OECD DAF/IME(2003)4/REV3

¹⁴⁰ The elements presented by Choudhury (2005) are a) Transparency, b) Due process (Including i. Denial of a right to a fair hearing, ii. Administrative decisions without an evidentiary basis and iii. Discreditable legal outcome), c) Breach of legitimate expectations, d) Arbitrary and discriminatory conduct, e) Acting beyond the scope of legal authority and f) Good faith.

¹⁴¹ Schreuer (2005) p.373

¹⁴² referring to “an outrage, bad faith and to wilful neglect of duty”

¹⁴³ “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety”

failure to effectively implement aspects of domestic law is not necessarily a breach of the fair and equitable treatment standard” and other criteria, such as arbitrariness, idiosyncrasy, injustice, lack of good faith, lack of due process and proportionality.

This illustrates that there seem to be emerging elements, but that they can be categorized in several ways. The reasoning and weighing of the various elements are vague and to a substantial degree overlapping. Transparency can for example be seen as a condition by its own right, as part of the legitimate expectations of the investor or subsumed under denial of justice¹⁴⁴.

I will start by presenting the elements that are relevant as the basis of the standard, or the areas of law that have hereto been included in the standard, focusing on three core standards that are also part of international customary law; *Denial of justice*, *Due diligence* and *Good faith*. The standards encompass several other elements such as discriminatory and arbitrary behaviour and transparency. I have chosen a more “overarching” approach because some of the “sub-categories” of the core elements have only been argued by one or two tribunals. My starting point is that the standard is interconnected to another legal standard; the legitimate expectations of the investor, based on international law and the particular prospects that the specific investor reasonably should be able to rely on. The legitimate expectations of the investor can be seen as a core element itself, but also as a threshold for the treatment.

5.2 Denial of justice

The alien’s right not to be subjected to “denial of justice” is considered an important principle of international customary law and constitutes a substantial part of the minimum standard¹⁴⁵. Customary law imposes an obligation on states “to maintain and make available to aliens, a fair and effective system of justice”¹⁴⁶. An article in Harvard Research Draft¹⁴⁷ also illustrates the principle;

¹⁴⁴ I have chosen the latter approach

¹⁴⁵ The terms “Procedural propriety” or “due process” can also be used in order to describe this principle, see Schreuer (2005) p. 381.

¹⁴⁶ *Loewen* para 129, referring to Respondent’s expert Professor Greenwood QC. See also Freeman (1938) p. 50 and 328. He argued that the central test was whether the judicial act or omission “infringes any international rule aiming, either wholly or in part, at the legal protection of foreigners.” He further argued that if a judgement is “in flagrant disregard of the aliens’ rights”, an international claim arises. This notion

“A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiencies in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not denial of justice.”

Denial of justice includes acts and omissions of all branches of the State’s government (executive, legislative and judiciary). It can be established both through procedural and material deficiencies.

The principle has been adopted by arbitration panels in disputes relating to the fair and equitable treatment standard. There are various elements that can be included in the concept of denial of justice. In *Azinian*¹⁴⁸ the tribunal held that;

“A denial of justice could be pleaded if *the relevant courts refuse to entertain a suit*, if they subject it to *undue delay*, or if they *administer justice in a seriously 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 mask a violation of international law.” [Emphasis added]

In *Mondev*¹⁴⁹ the Tribunal rejected a denial of justice claim and attempted to set threshold of the standard. The Tribunal stated 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’.” [Emphasis added]

There is a fine line between an erroneous judgement, and a judgement which constitutes a Denial of justice. Governments and judiciaries do make mistakes, but the ordinary remedy in these cases is not found by raising a denial of justice claim, but by “internal political and legal processes, including elections”¹⁵⁰. As stated in the Harvard Research Draft, an error of a court is not necessarily a denial of justice. The arbitration panels are not courts of appeal to an investor that has lost on the merits after the exhaustion of

was also advocated by de Visscher (as interpreted by Freeman, *ibid* p. 327) in his finding that judgement being rendered “manifestly contrary to all justice” no longer is regarded in international relations “comme une oeuvre de justice”. The international duty of protection is violated and appeal to international action is thus open.

¹⁴⁷ Article 9. See also Brownlie (2003) p. 506

¹⁴⁸ Para 103

¹⁴⁹ Para 127 cited in *Loewen* para 132

¹⁵⁰ *Myers* Para 261. This statement was endorsed and adopted by *Gami*, see para. 93, see OECD DAF/FE/IME(2003)4/REV3

local remedies, even though there might arguably be inadequacies in the judgment. This has been underlined by tribunals, e.g. *Myers*¹⁵¹ “[the] Tribunal does not have an open-ended mandate to second-guess government decision making” and *Azinian*¹⁵²;

“The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. *What must be shown is that the court decision itself constitutes a violation of the treaty.* Even if the ... courts were wrong ... this would not per se be conclusive as to a violation of NAFTA. More is required; *the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.*” [Emphasis added]

In finding denial of justice both the result itself and the process leading up to it has to be analysed. In *Loewen*¹⁵³ it is stated that “Manifest injustice in the sense of a *lack of due process leading to an outcome which offends a sense of judicial propriety* is enough...” The Tribunal concluded that “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.”

The threshold of a denial of justice claim must be high. This can be illustrated by Professor Greenwood’s statement in his Second Opinion in *Loewen*;

“the awards and texts make clear that error on the part of the national court is not enough, what is required is “*manifest injustice*” or “*gross unfairness*”, “*flagrant and inexcusable violation*” or “*palpable violation*” in which “*bad faith not judicial error seems to be the heart of the matter*” . “[t]he alien must sustain a heavy burden of proving that there was an *undoubted mistake of substantive or procedural law operating to his prejudice*”. [Emphasis added. Reference omitted]

It has been made a point of the legitimacy of the entity that has made the decision in some denial of justice claims. As stated in the by the tribunal in the *Mondev*¹⁵⁴; “It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State.”

¹⁵¹ Para 261

¹⁵² Para 99

¹⁵³ Para 132 [Emphasis added.] The Tribunal concluded that “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.

¹⁵⁴ Para 126

While a mere error of law is not enough to establish denial of justice, Brownlie argues that an error in law accompanied by a discriminatory intention may be a breach of the international standard¹⁵⁵. This brings us to another element that has been considered by many tribunals under the fair and equitable treatment standard; discriminatory or arbitrary action.

5.2.1 *Discriminatory and Arbitrary*

Customary law does not require that a state treat all aliens (and alien property) equally, or that it treats aliens as favourably as nationals. Indeed, “even unjustifiable differentiation may not be actionable”¹⁵⁶.

The ordinary meaning of the words “fair and equitable” does, however, seem to imply that there is an element of non-discrimination in the standard¹⁵⁷, i.e. that discriminatory treatment can constitute a breach of the fair and equitable treatment standard on the merits. However, many treaties include a provision which specifically prohibits discriminatory or arbitrary actions as well as provisions on national treatment and most favoured nation treatment¹⁵⁸. In *Genin*¹⁵⁹ “fair and equal” and “non-discriminatory and non-arbitrary” treatment are discussed jointly, but the Tribunal states that the latter language “further requires the signatory governments not to impair investment by acting in an arbitrary or discriminatory way”.

Several Tribunals seem to emphasise the discriminatory element. In *Myers*¹⁶⁰ the Tribunal found that a breach of the national treatment provision could also establish a breach of the fair and equitable treatment standard. In *Lauder*¹⁶¹ the Tribunal stated that the Media Council had not discriminated the investor in favour of a national, and hence

¹⁵⁵ Brownlie p. 507, footnote 54.

¹⁵⁶ See Dolzer and Stevens (1995) pp. 61–62. See also *Oppenheim’s International Law*, Volume 1 “Peace” (9th edition), p. 933 noting that “[a] degree of differential treatment as between national and foreign investment may be called for, and is not necessarily contrary to the state’s international obligations”, cited in *Genin* para 368

¹⁵⁷ See Chapter 4

¹⁵⁸ The 1996 Norwegian Model BIT does not include such a provision, but an example can be found in the US-Estonia BIT; “Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.”

¹⁵⁹ Paras 366 and 367

¹⁶⁰ Para 266. See also Choudhury (2005) p. 313

¹⁶¹ Para 291

the investor had not demonstrated a breach of the fair and equitable treatment standard¹⁶². In *Gami*¹⁶³ it is stated that “Each NAFTA party must ... accept liability if its officials ... implement regulations in an arbitrary or discriminatory fashion”¹⁶⁴. The attitude presented by these tribunals does however seem to be rebutted by the tribunal of the recent *Methanex*¹⁶⁵. The Tribunal, “ignoring ... the FTC’s interpretation”, argues that “the plain and natural meaning of the text ... does not support the contention that “the minimum standard of treatment” precludes governmental differentiation between nationals and aliens.” The tribunal goes on to argue that “even if Methanex had succeeded in establishing that it had suffered a discrimination for its claim under [national treatment] it would not be admissible for it, as a matter of textual interpretation, to establish a claim under Article 1105”¹⁶⁶. The arguments of the Tribunal is based on the fact that there is a reference to discrimination elsewhere in the article (relating to losses suffered by armed conflict and strife), and it can thus be interpreted as if differentiations between nationals and aliens in other situations is deemed legally discriminatory¹⁶⁷. The universal value of this statement might consequently be questioned, but at least it can be argued that the fair and equitable treatment article in treaties containing a separate provision on discrimination might have a more narrow scope than if no such provision is included.

Some tribunals have applied the standard set by the International Court of Justice (ICJ) in *ELSI*¹⁶⁸, relating to arbitrary conduct, in search for the fair and equitable treatment standard; see e.g. *Mondev*¹⁶⁹

“In the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays “a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety”. It is true that the question there was whether certain administrative conduct was “arbitrary”, contrary to the provisions of an FCN treaty. Nonetheless ... *the Tribunal regards the Chamber’s criterion as useful also in the context of denial of justice, and it has been applied in that context ...*” [Emphasis added. Reference omitted]

¹⁶² See Choudhury (2005) p. 314

¹⁶³ Para 94

¹⁶⁴ Regarding the NAFTA this interpretation can no longer be applied, see item 4.5 and annex III, but the FTC’s interpretation does not preclude it from being used as an argument regarding other treaties

¹⁶⁵ Part IV Chapter C Para 14

¹⁶⁶ *Ibid* para 16

¹⁶⁷ *inclusio unius est exclusion alterius*

¹⁶⁸ Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), ICJ, 20 July 1989

¹⁶⁹ Para 127. See also *Amco Asia Corp. v. Republic of Indonesia*, Resubmitted Case, Award of 31 May 1990 paras 136-137

In *Azinian*¹⁷⁰ the Tribunal also seems to consider arbitrary conduct as a breach of the fair and equitable treatment standard in stating that

“If the Claimant cannot convince the Arbitral Tribunal that the evidence for this finding was so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious, they simply cannot prevail.”

It seems clear that arbitrary measures and judgements may constitute denial of justice and thus be contradictory to the fair and equitable treatment standard.

5.2.2 Transparency

Transparency is an essential element of a due process. The investors are reliant on transparency regarding the legal framework and processes concerning their investments. The principle has close connection to the legitimate expectations of the investor, in the sense that the investor has to be able to trust that he can access all relevant information¹⁷¹.

An example of transparency being a vital element of the consideration of the fair and equitable treatment standard can be found in *Metalclad*. One of the issues of the case was that Metalclad’s application for a construction permit was denied without the company having had an opportunity to participate in the deliberation process. Metalclad was not notified of the Town Council meeting where the permit application was discussed and rejected nor given any opportunity to participate in that process.

The Tribunal understood transparency¹⁷² to include;

“the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made [...] should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party [...] become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.”

¹⁷⁰ Para 105

¹⁷¹ See item 5.5

¹⁷² Para 76. Reference was made to NAFTA article 102(1)

Transparency has also been considered an important element of the standard by other tribunals, relating to the administrative and judicial process and regarding the legal framework, see e.g. *Maffezini*¹⁷³ and *TecMed*¹⁷⁴.

Metalclad has subsequently been annulled by the Supreme Court of British Columbia, finding that transparency obligations were not included in Chapter 11. Transparency is a separate article of NAFTA, beyond the jurisdiction of the Tribunal¹⁷⁵. This cannot, however, be taken to mean that it is precluded as being an element of the fair and equitable treatment standard. A blatant reference to an article outside the scope of the Tribunals jurisdiction is one thing, another is seeing a transparent process and access to the legal framework as part of what the investor legitimately can expect¹⁷⁶.

5.3 Due diligence

In a number of decisions¹⁷⁷, the tribunals make reference to the obligation of the state to exercise due diligence¹⁷⁸ in protecting foreign investment in order to find an act or omission of the State as being contrary to fair and equitable treatment and full protection and security¹⁷⁹.

UNCTAD has examined the meaning of this doctrine, and found that 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”¹⁸⁰. The obligation of due diligence in international customary law, can be illustrated by this statement by Verdross¹⁸¹;

¹⁷³ Regarding a loan transaction, para 83, *see also* Choudhury (2005) p. 304

¹⁷⁴ Para 154

¹⁷⁵ Choudhury (2005) p.303

¹⁷⁶ The two other decisions referred under this item are based on BITs and hence not influenced by the annulment. The decision in *TecMed* was even taken after the annulment procedure.

¹⁷⁷ *See e.g. AAPL, AMT and Wena Hotels Ltd.*

¹⁷⁸ “‘Due diligence’; the care that a reasonable person exercises under the circumstances to avoid harm to other persons or their property”, *Encyclopædia Britannica* (2003). “‘Due diligence’; The legal obligation of states to exercise all reasonable effort to protect aliens and their property in the host state”, *Oxford Dictionary of Law*, fifth ed (2003). The requirement has also been phrased as an obligation of vigilance, *see e.g. OECD DAF/IME(2003)4/REV3*

¹⁷⁹ In these cases, the standards of “fair and equitable treatment” and “full protection and security” have been interlocking and examined together by tribunals, *ibid* p. 25.

¹⁸⁰ U.N. Conference On Trade & Development: *Bilateral Investment Treaties In The Mid-1990s* at 53, U.N. Doc. UNCTAD/ITE/IIT/7(1998)

¹⁸¹ Alfred Verdross, translation by OECD, *see OECD DAF/IME(2003)4/REV3*

“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’.”

Articles on due diligence was also incorporated in the Harvard Research Draft¹⁸², including the requirement of due diligence in relation to prevent injury (if local remedies have been exhausted without adequate redress).

In a more recent decision (*AAPL*¹⁸³), relating to protection under an investment protection treaty, 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. [Emphasis added]

In *AMT* the Tribunal stated that the host state is under an “obligation of vigilance, in the sense that [it] shall take all measures necessary to ensure the full enjoyment of protection and security of its investments”¹⁸⁴.

In *Wena Hotels ltd* the Tribunal found that Egypt had violated its obligation of vigilance under the BIT “by failing to accord Wena’s investments fair and equitable treatment and full protection and security”¹⁸⁵. The Tribunal found sufficient evidence that Egypt was aware of the EHC’s (State-owned Egyptian Hotels Company) intention to seize the hotels yet took no preventative action, did nothing to protect Wena’s investment after

¹⁸² Articles 10-12. See also Borchard (1930) p. 518: “[t]he article predicating state responsibility upon lack of due diligence in preventing or punishing the acts of private individuals, one of the most well-established rules of international law”, commanded a majority only of twenty-one to seventeen...” The Committee of Experts for the Progressive Codification of International Law appointed by the Hague Conference in its meetings March-April 1930 in voting for a tentative and partial list of ten articles. See also *British Claims in the Spanish Morocco* (U.S.A (H. Roberts) v. United Mexican States), as cited in Thomas (2002) p. 34

¹⁸³ One of the main issues in the case 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”, cf. OECD DAF/IME(2003)4/REV3

¹⁸⁴ See also *ibid*

¹⁸⁵ See *ibid* pp. 26-27

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.

These awards indicate that the obligation of due diligence has evolved to go beyond the mere prevention and protection against criminal and violent acts. It now seems to include a duty to prevent and protect the investor and/or the investment of the investor from any intervention that may be detrimental to such an extent that it over the threshold for what the investor can expect under international law¹⁸⁶.

5.4 Good faith

Treatment of an alien amounting to “bad faith” was one of the elements that could establish breach of international law under the *Neer* standard¹⁸⁷. This has been followed in more recent awards, e.g. *Azinian*¹⁸⁸, where the Tribunal seems to consider *malicious* state action as sufficient evidence of a breach of the fair and equitable treatment standard. In *Genin*¹⁸⁹ the tribunal found that the claimants had failed to prove “the *intention* to harm ... or to treat them in a discriminatory way”, thus supporting the view that the intention of the state is a valid element in considering the fair and equitable treatment standard.

In *TecMed*¹⁹⁰ the Tribunal found that the commitment of fair and equitable treatment included in the Agreement was “an expression and part of the *bona fide* principle recognized in international law, *although bad faith from the State is not required for its violation*: “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.*”¹⁹¹

¹⁸⁶ See item 5.5

¹⁸⁷ See chapter 2 p. 10

¹⁸⁸ Para 103 and 105

¹⁸⁹ Para 369 (the statement is related to the provision on arbitrary and discriminatory treatment). The Tribunal refers to Brownlie (2003) p. 541, footnote 96 (“[t]he test of discrimination is the intention of the government”). The tribunal also stated that “Under the present circumstances - where ample grounds existed for the actions taken by the bank of Estonia – the Respondent can not be held to have violated [the fair and equitable treatment standard]”

¹⁹⁰ Para 153, including citation from *Mondev* Para 116

¹⁹¹ [Emphasis added. References omitted]

In *Loewen*¹⁹² the Tribunal went even further in the direction of an objective requirement by stating that “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 ...”¹⁹³, and in *OEPC*¹⁹⁴ the Tribunal made it clear that the fair and equitable treatment standard is indeed an “*objective requirement* that does not depend on whether the Respondent has proceeded in good faith or not”.

Hence, subjective bad faith is not a prerequisite, but it may be a valid argument in favour of finding a breach of the standard¹⁹⁵.

5.5 The legitimate expectations of the investor

The legitimate expectations of the investor can be seen as a starting-point when assessing the fair and equitable treatment standard. An illustration in case law applying some of the elements of the standard (good faith, transparency and arbitrary), and using the legitimate expectations of the investor as a point of reference for the *level* of the fair and equitable treatment standard, can be found e.g. in *TecMed*¹⁹⁶ where the Tribunal stated the following;

“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, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. [...] The foreign investor also expects the host State to act consistently, i.e. *without arbitrarily revoking any preexisting decisions or permits* issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments [...]” [Emphasis added]

¹⁹² Para132

¹⁹³ In this case, however, Professor Greenwood stated in his Second Opinion that “bad faith ... seems to be the heart of the matter”.

¹⁹⁴ Para 186

¹⁹⁵ See also Mann pp. 244-245 “bad faith need not to be proved by the investor” and *CMS* para 280; “... this is an objective requirement unrelated to whether the Respondent has had deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.”

¹⁹⁶ Para 154

This passage has been frequently cited in arbitral awards, e.g. in *OEPC*¹⁹⁷ and *CMS*¹⁹⁸.

In finding what the investor legitimately can expect, reference is often made to the object of the treaty, see e.g. *CMS*¹⁹⁹ where fair and equitable treatment was seen to be inseparable from the treaty's object to maintain a stable framework for investments and maximum effective use of economic resources²⁰⁰ with the result that, although some changes were allowed, the "framework can [not] be dispensed with all together, 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."²⁰¹

This passage also illustrates that the investor can only rely on the legal framework at the time of the investment to a certain extent. In most cases it seems that it is the state's *specific commitments* towards an investor that are relevant. In *Waste management*²⁰² the Tribunal stated that "in applying this 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." The Tribunal found that it was clear that the City failed in a number of respects to fulfil its contractual obligations to Claimant under the Concession Agreement. However, the Tribunal concluded that a mere breach of contract ("even persistent non-payment") is not sufficient to find a breach of the fair and equitable treatment standard. In *MTD*²⁰³ the location of the Project was deemed a fundamental assumption of the bargain between MTD and the State of Chile, the Tribunal has found that Chile had treated MTD unfairly and inequitably treatment by its authorisation of an investment that could not take place for reasons of its urban policy.

It does not seem that the Tribunals have placed any significance to whether it is a contract or an administrative decision that has been breached, the central point seem to be that it is a representation by the state or by a unit which acts are attributed to the

¹⁹⁷ Para 185

¹⁹⁸ Para 268 (claimant)

¹⁹⁹ Paras 274-276

²⁰⁰ Cf. the preamble of the treaty

²⁰¹ See also *CME* where the Tribunal found that "The Media Council breached its obligation of fair and equitable treatment *by evisceration* of the arrangements in reliance upon with the foreign investor was induced to invest." [emphasis added]

²⁰² Para 98

²⁰³ Para 188

state. It is still unclear to what extent the fair and equitable treatment standard will protect a foreigner against breaches of contract by governmental authorities²⁰⁴, and it will lead to far to go deeper into this problem here.

A number of tribunals have also considered the state's action in breach of their own municipal laws. In *Gami*²⁰⁵ the Tribunal stated that "... a government's failure to implement and abide by its own law in a manner adversely affecting a foreign investor may but will not necessarily lead to a violation of Article 1105." The result of this deliberation will depend upon the context, e.g. to what extent the investor has depended on the implementation. In *Loewen*²⁰⁶ another factor is underlined; the special importance attached to discriminatory violations of municipal law in International law²⁰⁷.

The fair and equitable treatment standard does of course not give the investor a right to fulfil all of his expectations²⁰⁸. In *Maffezini*²⁰⁹ the Tribunal stated that "Bilateral Investment Treaties are not insurance policies against bad business judgements" and in *MTD*²¹⁰ it was stated that "This conclusion ... does not mean that Chile is responsible for the consequences of unwise business decisions or for the lack of diligence of the investor".

On all accounts the investor's expectations have to be balanced with the host state's need to have possibility and autonomy to develop its own policy. The measures in issue may have been taken by or on behalf of the Party concerned in the exercise its sovereign powers, which will have to carry weight in the determination²¹¹. In *Myers*²¹² the Tribunal underlined that the determination of whether or not there is a breach of the fair

²⁰⁴ See Schreuer (2005) p. 386

²⁰⁵ Para 91

²⁰⁶ Para 135

²⁰⁷ The Tribunal refers e.g. to Harvard Research Draft art 6 with Comments (*see* p. 174); ("the judgment is manifestly unjust, especially if it has been inspired by ill-will towards foreigners, as such, or as citizens of a particular states"). *See* also Freeman, p. 310; A discrepancy between national and international law will be seen as denial of justice if the consequences of that conflict "evidences a derogation from the general duty of protection owed towards aliens under international law,..."

²⁰⁸ *See* e.g. *Gami* para 85; "No one has suggested that NAFTA entitles an investor to act on the basis that a regulatory scheme constitutes a guarantee of economic success"

²⁰⁹ Para 64. Repeated e.g. in *CMS* para 64 and *MTD* para 178

²¹⁰ Para 167

²¹¹ 1967 OECD Draft p. 121

²¹² Para 263

and equitable treatment standard “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”.

5.6 Is fair and equitable treatment really a non-contingent standard?

The fair and equitable treatment standard has traditionally been presented as a non-contingent standard, i.e. a “fixed point of reference”, “an absolute standard” or an “international level of treatment”²¹³, as opposed to the national treatment standard and the most favoured nation standard which are dependent on the treatment the host state give their own nationals or nationals from another country. It has been presented as the only instance in which a party is obligated to conform its treatment of investments to a standard that is determined by the collective behaviour of states, rather than by the actions of the party itself²¹⁴. Brownlie, in comparing the minimum standard to the national treatment standard, argues that there is no single international treatment standard, and that where a reasonable care or due diligence standard is applicable *diligentia quam in suis*²¹⁵ might be employed²¹⁶.

It seems clear that an international standard is the starting point for arbitrators and commentators when considering the fair and equitable treatment standard, see e.g. *Mondev*²¹⁷ where it is indicated that the standard (the denial of justice element) may be compared to the rule stated in the Harvard Research Draft Article; “unreasonably departs from the principles of justice recognized by the principal legal systems of the world”. In *Myers*²¹⁸ the Tribunal finds that an investor has been treated in such an unjust or arbitrary manner that the treatment raises to the level that it is “unacceptable from the international perspective”. This is also evident in *Genin*²¹⁹;

²¹³ See e.g. Vasciannie (2000) pp. 105-106, UNCTAD (1999) p. 12, Walker (1957-58) p. 811 and Schreuer (2005) p. 367

²¹⁴ Bergman (1983) pp. 19 - 20

²¹⁵ “i.e national treatment, but on the basis of the standard *ordinarily* observed by the particular state in its own affairs.”, see Brownlie (2003) p. 504 in foot note 35

²¹⁶ *ibid* p. 503; “[t]he core principle, which is simply that the territorial sovereign can not in all circumstances avoid responsibility by pleading that nationals and aliens had received equal treatment.”

²¹⁷ Para 127

²¹⁸ Para 263

²¹⁹ Para 367

“...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’”

Hence the question is; is it really a fixed standard, regardless of national indicators?

The international minimums standard was built on western values, which might have been some of the problem with its acceptance²²⁰. It seems hard to establish a common rule of law that entails all the different values and social preferences of the various parts of the global society, and it has also been argued that the standard is less universal than it seems, see e.g. Ocran²²¹; “the minimum would be higher in a highly developed European country than in a sparsely inhabited and only partially developed territory in [say] Africa or Asia.” The arguments used in Higgins²²² in favour of a “relativism approach” to the due diligence standard can also be applied in relation to the minimum standard or fair and equitable treatment standard. Furthermore, although the idea is a unified standard, the expectations of the investor is linked to the level of treatment that follows from laws, regulations and policies of the specific state which indicates that the “floor” of the standard might vary. However, the core idea; the elements entailed and the fact that the investor’s expectations are valid point of reference may be considered to entail a unified concept or norm based on international law.

²²⁰ Akehurst’s (1997) p. 261. Brownlie (2003) p. 503. see also the 1957 ILC report where a member of the commission saw it as “a standard of a particular economic and social system was held out as the universally just standard”, *ibid* p. 505. Brownlie goes on to argue that it is not possible to put forward a minimum standard “which in effect supports a particular philosophy of economic life at the expense of the host state”. See also *Petrobart* where the tribunal refers to the “rule of law in a democratic society”.

²²¹ T. M. Ocran “Bilateral investment protection treaties: a comparative study” in Fatouros (1994) p. 121, citing Beckett, 17 *Grotius Society Transactions* 175, 179 (1931)

²²² Higgins (1994) p. 156

6 Do the developments of the fair and equitable treatment standard represent an evolution of the international minimum standard?

It has been argued that the core elements as represented above constitute a “working definition” for the fair and equitable treatment standard²²³. Under this item I will discuss whether the core elements of the fair and equitable standard, as presented above, also can be said to represent a contemporary understanding of the minimum standard in customary law²²⁴.

Customary law is inherently evolutionary. State practice and *opinio juris* changes, and reflect general development. The famous *Neer* standard arguably falls short of the notion of a minimum level of treatment as it will be interpreted today, and the NAFTA Parties have explicitly agreed that the minimum standard “is not frozen in amber at the time of the *Neer* decision”²²⁵ and that it “has evolved and can evolve”²²⁶. However, they underline that “the threshold for finding violation of the minimum standard of treatment is still high”²²⁷.

If states, arbitrators and commentators consider and apply fair and equitable treatment as an autonomous standard, unrelated to the minimum standard, the arbitration on the matter would arguably not have the same effect on customary law as if it is seen and applied as synonymous to (or an element included in) the minimum standard²²⁸. The relationship is still being debated and there are examples of arbitration on the basis of an

²²³ Choudhury (2005) pp. 316-317

²²⁴ It can be argued that the fair and equitable treatment standard has become customary law in its own rights, given the substantial number of treaties in which the standard is included. However, this is a complex issue, states have different opinions of what the standard entails and the solution will arguably not lead us closer to establishing the correct level of treatment, hence I will not discuss this issue further here. The issue has been discussed in e.g. *Pope & Talbot* and *Mondev*. See also Loewenfeld (2002) pp. 486-488

²²⁵ *ADF* para 179

²²⁶ *Mondev* para 124, see also para 108

²²⁷ *ADF* para 179

²²⁸ See chapter 3

autonomous standard²²⁹. Most of the arbitral awards are, however, based on a notion that fair and equitable treatment and the minimum standard are closely connected²³⁰, which makes it easier to argue that the elements crystallised in connection with the fair and equitable treatment standard have a bearing on the minimum standard. However, the crux of the matter is state practice and *opinio juris*. If states do not conform to the elements and the level of treatment they entail in a consistent manner, or if they do not feel that they are under a legal obligation to so, the elements cannot be said to represent the standard.

The number of treaties that include a fair and equitable treatment provision makes a good case for seeing the “fairness element” in the treatment of the investment as part of customary law²³¹. Furthermore; the elements presented above are well grounded in customary law, and should thus not be contentious. However, it seems that, at least some states are of the opinion that the principle of fair and equitable treatment has been interpreted too widely, in the sense that the *threshold* for finding breach of the standard has been set too low. Annulment procedures in NAFTA, statements from states involved in dispute settlements, the interpretative note from the NAFTA FTC and more recent treaties with a tendency to specify the content of the standard in a more narrow, exhaustive way²³² are all arguments indicating that the states are quite reluctant to accept all the level of treatment indicated above as the minimum standard. It is, however, still early; the elements are related to arbitral awards during the last five years and in another five years this question may very well be easier to answer.

²²⁹ See e.g. *Pope & Talbot*

²³⁰ A substantial part of the arbitration is based on NAFTA (after 2001), in which the standards are considered coherent

²³¹ See, however, foot note 224

²³² Especially by the NAFTA Parties. See also CAFTA, annex IV, which defines Fair and equitable treatment and only includes due process/denial of justice.

7 Final remarks

There are indications that most states had not foreseen the extensive interpretation of fair and equitable treatment standard when entering into investment treaties with such articles. The obvious illustrations of this are listed under chapter 7; annulment procedures, NAFTA FTC, more specific treaties etc²³³. Another example are the Norwegian BITs; the article on fair and equitable treatment is hardly mentioned, neither in the preparatory work nor in the transmittal documents. Furthermore, most BITs have been incorporated by royal decree and not by acts of Parliament, which would be applied for treaties with significant implications²³⁴. A reason for this may be that the states saw the provision as coherent with the minimum standard, hence reflecting the level of treatment set in the landmark cases in the end of the 19th Century²³⁵. This is not a very stringent standard, and most states would feel that they are in no risk of acting in contradiction with the principle. Furthermore, although the provision has been included in treaties for five decades, all the arbitration is of recent nature. This indicates that not much emphasis has been placed on the provision until now.

But the development during the last five years shows that the provision has a “hidden depth”. In some arbitrations measures that could not be subsumed under specific provisions (e.g. expropriation) still has been found to be in breach of the treaty obligation by application of the fair and equitable treatment standard²³⁶. This way, the careful formulation of the specific provision may be worthless. This was probably not the intention of the parties.

The standard is open-ended and placed at the discretion of the various tribunals. This leads to a complex and ambiguous legal situation. It is not clear what emphasis future

²³³ However, a substantial number of treaties with the traditional language of the fair and equitable treatment provision are still concluded.

²³⁴ The Norwegian Constitution § 26, 2. There are other articles in the treaty which should also indicate that the treaties should have been incorporated by act of Parliament

²³⁵ See e.g. Roberts case; the test is, broadly speaking, whether aliens are treated *in accordance with ordinary standards of civilization*. See also Thomas (2002) p. 36

²³⁶ See e.g. *Pope & Talbot*

Tribunals will place on the previous arbitral awards and other sources attempting to clarify the standard. Arbitration can lead to extensive and even contradictory results²³⁷. Given this situation it might be wise for states to specify the content of the provision. The US has done so in its last Model BIT. However; to embellish a specific treaty provision that should safeguard the investors from infringements from the host state in detailed and inflexible rules seems impossible and futile. As a legal standard some uncertainty is inevitable if it is to be sufficiently flexible, hence the level of protection and the infringement of sovereignty will be in the hands of the arbitrator. The level of trust toward the arbitrator is of significant importance in this situation. The threshold value should be high, aware of what interests the standard is balanced against.

One could argue that the attitude towards investment treaties in general is different than it was in the 90ies. Extensive arbitration (substantial number of cases, wide in scope and high damages) and a more realistic reciprocity have made at least some states more cautious and less liberal when it comes to investment treaties. The problems related to the limitation on sovereignty have become more evident among the developed states during the last five years. Treaties on investment protection are no longer fitting the image of western capital-exporting states wanting to secure the investments of their nationals in developing countries. Great transformation of economies in Eastern Europe, Central Asia and indeed many developing countries has transformed former capital-importing countries to capital-exporters²³⁸. Furthermore a substantial part of the more recent treaties on investment protection, like the NAFTA and other Free Trade Agreements including investment provisions, are between developed countries.

There are issues of interests that I have not found room to analyse in the framework of this thesis; e.g. what is the value of a fair and equitable treatment provision in treaties without prior consent to investor-state dispute settlement²³⁹? What happens if the standard is used in an agreement limited to the promotion element and not measures on investment protection? What about areas that are carved out from the scope of the Treaty, e.g. tax or sectoral measures? Could an investor claim unfair and inequitable tax

²³⁷ e.g. *Lauder*, which seems to be based on the same facts as the *CME case*, but arrived at the opposite result. See also Choudhury (2005)

²³⁸ See Shihata (1993) p. 1369

²³⁹ See e.g. EFTA-Tunisia FTA. See also UNCTAD (1999) p. 12 and item 5.1, above

measures? And there are many, many more questions of interest regarding this subject...

It is too early to establish a clear definition for the fair and equitable treatment standard, and it is arguably too early to flesh out the content of the minimum standard in customary law. It is not even possible to come to a universal conclusion regarding the relationship between the two standards. What seems evident, however, is that the content of the fair and equitable treatment standard, and other issues regarding the standard, will develop and get clearer through case-by-case arbitration. It may be argued that there now is a tendency towards a more stringent interpretation²⁴⁰. Maybe the “heydays” of the standard are coming to an end? Qui vivra verra...

²⁴⁰ After NAFTA FTC etc

8 References

8.1 Literature

Bergman, Mark S. “Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the US Prototype Treaty”. *New York University Journal of International Law and Politics* vol.16 (1983) pp.1-43

Borchard, Edwin M. ““Responsibility of States” at the Hague Codification Conference”. *24 American Journal of International Law* (1930) pp.517-540

Brownlie, Ian. *Principles of Public International Law*, 6th ed., Oxford, 2003

Carlson, S.N. “Foreign investment laws and foreign direct investment in developing countries”. *29 Int. l.* (1995) p. 577-598

Cassese, Antonio. *International Law*. Oxford, 2001

Choudhury, Barnali. “Evolution or devolution? Defining Fair and Equitable Treatment in International Investment Law”. *Journal of World Investment and Trade*, vol 6 (2005) pp.297-320

Denza, Eileen. “Investment Protection Treaties: United Kingdom Experience”. Eileen Denza and Shelagh Brooks. *International and Comparative Law Quarterly*, Vol. 36 (1987) pp.908 – 923

Dolzer, Rudolf. *Bilateral Investment Treaties*. Rudolf Dolzer and Margrete Stevens, Martinus Nijhoff Publishers, 1995

Fatouros, A. A. “Transnational Corporations: The International Legal Framework” (Edited by Fatouros), *United Nations Library on Transnational Corporations*, Vol. 20, 1994

Freeman, A.V. *The International Responsibility of States for Denial of Justice*.
Longman, Green & co, 1938

Gann, Pamela. "The US Bilateral Investment Treaty Program". *Stanford Journal of International Law* 21 (1985) pp. 373-457

Hambro, Edvard. *Folkerettspleie*. Gyldendal, 1956

Harris, D.J. *Cases and Materials on International Law*. 6th ed. Sweet and Maxwell, 2004

Held, David. *Democracy and the global order*, Polity, 1995 part IV

Higgins, Rosalyn. *Problems and Process - International Law and How we Use it*, Claredon Press (1994), pp. 146-169

Houtte, Hans van. *The Law of International Trade*, 2nd ed. Sweet & Maxwell, 2002

Knoph, Ragnar. *Rettslige standarder: Særlig Grunnlovens § 97*. Oslo, 1939, pp. 1-44

Kuhn, Arthur K. "The International Conference on the Treatment of Foreigners". 24 *AJIL* (1930) pp. 570-573

Loewenfeld, Andreas F. *International Economic Law*, Oxford, 2002 pp.486-488

Malanczuk, Peter. *Akehurst's Modern Introduction to International Law*, 7th ed. Routledge, 1997 reprinted 2004

Mann, F.A. "British Treaties for the Promotion and Protection of Investments". 52 *BYIL* (1981) 241-253

Mann, F.A. *Further Studies in International Law*. Oxford, 1990

Price, Daniel M. "An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement". *27 Int'l Law* (1993) pp. 727-736

Root, Elihu: "The Basis of Protection to Citizens residing Abroad". *4 American Journal of International Law* (1910) 517

Schreuer, Christoph: "Fair and Equitable Treatment in Arbitral Practice". *Journal of World Investment and Trade*, vol 7 (2005) pp.357-386

Schwarzenberger, G. "The Ads-Shawcross Draft Convention on Investments Abroad: A Critical Commentary". *9 Journal of Public Law* (1960) pp. 150-154

Shihata, Ibrahim. *Legal Treatment of Foreign Investment: "The World Bank Guidelines"*, Martinus Nijhoff Publishers, 1993

Sohn, Louis B. "Responsibility of States for Injuries to the Economic Interests of Aliens". Louis B. Sohn and R. R. Baxter in *55 AJIL* (1961) pp. 545-584

Sornarajah, M. *The International Law on Foreign Investment*. Cambridge (2004)

Thomas, J.C. "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.

Vandevelde, Kenneth J. "The Bilateral Investment Treaty Program of the United States". *21 Cornell ILJ* (1988) pp.201-230

Vasciannie, Stephen. "The fair and equitable Treatment Standard in International Investment Law and Practice". *BYIL* (2000) vol. 70 pp. 99-164

Wälde, Thomas W. “European Energy Charter Conference: Final Act, Energy Charter Treaty, Decisions and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects”, *34 International Legal Materials (1995) pp.360-366*

Walker. “Modern Treaties of Friendship, Commerce and Navigation”. *Minnesota Law Review, 42 (1957-58), pp. 805-24*

Weiler, Todd: “Metalclad vs Mexico: A Play in Three Parts”, www.naftlaw.org

Weiler, Todd: “NAFTA Investment Arbitration an the Growth of International Economic Law”, www.naftalaw.org

8.2 Treaties

Energy Charter Treaty art. 10

North American Free Trade Agreement (NAFTA), see annex III

Norwegian BITs, see annex II

US – Chile Free Trade Agreement

http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html

Various other BITs

1969 Vienna Convention on Law of Treaties

8.3 Soft Law Instruments

Draft Central American Free Trade Agreement (CAFTA), see annex IV

http://ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html

“Draft Convention and Comments on Nationality, Responsibility of States for Injuries to aliens, and Territorial Waters, Prepared by the Research in International Law of

Harvard Law School” (“Harvard Research Draft”) 23 *AJIL* (1929), *Special Number* pp.133-135, pp.140-145 and pp.173-188

“Draft Convention on Investments abroad” (Abs-Shawcross) 9 *Journal of Public Law* (1960) pp. 115-124

GA Resolution 40/144: “The UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live”

GA Resolution XX (1962): “[...] on Permanent Sovereignty over Natural Resources”

“Havana Charter”, UNCTAD, *International Investment Instruments: A Compendium*, Doc. UNCTAD/DTCI/30. vol.1 (1996) pp. 3-13

OECD Draft Convention on the Protection of Foreign Property (1963). 2 *International Legal Materials* (1963) pp. 241-267

OECD Draft Convention on the Protection of foreign property (1967). 7 *International Legal Materials* (1968) pp. 117-143

OECD Draft Multilateral Agreement on Investment, OECD doc DAF/MAI(98)7

UNCTC, *The United Nations Code of Conduct on TNC*, UN Doc. ST/CTC/SER.A/4, annex 1

1992 World Bank Guidelines, 31 *International Legal Materials* (1992) pp1363-1384

8.4 Documents

Appendix to Statement of Claim: Opinion of Sir Robert Jennings re: NAFTA Article 1105 (1), 5 November 2002 (in relation to the Methanex case)

<http://naftaclaims.com/Disputes/USA/Methanex/MethanexResubAmendStateClaimAppend.pdf>

“Fair and equitable treatment”, UNCTAD Series on issues in international investment agreements, Geneva, 1999

NAFTA Chapter 11 Trilateral Negotiating Draft Texts

http://www.ustr.gov/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negotiating_Draft_Texts/Section_Index.html

OECD doc. DAF/IME(2003)4/REV3

Various documents (preparatory work) relating to the negotiation of Norwegian BITs, in the archives of the Ministry of Foreign Affairs

World Development Reports 2005, World Bank, Chapter 9

http://siteresources.worldbank.org/INTWDR2005/Resources/11_WDR_Ch09.pdf

2004 US Model BIT <http://www.state.gov/documents/organization/38710.pdf>

1996 Norwegian Model BIT

8.5 Case-law

8.5.1 *International Court of Justice*

All cases are found at the ICJ web-page; <http://www.icj-cij.org/>

Barcelona Traction (Belgium v. Spain), Judgement 5 February 1970

Case concerning the frontier dispute (Burkina Faso v. Republic of Mali), 22 December 1986

Danube/ Gabčíkovo-Nagymaros case (Hungary v. Slovakia), 25 September 1997

Elektronika Sicula S.p.A. (ELSI) (United States of America v. Italy), 20 July 1989

North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 20 February 1969

Oil Platforms case (Islamic Republic of Iran v. United States of America). Separate opinion of Judge Higgins, 6 November 2003

8.5.2 Arbitral awards

ADF Group Inc. v. United States of America. Final award, 9 January 2003

http://ita.law.uvic.ca/documents/ADF-award_000.pdf

AAPL vs Sri Lanka (arbitrator Assante's dissenting opinion), Final Award, 27 June 1990, 30 *International Legal Materials* (1991) pp. 580-655

American Manufact & Trading (AMT) vs. Zaire. Award, 21 February 1997
36 *International Legal Materials* (1997) pp. 1531-1561 (part. pp. 1548-1549)

Azinian, Robert, Kenneth Davitian & Ellen Baca v The United Mexican States. Final Award, 1 November 1999. <http://naftaclaims.com/Disputes/Mexico/Azinian/AzinianFinalAward.pdf>

Canfor Corporation v. United States of America. Procedural Order No. 5, 28 May 2004.
<http://www.state.gov/documents/organization/33109.pdf>

CME Czech Republic B.V. v. The Czech Republic. Final Award, 14 March 2003
<http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>

CMS Gas Transmission Company vs. the Republic of Argentina. Decision on Jurisdiction, 17 July 2003, 42 *ILM* 788 (2003)

Enron Corporation and Ponderosa Assets, L.P. vs. the Argentine Republic. Award on jurisdiction, 14 January 2004

Genin, Alex, Eastern Credit Ltd Inc and AS Baltoil v Republic of Estonia. Award, 25 June 2001 <http://ita.law.uvic.ca/documents/Genin-Award.pdf>

Lauder, Ronald S. v The Czech Republic. Final Award, 3 September 2001

<http://ita.law.uvic.ca/documents/LauderAward.pdf>

Loewen Group, Inc. and Raymond L. Loewen v. United States. Final Award, 26 June 2003 <http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf>

Metalclad Corp. v. United Mexican States. 30 August 2000

<http://ita.law.uvic.ca/documents/MetacladAward-English.pdf>

Methanex Corporation v. United States of America. Final Award, 3 August 2005

<http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf>

Mondev International Ltd. v. United States of America. 11 October 2002

<http://ita.law.uvic.ca/documents/Mondev-Final.pdf>

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile. 25 May 2004

<http://www.asil.org/ilib/MTDvChile.pdf>

“*Myers*”, *S.D. Myers Inc. v Canada*. Partial Award (Final Award on the Merits), 13

November 2000 <http://naftaclaims.com/Disputes/Canada/SDMyers/SDMyersFinalAwardMerits.pdf>

Occidental Exploration and Production Company (OEPC) v. The Republic of Ecuador.

1 July 2004 http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf

Petrobart ltd. v The Kyrgyz Republic. Award, 29 March 2005

http://ita.law.uvic.ca/documents/petrobart_kyrgyz.pdf

Plama Consortium Limited v. Republic of Bulgaria. Decision on jurisdiction,

8 February 2005 <http://www.asil.org/pdfs/ilibdecision050225.pdf>

Pope & Talbot, Inc. v. Government of Canada. Award on Damages, 31 May 2002

<http://ita.law.uvic.ca/documents/Pope-Damages.pdf>

Siemens A.G. v. The Argentine Republic. Decision on Jurisdiction, 3 August 2004

http://www.asil.org/ilib/Siemens_Argentina.pdf

Tecnicas Medioambientales TECMED S.A. v. Mexico. 29 May 2003

http://ita.law.uvic.ca/documents/Tecnicas_001.pdf

Waste Management Inc v. United Mexican states. Award, 30 April 2004

Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt. Award, 8 December 2000,
reprinted in 41 *I.L.M.* 896 (2002).

ANNEX I

THE ORIGINS OF THE FAIR AND EQUITABLE TREATMENT STANDARD

Copied from DAF/IME(2003)4/REV3 pp. 3-5

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

1. make recommendations for and promote bilateral or multilateral agreements on measures designed...
2. to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another.

The organisation was to be authorised, *inter alia*, to promote arrangements which would facilitate “an equitable distribution” of skills, arts, technology, materials and equipment, with due regard to the needs of all member States. Also, the member States were to recognise the right of each State to determine the terms of admission of foreign investors on its territory, to give effect to “just terms” on ownership of investment, and to apply “other reasonable requirements” with respect to existing and future investments.²⁴¹ 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*,²⁴² 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”.*²⁴³

241. 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.

242. 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.

243. 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”.

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

At the bilateral level, the *US treaties on Friendship, Commerce and Navigation (FCN)*, developed after the First World War, contained a standard reference to international law in connection with protection of the persons and property of aliens. In the period following the preparation of the Havana Charter, the terms “equitable” and “fair and equitable treatment” started to appear in certain of the US FCN treaties²⁴⁴. The proponents of the standard considered it as a safeguard against state action that violated internationally acceptable norms.²⁴⁵

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”.²⁴⁶ 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. 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.

244. 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.

245. 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.

246. 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.

ANNEX II

NORWEGIAN BILATERAL INVESTMENT TREATIES

	<i>Date of signature</i>	<i>Entry into force</i>	<i>Pub. details</i> ²⁴⁷
Madagascar ²⁴⁸	13 May 1966	8 September 1967	1967 p. 374
China	21 November 1984	10 July 1985	1986 p. 446
Sri Lanka	13 June 1985	13 June 1985	1986 p. 452
Poland	5 June 1990	24 October 1990	1990 p. 726
Hungary	8 April 1991	4 December 1992	1992 p. 1362
The Czech Republic	21 May 1991	6 August 1992	1992 p. 554
The Slovak Republic ²⁴⁹	21 May 1991	6 August 1992	1992 p. 554
Romania	11 June 1991	23 March 1992	1992 p. 344
Estonia	15 June 1992	15 June 1992	1992 p. 624
Latvia	16 June 1992	1 December 1992	1992 p. 1512
Lithuania	16 June 1992	19 December 1992	1992 p. 1374
Chile	1 June 1993	8 September 1994	1994 p. 1328
Peru	10 March 1995	5 May 1995	1995 p. 458
Russia	4 October 1995	21 May 1998	1998 p. 416

²⁴⁷ Norsk traktatsamling

²⁴⁸ The treaty with Madagascar is a on Friendship, Commerce and Navigation (FCN), but includes investment provisions

²⁴⁹ See protocol between the Government of the Kingdom of Norway and the Government of the Slovak Republic on the agreements governing bilateral Slovak-Norwegian relations, 16 September 1994

ANNEX III

NAFTA

Article 1105: Minimum Standard of Treatment

<http://www-tech.mit.edu/Bulletins/nafta.html>

1. 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.
2. Without prejudice to paragraph 1 and notwithstanding Article 1108 (8) (b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it maintains or adopts relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
3. Paragraph 2 shall not apply to existing measures related to subsidies or grants that are inconsistent with Article 1102.

Notes of Interpretation of Certain Chapter 11 Provisions

(NAFTA Free Trade Commission, July 31, 2001)

(excerpt)

<http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>

B. Minimum Standard of Treatment in Accordance with International Law

1. 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.
2. 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.
3. 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).

ANNEX IV

Draft Central American Free Trade Agreement (CAFTA)

http://ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file328_4718.pdf

Article 10.5: Minimum Standard of Treatment²⁵⁰

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. 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 that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
 - (a) “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; and
 - (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.
3. 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.

Annex 10-B

Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, 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.

²⁵⁰ Article 10.5 shall be interpreted in accordance with Annex 10-B