
# The Fair and Equitable Treatment Standard in International Investment Agreements

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## Abstract

### The Fair and Equitable Treatment Standard in International Investment Agreements

The objective of this thesis is to examine how the fair and equitable treatment standard in international investment agreements has evolved over the years and what role the standard plays in international investment law. The history of the standard will be discussed and what sources should be used by tribunals to interpret the standard but mainly the interpretations are based on treaties, custom and general principles of law. The discussion will also focus on the standard as an international minimum standard or as an independent self-contained standard but tribunals and scholars have interpreted the issue in different ways. The fair and equitable treatments substantive elements will also be discussed and how tribunals have found violations of the elements which have led to violation of fair and equitable treatment. In the end the relationship between fair and equitable treatment and other treaty standard will be discussed mainly to show how the standard fits into the international investment structure.

## Útdráttur

### Meginreglan um sanna og réttláta málsmeðferð í alþjóðlegum fjárfestingasamningum

Megintilgangur þessarar ritgerðar er að skoða hvernig meginreglan um sanngjarna og réttláta málsmeðferð í alþjóðlegum fjárfestingasamningum hefur þróast í tímans rás og hvaða hlutverki meginreglan gegnir í alþjóðlegum fjárfestingarétti. Saga meginreglunnar verður rakin og hvernig gerðardómar hafa túlkað meginregluna en hún er túlkuð út frá alþjóðlegum samningum, venjum og meginreglum laga. Áhersla verður einnig lögð á að fjalla um tengsl meginreglunnar við alþjóðlegu regluna um lágmarksvernd og/eða hvort að meginreglan skuli vera túlkuð sem sjálfstæð meginregla en fræðimenn og dómstólar hafa túlkað efnið á mismunandi hátt. Fjallað verður einnig um aðrar meginreglur alþjóðlegs fjárfestingaréttar og við hvaða aðstæður gerðardómar hafi fundið brot á þessum meginreglum sem hefur falið í sér brot á meginreglunni um sanngjarna og réttláta málsmeðferð. Í lokin verður fjallað um tengsl meginreglunnar og annarra alþjóðlegra meginreglna í alþjóðlegum fjárfestingasamningum til þess að sýna hvernig meginreglan um sanngjarna og réttláta málsmeðferð passar inn í alþjóðlega fjárfestingarumhverfið.

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**List of Abbreviations**

| | |
|---|---|
| BIT | Bilateral Investment Treaty |
| ECT | Energy Charter Treaty |
| FET | Fair and equitable treatment |
| FPS | Full protection and security |
| FTC | NAFTA Free Trade Commission |
| GATT | General Agreement on Tariffs and Trade |
| ICJ | International Court of Justice |
| IIA | International Investment Agreements |
| NAFTA | North American Free Trade Agreement |
| TRIMS | Agreement on Trade-Related Aspects of Investment |
| UNCITRAL | United Nations Commission on International Trade Law |
| VCLT | Vienna Convention on the Law of Treaties |

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*Azurix Corp. and others* v. *Argentina,* Award of July 14 2006, ICSID Case No. ARB/01/12

*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Pakistan,* Award of 27 August 2009 ICSID Case No. ARB/03/29

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*EDF International SAUR International S.A. and Leon Participaciones* v. *Argentina,* Award of 11 June 2012, ICSID Case No. ARB/03/23

*Impregilo S.p.A.* v. *Pakistan,* Decision on Jurisdiction of 22 April 2005, ICSID Case No. ARB/03/3

*Jan de Nul N.V. Dredging International N.V.* v. *Egypt,* Award of 6 November 2008, ICSID Case No. ARB/04/13

*Merril & Ring Forestry L.P.* v. *Canada,* Award of 31 March 2010, ICSID Administered Case

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

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*SGS Société Générale de Surveillance S.A.* v. *Philippines*, ICSID Case No. ARB//02/06

*Siemens A.G.* v. *Argentina,* Award of 6 February 2007, ICSID Case No. ARB/02/8

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*United Parcel Service of America Inc* v. *Canada*, Award on Jurisdiction of 22 November 2001, NAFTA Arbitration

Table of International Treaties and Conventions

**Bilateral Investment Treaties (BITs)**

Agreement for an Economic Partnership (Australia-Japan) (signed 8 July 2014)

Agreement for Reciprocal Promotion and Protection of Investments (Denmark–Morocco) (signed 22 May 2003)

Agreement for Reciprocal Promotion and Protection of Investments (Netherlands–Slovenia) (signed 24 September 1996, entered into force 1 August 1998)

Agreement for the Promotion and Protection of Investment (Australia-Egypt) (signed 3 May 2001, entered into force 5 September 2002)

Agreement for the Promotion and Protection of Investment (Canada-Serbia) (signed 1 September 2014)

Agreement for the Promotion and Protection of Investments (Canada-Slovakia) (signed 27 July 2010, entered into force 14 March 2012)

Agreement on the Promotion and Protection of Investments (Germany-Bangladesh) (signed 6 May 1981, entered into force 14 September 1986)

Agreement for the Promotion and Protection of Investments (United Kingdom-Northern Ireland) (signed 4 July 2001)

Agreement for the Promotion and Reciprocal Protection of Investments (Israel-Georgia) (signed 19 June 1995, entered into force 18 February 1997)

Agreement on Encouragement and Reciprocal Protection of Investment (Netherlands-United Arab Emirates) (signed 26 November 2013)

Agreement on Encouragement and Reciprocal Protection of Investments (Netherlands-Belarus) (signed 11 April 1995, entered into force 1 August 1996)

Agreement on the Liberalisation, Promotion and Protection of Investments (Japan-Myanmar) (signed 15 December 2013)

Agreement on the Promotion and Protection of Investments (Albania-Lithuania) (signed 28 March 2007, entered into force 7 December 2007)

Agreement on the Promotion and Protection of Investments (Hong Kong-Sweden) (signed 27 May 1994, entered into force 26 June 1994)

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Treaty for the Promotion and Protection of Investments (Germany-Pakistan) (signed 25 November 1959, entered into force 28 April 1962) 6575 UNTS.

**Multilateral Treaties**

Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) (signed 18 March, entered into force 14 October 1966)

The Draft Convention on the Protection of Foreign Property (OECD) (adopted 12 October 1967)

The Energy Charter Treaty (ECT) (signed in December 1994, entered into force in April 1998)

The General Agreement on Tariffs and Trade (GATT) (signed 30 October 1947, entered into force 1 January 1948, amended 1 January 1995)

The North American Free Trade Agreement (NAFTA) (signed on 17 December 1992, entered into force 1 January 1994)

The Statute of the International Court of Justice (ICJ)

Vienna Convention on the Law of Treaties (VCLT) (signed 23 May 1969, entered into force 27 January 1980)

**Free Trade Agreements**

Agreement on Trade and Investment Cooperation (Iceland-United States) (signed 15 January 2009)

Arrangement on Trade and Economic Cooperation (Iceland-Canada) (signed 24 March 1998, entry into force 24 March 1998)

Free Trade Agreement (Canada-Korea) (signed 6 June 2014)

Free Trade Agreement (Iceland-China) (signed 15 April 2013) (entered into force 1 July 2014)

**The Fair and Equitable Treatment Standard in International Investment Agreements**

# 1 Introduction

The international investment legal framework consist of a broad network of international investment agreements (IIA). The current network can be traced to the Middle Ages and prior to the twentieth century investors could only rely on diplomatic protections of their home state in order to solve a dispute in the event of damage.[1] This lead to indirect protection because the investor depended on his state's will to sustain the dispute against the host state and he had no way of directly enforcing his rights against the host state.[2]

Following the end of the Second World War the states realized that foreign investment was important for the state's economy and growth. To stimulate investment, states began to grant protection to investors, sometimes greater than the protection afforded to their own nationals, which was accomplished through agreements signed between states. The investors' decisions to invest in the host state depended on the state's stable and secure environment. Therefore, states agreed to set basic standards to grant protection to the investors so they would be able to continue the investment over time. To ensure this protection, states began to sign bilateral initiatives in the 1960s that formed a worldwide network of investment agreements. These bilateral investment treaties (BITs) granted foreign investors protection for their investments, by establishing standards and dispute settlement regimes as well. The dispute settlement allowed investors and any of the parties to have access to tribunals and they were able to choose either the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade law (UNCITRAL) arbitration rules.[3] This provided the investors with the security they were seeking for.

Today, most IIAs and BITs contain the fair and equitable treatment standard (FET) and the standard has been at the center of debate in various investment disputes. The FET standard is intended to protect the foreign investor from the host state's action but it has also exposed various risks and uncertainties. These uncertainties are mainly due to tribunals having interpreted the standard broadly by including all kinds of specific requirements which obliges the host states to act consistently, transparently, reasonably, free from ambiguity, ensure due process and respect investors' legitimate expectations. Regardless of these requirements, the

[1] Andrew Newcomb, Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 1-2.
[2] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*. (Oxford University Press 2008) 1.
[3] Marcela K. Bronfman, 'Fair and Equitable Treatment: An Evolving Standard' University of Heidelberg, Max Planck Institute for Camparative Puplic Law and International Law and University of Chile, Mars 2005 610 <http://www.mpil.de/files/pdf3/15_marcela_iii1.pdf> accessed 30 June 2014.

debate has often been over whether the FET standard should be linked to the minimum standard of treatment of aliens, interpreted as an autonomous standard, and while other tribunals have interpreted the standard as a self-standing standard.[4] The effect of these different interpretations the FET standard has caused some worries among investors because the standard is supposed to give investors security and stability.[5]

The main purpose of this essay is to explore the FET standard, its meaning and purpose, and how the standard has developed through the years.

In chapter two, the historical background of the FET standard will be viewed which constitutes early treaty practice together with other important international investment treaties.

In chapter three, the sources of the FET standard will be discussed briefly and the legal basis of the standard will be examined, whether it is based on treaty, custom or general principles, and how tribunals use these sources to interpret the standard.

In chapter four, the difference between the FET standard as a part of customary international law and independent standard will be discussed and the problems of tribunals in defining the standard. Interpretations of international organizations, scholars, various cases and agreements will be taken into consideration when the standard is examined.

In chapter five, the FET standard substantive elements will be discussed and what elements tribunals take into account when finding a breach of the standard. The main categories which will be especially discussed are the investors' legitimate expectations, host state's transparency, due process, acting in good faith and finally freedom from coercion and harassment.

Finally, in the last chapter, the relationship between the FET standard and other important standards in investment agreements will be discussed.

[4] UNCTAD, 'Fair and Equitable Treatment' (UNCTAD Series on Issues in International Investment Agreements II, UN 2012) Executive Summary, Chapter xiii <http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf> accessed 18 January 2015.
[5] Bronfman (above fn. 3) 612.

# 2 Historical background of the Fair and Equitable Treatment standard

## 2.1 Early Treaty Practice

The term "fair and equitable" first appeared in Article 11(2) of the Havana Charter for an International Trade Organization of 1948. The purpose of the article was to "assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another".[6] The objective of the Charter was to encourage economic development, particularly in developing countries. The Havana Charter, however, never came into force but the failure of the Charter did not put an end to fair treatment in investment instruments.[7] Another agreement which never came into force either was the Economic Agreement of Bogotá from 1948 that contained provisions to safeguard foreign investors but it was considered to be too unclear and dangerous.[8]

Other conventions followed after the Havana Charter and the Bogotá agreement, for example the Draft Convention on the Protection of Foreign Property of 1967 prepared by the Committee of the Organization for Economic Cooperation and Development (OECD). Article I, stated: "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of other Parties".[9] The Draft Convention was however never opened for signature.[10]

## 2.2 Bilateral Investment Treaties

In recent years the number of BITs has grown increasingly.[11] The first BIT was signed between Germany and Pakistan in 1959[12] and today there are more than 2700 BITs.[13] The origins of BITs can be traced back to bilateral treaties of Friendship, Commerce and Navigation Treaties

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[6] United Nations Conference on Trade and Developement, 'Final Act and Related Documents' (UN doc E/Conf. 2/78, April 1948) Chapter III Art. 11(2) <https://www.wto.org/English/docs_e/legal_e/havana_e.pdf> accessed 3 September 2014.

[7] Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practise' (1999) 17 BYBIL 99, 108-109.

[8] Tudor (above fn. 2) 1.

[9] The Draft Convention on the Protection of Foreign Property (OECD) (adopted 12 October 1967) Art 1 <http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf> accessed 4 July 2014.

[10] OECD, 'Fair and Equitable Treatment Standard in International Investment Law (2004) Working Papers on International Investment 2004/3, 4 <http://www.oecd.org/investment/internationalinvestmentagreements/33776498.pdf> accessed 4 July 2014.

[11] Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (Oxford: Oxford University Press 2007) 26.

[12] Treaty for the Promotion and Protection of Investment (Germany-Pakistan) (signed 25 November 1959, entered into force 28 April 1962) 6575 UNTS.

[13] UNCTAD (Database of International Investment Agreements) <http://investmentpolicyhub.unctad.org/IIA> accessed 1 September 2014.

(FCN)[14] and after the World War II, following the negotiations of the Havana Charter, most of the FCN treaties included the FET standard.[15]

The structure of BIT is generally the same. It contains a preamble that specifies the desire to increase economic cooperation between the investor and the host state. The purpose is to grant the investors protection which stimulates foreign investment for the host state[16] which is beneficial for both parties. One example is the preamble in the BIT between Serbia-United Arab Emirates which provides:

> Desiring to promote greater economic co-operation between them, with the respect to investment made by investors of one Contracting Party in the territory of other Contracting Party;
>
> Recognizing that agreement on the promotion and reciprocal protection to be accorded to such investment will stimulate the flow of capital and the economic development of the Contracting Parties;
>
> Agreeing that a stable framework for investments will maximize effective utilization of economic resources and approve living standards;
>
> Understanding that promotion of such investment requests co-operative efforts of the investors of one Contracting Party and the other Contracting Party.[17]

Tribunals have often, in their conclusion, interpreted the preamble in BITs[18] as the Tribunal did in *Azurix Corp. v. Argentina.*[19] The FET standard was established in the preamble of the BIT between the United States and Argentina stating: "agreeing that fair and equitable treatment of investment is desirable in order to maintain stable framework for investment…"[20]

BITs play a very important role between the investor and the host state. By establishing a BIT states grant each other, or more importantly their investors, fair and equitable treatment in investment matters which gives the investors the security that they expects and their investments will be subjected to treatment compatible with their main expectations.[21]

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[14] McLachlan, Shore and Weiniger (above fn. 11) 26.
[15] Bronfman (above fn. 3) 614.
[16] McLachlan, Shore and Weiniger (above fn. 11) 28.
[17] Agreement on the Promotion and Reciprocal Protection of Investments (Serbia-United Arab Emirates) (signed 17 February 2013) Preamble <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2255> accessed 16 September 2014.
[18] McLachlan, Shore and Weiniger (above fn. 11) 28.
[19] *Azurix Corp. and others* v. *Argentina*, Award of July 14 2006, ICSID Case No. ARB/01/12 at para. 307 <http://www.italaw.com/documents/AzurixAwardJuly2006.pdf> accessed 18 September 2014.
[20] Treaty Concerning the Reciprocal Encouragement and Protection of Investment (United States- Argentina) (signed 14 November 1991, entered into force 20 October 1994) Preamble <http://investmentpolicyhub.unctad.org/Download/TreatyFile/127> accessed 18 September 2014.
[21] Vasciannie (above fn. 7) 99-100.

Today the FET standard appears in the majority of BITs but they include different versions of the standard which means different wordings and meanings behind each agreement.[22] Here are some examples:

Art. 4 in the Japan-Myanmar BIT states:

> Each Contracting Party shall in its Area accord to investment of investors of the other Contracting Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.[23]

Art. 3.1 in the Netherlands-United Arab Emirates BIT states:

> Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.[24]

Art. 6 in the Canada-Tanzania BIT contains a minimum standard of treatment which states:

> Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.[25]

These examples show that the standard can be formulated in various ways. Often the standard is linked to international law, or linked to the minimum standard of treatment under customary international law, but some are not linked to any of these, only the FET standard with additional content such as unreasonable and discriminatory measures[26] as the Netherlands-United Arab Emirates BIT shows above. The debate concerning different interpretations will be discussed in more details in chapter three.

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[22] Fiona Marshall, 'Fair and Equitable Treatment in International Investment Agreements' (Issues in International Investment Law October 2007) 3-4 <http://www.iisd.org/pdf/2007/inv_fair_treatment.pdf> accessed 9 September 2014.

[23] Agreement on the Liberalisation, Promotion and Protection of Investment (Japan-Myanmar) (signed 15 December 2013) Art. 4 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3113> accessed 1 September 2014.

[24] Agreement on Encouragement and Reciprocal Protection of Investment (Netherland-United Arab Emirates) (signed 26 November 2013) Art 3.1 <http://investmentpolicyhub.unctad.org/IIA/CountryBits/148#iiaInnerMenu> accessed 1 September 2014.

[25] Agreement on the Promotion and Reciprocal Protection of Investment (Canada-Tanzania) (signed 17 May 2013, entered into force 9 December 2013) Section b Art. 6 <http://investmentpolicyhub.unctad.org> accessed 1 September 2014.

[26] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 17-18.

2.3 Multilateral Investment Treaties

Along with BITs the FET standard is also provided in many multilateral investment treaties which have entered into force[27] and the most recognized treaties are the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT).

The NAFTA was an important development in 1992 between Canada, Mexico and United States. The objective was to cover goods, services, government procurement, and the most vital thing, investments.[28] The agreement provides the FET standard in chapter eleven Art. 1105 which provides: "Each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".[29] This article in NAFTA contains full protection and security in accordance with international law but the agreement was considered to be the first one to make a clear reference to international law.[30]

The Energy Charter Treaty of 1994 also contains provision of fair and equitable treatment in Art. 10 which states the following:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.[31]

The ECT is a clear example of a treaty providing protection which is no less favorable than is required by international law, providing constant protection and security and finally prevents unreasonable and discriminatory measures. The charter is also interesting because the provision is very detailed and the member states agreed to the standard in its complete formulations.[32]

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[27] Cristoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) Vol. 6 The Journal of World Investment and Trade 358 <http://www.univie.ac.at/intlaw/wordpress/pdf/77.pdf > accessed 8 July 2014.
[28] Newcomb and Paradell (above fn. 1) 53.
[29] The North American Free Trade Agreement (NAFTA) (signed on 17 December 1992, entered into force 1 January 1994) Part five, Chapter eleven Art. 1105 <https://www.nafta-sec-alena.org> accessed 8 July 2014.
[30] Tudor (above fn. 2) 43.
[31] The Energy Charter Treaty (ECT) (signed in December 1994, entered into force in April 1998) Part III, Art. 10 <http://www.encharter.org> accessed 8 July 2014.
[32] Tudor (above fn. 2) 43-44.

### 2.4 Free Trade Agreements

New generations of IIAs has recently been developed, so called "Free Trade Agreements" allowing greater specificity.[33] It must be noticed that the articles containing the FET standard are more detailed than in BITs. One, for example, is Art. 14.5 in the Australia – Japan IIA that contains the minimum standard of treatment and it states:

> Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> Notes 1: This Article prescribes the customary international law minimum standard of treatment to be afforded to a party to covered investment. The concept 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 aliens.[34]

Another similar approach of FET standard appears in the Canada-Korea IIA in Article 8.5 which states:

> Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be accorded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 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.[35]

## 3 The sources of the Fair and Equitable Treatment standard

### 3.1 The Statute of the International Court of Justice (ICJ)

[33] OECD, 'International Investment Law: A Changing Landscape, *A Companion Volume to International Investment Perspective'* (2005) 78.
[34] Agreement for an Economic Partnership (Australia-Japan) (signed 8 July 2014) Chapter fourteen Art. 14.5 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3058> accessed 2 September 2014.
[35] Free Trade Agreement (Canada-Korea) (signed 6 June 2014) Vol I Chapter eight Art 8.5 <http://www.sice.oas.org/TPD/CAN_KOR/CAN_KOR_Final_FTA/ENG/ckfta-tofa-eng.pdf> accessed 2 September 2014.

To examine the legal basis of the FET standard it is necessary to investigate the sources of international law. The main source which has generally been accepted[36] is Art. 38(1) of the Statute of the International Court of Justice (ICJ) which states:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[37]

The sources of international law are described in this article, establishing three main bases, treaties, custom and general principle of laws.[38] According to Tudor all the sources listed up in the article are legal basis for the FET standard.[39]

3.2 The Convention on the Settlement of Investment Disputes (ICSID)

In addition to Art. 38 (1) ICJ is Art. 42 (1) of the ICSID Convention which experts would also look into because it "refers to the applicable law in the field of ICSID arbitral disputes".[40]

Art. 42(1) of the ICSID Convention provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[41]

Even though Art. 42(1) of the ICSID Convention is not linked directly to Art. 38(1) the expression in the article "and such rules of international law as may be applicable" gives the arbitrators choice to use the Art. 38(1) of the ICJ statute.[42] Art. 42(1) "should therefore be

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[36] Tudor (above fn. 2) 9-10.
[37] The Statute of the International Court of Justice, Chapter II Art. 38(1) (ICJ) <http://www.icj-cij.org/documents/?p1=4&p2=2> accessed 30 August 2014.
[38] Roland Kläger, *'Fair and Equitable Treatment' in International Investment Law* (Cambridge University Press 2011) 261.
[39] Tudor (above fn. 2) 9.
[40] Ibid., 9.
[41] Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) (signed 18 March, entered into force 14 October 1966) Art. 42(1) <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf > accessed 15 Septmber 2014.
[42] Tudor (above fn. 2) 11.

understood as an option for the tribunal to determine the applicable substantive rules of international law in accordance with the sources set forth in Article 38 of the Statute of the International Court of Justice".[43]

In *MTD* v. *Chile*[44] the Tribunal applied international law and departed from the BIT:

> Article 42(1) of the Convention is the relevant provision for determining the law applicable to the merits of the dispute between parties. This article requires the Tribunal to "decide a dispute in accordance with such rules of law as may be agreed by the parties". This being a dispute under the BIT, the parties have agreed that the merits of the dispute be decided in accordance with international law. For purposes of Article 42(1) of the Convention, the parties have agreed to this arbitration under the BIT. This instrument being a treaty, the agreement to arbitrate under the BIT requires the Tribunal to apply international law.[45]

3.3 The Vienna Convention of the Law of Treaties (VCLT)

Another treaty which concerns the interpretation of investment standards[46] is the Vienna Convention on the Law of Treaties 1969 (VCLT).[47] Art. 31 of the Convention is generally accepted and considered to be the most important as it states general rule of interpretations based on customary international law. The articles "have also been repeatedly accepted by investment arbitration tribunals as constituting rules of interpretation which are binding on them in the interpretations of investment treaties, whether by virtue of being directly binding on the parties to the BIT as treaty rules, or as customary international law".[48] For example in *Azurix* v. *Argentina*[49] the Tribunal confirmed that the BIT should be interpreted in accordance with the VCLT. The Tribunal stated:

> The BIT is an international treaty and should be interpreted in accordance with the interpretation norms set forth by the Vienna Convention on the Law of the Treaties ('the Vienna Convention"), which is binding on the States parties to the BIT. Article 31(1) of the Vienna Convention requires that a treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[50]

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[43] Emmanuel Gaillard and Yas Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process 397 <http://www.arbitration-icca.org/media/0/12178520651780/the_meaning_of_and__article_42_1_eg.pdf> accessed 15 September 2014.

[44] *MTD Equity Sdn. Bhd. and MTD Chile S.A.* v. *Chile,* Award of 25 May 2004, ICSID Case No. ARB/01/7 <http://www.italaw.com/documents/MTD-Award_000.pdf> accessed 15 September 2014.

[45] Ibid., at paras 86-7.

[46] McLachlan, Shore and Weiniger (above fn. 11) 221.

[47] Vienna Convention on the Law of Treaties (VCLT) (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> accessed 11 September 2014.

[48] McLachlan, Shore and Weiniger (above fn. 11) 221.

[49] *Azurix* v. *Argentina* (above fn. 19).

[50] Ibid., at para. 307.

Article 31 VCLT provides a general rule of interpretations and it states:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.[51]

Art. 31(1) states the ordinary meaning of term which would not be likely to be interpreted very far. The object and purpose which are stipulated in investment agreements usually contain the purpose of the agreement and that can take the interpretations much further.[52] For example the Iceland-China BIT states the objective and the purpose of the agreement:

> The Government of the People's Republic of China and the Government of the Republic of Iceland,
> Intending to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,
> Recognizing that the promotion and reciprocal protection of such investments will be conducive to stimulating business initiative of the investors and will increase prosperity in both States…[53]

The ordinary meaning of the term stated in Art. 31(1) of the Convention is often used as a basis to analyze the meaning behind each agreement.[54] In *MTD* v. *Chile*[55] the Tribunal gave the FET standard its ordinary meaning:

> In their ordinary meaning, the terms "fair" and "equitable" used in Article 3(1) of the BIT mean "just", "even-handed", "unbiased", "legitimate". These terms are also

[51] VCLT (above fn. 47) Art. 31.
[52] McLachlan, Shore and Weiniger (above fn. 11) 221-222.
[53] Agreement on the Promotion and Reciprocal Protection of Investment (Iceland-China) (signed 31 March 1994, entered into force 01 March 1997) <http://arbitrationlaw.com/files/free_pdfs/china-iceland_bit.pdf> accessed 1 September 2014.
[54] Newcomb and Paradell (above fn. 1) 111.
[55] *MTD Equity* v. *Chile* (above fn. 44).

> used in Article 2(2) of the BIT entitled "Promotion and Protection of Investments". As regards the object and purpose of the BIT, the Tribunal refers to its Preamble where the parties state their desire "to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party", and the recognition of "the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view to the economic prosperity of both Contracting Parties". Hence, in terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – "to promote", "to create", "to stimulate"- rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.[56]

In *Anatolie Stati* v. *Kazakhstan*[57] the Tribunal was not able to interpret the FET standard in the light of the Art. 10 ECT because the clause did not provide any guidance for interpretation. Instead the Tribunal turned to Art. 31(1) and Art. 32(2) of VCLT to interpret the FET standard.[58]

Art. 31(2) of the VCLT provides the interpretation of agreements between parties including the annexes and the preamble with are established in the treaties.[59]

Art. 31(3) of the VCLT provides for references to other sources of international law although treaty based rules are generally interpreted by general principles of law. Customary international law is according to the article still applicable as the article states: "any relevant rules of international law applicable in the relation between parties". However, the main issues over the years have concerned whether BITs are linked to customary international law, namely which is the international minimum standard.[60] These discussions of customary international law and international minimum standard will be more detailed in chapter four.

Art. 31 of the VCLT is widely accepted by investment arbitral tribunals as they establish rules of interpretation which are binding in investment treaties. Often they are directly binding in BITs as treaty rules or as customary international law.[61]

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[56] Ibid., at para. 113.
[57] *Anatolie Stati and others* v. *Kazakhstan*, Award of 19 December 2013, SCC Arbitration <http://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf > accessed 26 September 2014.
[58] Ibid., at para. 942.
[59] Kläger (above fn. 38) 39.
[60] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd. ed. Oxford University Press 2012) 17.
[61] Campbell McLachan, 'Investment treaties and general international law' [2008] 362 I.C.L.Q 371.

# 4 Fair and Equitable Treatment and customary international law

## 4.1 General

The concept of state being responsible for injuring an alien and his property first began to appear during the end of the colonial period in Latin America. This situation occurred between the United States and the Latin American States where US citizens suffered injury by the Latin Americans.[62] The United States, therefore, claimed the international minimum standard protection to be given to the aliens. The European countries followed by adopting rules of minimum standard when they gave up their colonies. However, these rules were very uncertain and did not contain any guarantee for the investors. The main reason was unclear investment laws and states could also refuse to support a foreign investment claim because the claim could be more expendable than other foreign policy objects.[63]

Another view of the standard expands the scope of the international minimum standard and allows the new standard to be developed by future tribunals.[64] It contains a "plain meaning of the standard" and is based on the idea that the FET standard is an independent self -contained standard.[65]

The main debate over the FET standard has concerned whether the standard should be linked to customary international minimum standard or whether it should be referred to general international law offering an autonomous standard.[66] Although the parties of the debate have agreed that the FET standard is a part of customary international law minimum standard the problem has been how to define the customary international standard.[67] This point has been discussed by many arbitrators and scholars who have given the standard many interpretations. In chapter 4.2-3 the discussion will concentrate on the fair and equitable treatment as a customary international minimum standard and how scholars and arbitrators have attempt to define the standard. Chapter 4.3 will contain a discussion of the FET standard as an independent standard required by international law.

[62] Although the US had not been colonial empire they had a significance commercial interests.
[63] M. Sornarajah, *The International Law on Foreign Investment* (2nd. ed. Cambridge University Press 2004) 37-38.
[64] Ibid., 332.
[65] Kläger (above fn. 38) 59.
[66] Dolzer and Schreuer (above fn. 60) 134.
[67] *Glamis Gold Ltd* v. *United States*, Award of 8 June 2009 (UNCITRAL) at para. 541 <http://italaw.com/sites/default/files/case-documents/ita0378.pdf> accessed 12 October 2014.

### 4.2 The Fair and Equitable Treatment as Customary International Minimum Standard

The customary international minimum standard provides a minimum set of principles which states must honor in their relation to foreign nationals.[68] These principles received great attention in the later part of the nineteenth century and in the first half of the twentieth century when the basic features of the standard were beginning to develop. The background of the concept is found in the theory of national treatment of aliens which requires that the host state treat aliens in the same respectable way as their own nationals.[69]

#### 4.2.1 Early case law

The best known case establishing the international minimum standard was the *Neer*[70] case from 1926. It concerned the murder of Paul Neer, a mine employee in Guanaceví, State of Durango Mexico. The American Commission claimed that the Mexican Authorities failed to apprehend and punish those who were guilty of the murder of Neer and also failed to investigate the case. The Tribunal referred to the international standard by stating:

> The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful 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.[71]

The *Neer* case is an old case and it is still mentioned in arbitral awards[72] although the threshold to find a violation the FET standard was considered at that time to be very high.[73] Arbitrators still disagree whether the minimum standard is limited to the interpretation which was given in *Neer* or if the minimum standard is still developing.[74]

#### 4.2.2 The interpretations of international organizations

The FET standard as a customary international law standard has often be considered vague and unclear. International organizations have felt the need to fill the gaps by establishing declarations to prevent this uncertainties.[75]

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[68] OECD, 'International Investment Law: A Changing Landscape' (above fn. 33) 81.
[69] Kläger (above fn. 38) 48-49.
[70] *L.F.H Neer and Pauline Neer USA* v. *Mexico,* Award of 15 October 1926 UN Vol IV. <http://legal.un.org/riaa/cases/vol_IV/60-66.pdf> accessed 24 September 2014.
[71] Ibid., at paras. 60-62.
[72] *EDF International SAUR International S.A. and Leon Participaciones* v. *Argentina,* Award of 11 June 2012, ICSID Case No. ARB/03/23, at paras. 344-348 <http://www.italaw.com/sites/default/files/case-documents/ita1069.pdf> accessed 25 September 2014.
[73] Kläger (above fn. 38) 71.
[74] OECD, 'International Investment Law: A Changing Landscape' (above fn. 33) 83.
[75] Kläger (above fn. 38) 56.

The Notes and Comments in Art. 1 of the Draft Convention on the Protection and Foreign Property stated that the main obligation between states was to respect and protect the property of nationals of another states. This situation is considered to be a well-established general principle of international law.[76] The Committee also noted:

> The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that – subject to essential security interests – protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national laws or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the "minimum standard" which forms part of customary international law.[77]

These comments are one of the earliest attempt to define the standard.[78] The latest instrument which defines the standard and has received the most attention is the NAFTA Free Trade Commission (FTC). This discussion over the interpretation is more detailed in the following chapter.

### 4.2.3 The Article 1105 of NAFTA

The Art. 1105(1) NAFTA has been the center of debate over the relationship between the FET standard and customary international law.[79] The Commission has, according to Art. 1131(2) NAFTA, power to interpret the NAFTA provisions which "shall be binding on a Tribunal established under this Section".[80] The Commission released a binding interpretation on 31 July 2001 in order to clarify and confirm Art. 1105 NAFTA and the meaning behind it. The interpretation provides:

> Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

[76] OECD (above fn. 9) Notes and Comments to Article 1, The Obligation 8.
[77] Ibid., First rule: Fair and Equitable Treatment 9.
[78] Kläger (above fn. 38) 56.
[79] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 23.
[80] NAFTA (above fn. 29) Section B, Art. 1131(2).

> 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).[81]

The reason for the guidelines which the Committee established is different interpretation of arbitral tribunals and scholars of the FET standard in NAFTA.[82] One of the scholars worth mentioning is Sir Ian Sinclair. In his opinion (prior to the FTC interpretation) it should be the language in Art. 1105(1) itself that should be interpreted, not the heading to the article which contains the "minimum standard". This has caused some confusion because the term "minimum standard of treatment" was used in the past to secure aliens or residents in another state from physical harm. Today the concept is very contentious which has caused problems in practice.[83]

However, the FTC interpretation has received much criticism among arbitrators and scholars. The criticism has concerned the wording "the Article 1105(1) prescribes the customary international minimum standard of treatment of aliens as the minimum standard of treatment…". One of them is Professor Sir Roberts Jennings and he has pointed out that Art. 1105(1) NAFTA does not include "alien" or the word "customary", not even in the heading of the Article "minimum standard of treatment". The Commission's to attempt to interpret the Art. 1105(1) by changing the text of the paragraph is equal to betrayal of "this so-called interpretation".[84] Another scholar that disagreed with Sir Jennings was Christopher Greenwood which interpreted Art. 1105(1) in a different way. Greenwood said that NAFTA has to be interpreted in accordance with the principles of customary international law set forth in Articles 31-33 of the VCLT. The "fair and equitable treatment" in Art. 1105(1) was not intended to go beyond the requirements of customary international law. Greenwood also said that it is clear that the FTC interpretations includes Art. 1105(1) as a customary international standard.[85]

The best known case where the Tribunal did not accept the Commission's interpretation was the *Pope & Talbot*[86] case. The Tribunal held that it had "a duty to consider and decide"

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[81] North American Free Trade Agreement, 'Notes of interpretation of Certain Chapter 11 Provisions' (NAFTA Free Trade Commission 31 July, 2001) <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> accessed 6 October 2014.

[82] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (above fn. 10) 10.

[83] Ian Sinclair, 'Opinion by Sir Ian Sinclair' (Loewen Group and Another v. United States of America) 40 <http://italaw.com/sites/default/files/case-documents/ita0976.pdf> accessed 10 October 2014.

[84] Roberts Jennings 'Second opinion of Professor Sir Roberts Jennings, Q.C' (Methanex Corporation v. United States of America) 3 <http://italaw.com/sites/default/files/case-documents/ita0983.pdf> accessed 10 October 2014.

[85] Christopher Greenwood, 'Second Opinion of Christopher Greenwood'(Loewen Group and Another v. United States of America) 74-75, 100 <http://italaw.com/sites/default/files/case-documents/ita0973.pdf> accessed 10 October 2014.

[86] *Pope & Talbot Inc.* v. *Canada*, Award on Damages of 31 May 2002 (UNCITRAL) <http://italaw.com/sites/default/files/case-documents/ita0686.pdf> accessed 24 October 2014.

whether the Commission's interpretation was binding and whether the Commission's action should be qualified as an "interpretation".[87] The Tribunal also stated that the FTC interpretation was not binding but rather an invalid amendment.[88]

The Tribunal went far by amending the Commission's interpretation. As Art. 1131(2) states that the Tribunal shall be bound by the interpretations of the Commission and not follow the Art. 1132(2) the Tribunal went far beyond its authority. Other tribunals have not reached the same conclusion as the Tribunal in the *Pope & Talbot* case.

One example is the *UPS* v. *Canada*[89] case where the Tribunal did not accept the view in the *Pope and Talbot* case that the FTC interpretation was not available for tribunals. The Tribunal rather stated that "in any event the FTC's Interpretation is binding on chapter 11 tribunals including this one".[90]

Another main issue among tribunals in NAFTA cases has been over whether the international minimum standard has evolved over time, should be interpreted as done in the *Neer* case or as formulated in the Art. 1105(1) NAFTA. Following this discussion there are few cases which express this different and views the standard from different perspectives.

The Tribunal in *Mondev* v. *United States*[91] stated that the FTC interpretations were definite and the Art. 1105(1) referred to a standard under customary international law but not to standards which are established by other treaties of the NAFTA Parties. Secondly, the Tribunal found that the FTC interpretation was clear about the terms in the Art. 1105(1) "fair and equitable" and "full protection and security". These terms according to the Tribunal "are in the view of the NAFTA Parties, references to *existing* elements of the customary international law standard and are not intended to add novel elements to that standard".[92] Thirdly, the Tribunal stated that the term "customary international law" did not refer to customary international law of the 19th century and the first half of 20th century but rather it refers to customary international law as it stands when NAFTA came into force.[93]

[87] Ibid., at paras. 23-4.
[88] Ibid., at para. 47.
[89] *United Parcel Service of America Inc* v. *Canada,* Award on Jurisdiction of 22 November 2001, NAFTA Arbitration <http://www.italaw.com/sites/default/files/case-documents/ita0884.pdf> accessed 7 October 2014.
[90] Ibid., at para. 96.
[91] *Mondev International Ltd* v. *United States,* Award of 11 October 2002, ICSID Case No. ARB(AF)/99/2 <http://www.italaw.com/sites/default/files/case-documents/ita1076.pdf > accessed 10 October 2013.
[92] Ibid., at paras. 121-122.
[93] Ibid., at para. 125.

In *ADF Group* v. *United States*[94] the Tribunal approached the conclusion in *Mondev* where the Tribunal referred to the customary international law as it stood when NAFTA came into force and expanded the view by stating that customary international law and the minimum standard of treatment was "constantly in process of development".[95] The Tribunal agreed that "fair and equitable treatment" must be "based upon State practice, and judicial, or arbitral case law or other sources of customary or general international law".[96] The Tribunal also considered the meaning behind the FTC interpretation and declared that it was important that the United States accepted that the customary international law in Art. 1105(1) was not "frozen in time" and the minimum standard did evolve. The Tribunal also noted:

> The FTC Interpretation of 31 July 2001, in the view of the United States, refers to customary international law "as it exists today."Itis equally important to note that Canada and Mexico accept the view of the United States on this point even as they stress that "the threshold [for vio-lation of that standard] remains high." Put in slightly different terms, what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the Neer case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.[97]

However, in *Glamis Gold* v. *United States*[98] the Tribunal noted that the Neer standard was still applicable today[99] and it did not agree that the standard had evolved since 1926.[100] The Tribunal noted:

> The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by international community. Although the circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor. The protection afforded by Article 1105 must be distinguished that provided for in Article 1102 on National Treatment. Article 1102 states: "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors…." The treatment of investors under Article 1102 is compared to the treatment the State's own investors receive and thus can vary greatly depending on each State and its practices. The fair and equitable treatment promised by Article 1105 is not dynamic;

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[94] *ADF Group Inc* v. *United States,* Award of 9 January 2003, ICSID Case No. ARB(AF)/00/1, <http://www.italaw.com/sites/default/files/case-documents/ita0009.pdf> accessed 8 October 2014.
[95] Ibid., at. para. 179.
[96] Ibid., at. para. 184.
[97] Ibid., at. para. 179.
[98] *Glamis Gold* v. *United States* (above fn. 67).
[99] Ibid., at para. 616.
[100] Ibid., at para. 612.

> it cannot vary between nations as thus the protection afforded would have no minimum.[101]

In *Merril & Ring* v. *Canada*[102] the investor noted that the Art. 1105 provided for a treatment in accordance with international law but not just with customary international law. The investor also pointed out that *travaux préparatories* did not contain any evidence that the Article should be restricted by customary international law and the ordinary meaning of the FET standard was an autonomous standard under international law. He also pointed out that it had "converged with that under customary law in the light of the evolution that has taken place in recent years to the point that there is no meaningful difference between the two, as held by number of tribunals".[103]

The Tribunal noted that the FET standard was the most complex and difficult question brought up in the case. The reason is that the standard is very broad in present times and the discussion is still very unsettled about the proper law applicable to this standard. It goes from being free-standing obligation under international law to the standard which is included in customary international law.[104] The Tribunal concluded:

> The applicable minimum standard of treatment of investors is found in customary international law and that, expect for cases for safety and due process, today's minimum standard is broader than that defined in the *Neer* case and its progeny. Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law, as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard.[105]

It must be said that the FET as an international minimum standard is still very vague and unclear. Although the FTC interpretation had tried to interpret the standard it has not reach any conclusion according to previous discussed cases. The FET standard is still left wide open for future tribunals to interpret.

### 4.3 The Fair and Equitable Treatment Standard as an Independent Standard required by International Law

The FET standard as an independent standard required by international law rejects the idea that fair and equitable treatment is linked to international minimum standard. An independent

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[101] Ibid., at para. 615.
[102] *Merril & Ring Forestry L.P.* v. *Canada*, Award of 31 March 2010, ICSID Administered Case <http://italaw.com/sites/default/files/case-documents/ita0504.pdf> accessed 10 October 2014.
[103] Ibid., at paras. 161-162.
[104] Ibid., at para. 182.
[105] Ibid., at para. 213.

standard is based on the idea that fair and equitable treatment is a self-contained standard which has to be interpreted in each case by arbitrators.[106]

Among scholars, F.A. Mann is known to be the staunchest supporter of the FET standard as an independent standard.[107] His article from 1981 expressed this view:

> It is submitted that nothing is gained by introducing the conception of a minimum standard and, more than this, it is positively misleading to introduce it. 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.[108]

Vasciannie agrees with Mann by confirming that the FET standard is an independent autonomous standard and in his study *Fair and Equitable Treatment* he says:

> …given the substantial volume of State practice incorporating the fair and equitable standard, it is noteworthy that the instances in which States have indicated or implied an equivalence between this standard and the international minimum standard are relatively sparse. Moreover, bearing in mind that the international minimum standard has itself been an issue of controversy between developed and developing States for a considerable period it is unlikely that a majority of States would have accepted the idea that this standard is fully reflected in the fair and equitable standard without clear discussion. These considerations point ultimately towards the conclusion that the two standards in question are not identical: both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors. Following Mann, where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and equitable.[109]

When considering whether the FET is in conformity with the general principles of international law but not the international minimum standard it is necessary to examine the arbitration awards and their conclusion. A few cases will be discussed to show how tribunals have interpreted the FET standard as a principle of international law.

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[106] Kläger (above fn. 38) 59.
[107] Newcomb and Paradell (above fn. 1) 265.
[108] Francis. A Mann, 'British Treaties for the Promotion and Protection of Investment' (1981) 52 BYBIL 240, 244.
[109] Vasciannie (above fn. 7) 144.

In *Genin* v. *Estonia*[110] the Tribunal understood the standard as an international minimum standard that would be separate from domestic law but was indeed a minimum standard.[111] Schreuer points out that the Tribunal was not referring to international minimum standard under customary international law but the fair and equitable treaty provision contained a minimum "below which domestic law may not fall".[112]

In *Vivendi* v. *Argentina*[113] the Art. 3 of the Argentina-France BIT stated "each of the Contracting Parties Undertakes to grant, within its territory and its maritime area, fair and equitable treatment according to the principles of international law…". The Tribunal noted that the BIT was a treaty and it should be interpreted in accordance with international law reflected in Art. 31(1) of the Vienna Convention.[114] The Tribunal stated:

> Article 3 refers to fair and equitable treatment *in conformity* with the principles of international law, and not to the minimum standard of treatment… The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the references to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment *conform* to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty's fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only principles from almost a century ago.[115]

The phrase "in accordance to the principle of international law" as stated in the Argentina-France BIT, is to ensure that the standard is interpreted by the principle of international law but not by customary international law.[116]

In *Azurix* v. *Argentina*[117] the Art. II 2(a) in Argentina-US BIT provided fair and equitable treatment that should "in no case be accorded treatment less than is required by international law". The Tribunal stated:

> The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. The

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[110] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil* v. *Estonia,* Award of 25 June 2001, ICSID Case No. ARB/99/2 <http://www.italaw.com/sites/default/files/case-documents/ita0359.pdf> accessed 10 October 2014.
[111] Ibid., at para. 367.
[112] Cristoph H. Schreuer, 'Selected Standards of Treatment available under The Energy Charter Treaty' Chapter 2 (2008) <http://www.univie.ac.at/intlaw/wordpress/pdf/91.pdf> accessed 30 October 2014.
[113] *Compania de Aguas del Aconquije S.A. and Vivendi Universal S.A.* v. *Argentina,* Award of 20 August 2007, ICSID case No. ARB/97/3 <http://www.italaw.com/sites/default/files/case-documents/ita0215.pdf> accessed 24 September 2014.
[114] Ibid., at para. 7.4.2.
[115] Ibid., at para. 7.4.6-7.
[116] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 22-23.
[117] *Azurix* v. *Argentina* (above fn. 19).

> purpose of the third sentences is to set a floor, not a ceiling, in order to avoid possible interpretation of these standards below what is required by international law.[118]

The formulation in the Argentina-US BIT gives the standard a treatment "less" than is required by international law. The Tribunal is setting a floor not a ceiling as in *Vivendi* v. *Argentina* above and the standard cannot go below that floor. This gives the tribunal more freedom to interpret the standard but on the other hand this can also lead to the standard being more unqualified.[119] However, the Tribunal in *EDF* v. *Argentina*[120] did not decide whether the FET standard in the French-Argentina BIT was an autonomous or independent standard. The BIT provided "fair and equitable treatment according to the principles of International Law to the investment made by the investors…".[121] The Tribunal stated:

> The Fair and Equitable Treatment clause under Article 3 obligated Respondent to respect international law in principle and in practice. The Tribunal need not decide whether Article 3 establishes an autonomous or independent standard of fairness or simply coincides with customary international minimum standard. In either event, failure to abide by express commitments without re-establishing economic balance in a reasonable period of time constitutes inequitable conduct.[122]

If the FET standard is decided to be established by customary international law, general principle of law as a source of international law is however not completely excluded. The argument can be traced back to Art. 38 of the ICJ statute which contains the three main basic sources, namely treaties, customs and general principles of law.[123]

In *Saluka* v. *Czech Republic*[124] the Respondent and the Claimant argued whether the FET standard was an independent treaty standard or a minimum standard under customary international law. The Claimant held that the FET standard should be interpreted broadly and referred to the conclusion set forth in the *Pope and Talbot* case. The Respondent, however, referred to *Neer,* which is mentioned above, and its historical development of the customary minimum standard stating that the FET standard was a part of customary international law.[125] The Tribunal noted:

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[118] Ibid., at para. 361.
[119] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 23.
[120] *EDF* v. *Argentina* (above fn. 72).
[121] Ibid., at para. 998.
[122] Ibid., at para. 999.
[123] Tudor (above fn. 2) 54.
[124] *Saluka Investments B.V.* v. *Czech Republic,* Partial Award of 17 March 2006 (UNCITRAL) <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> accessed 8 October 2014.
[125] Ibid., at paras 286-291.

> Whatever the merits of this controversy between the parties may be, it appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well be demonstrated that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.[126]

In its conclusion the Tribunal stated: "The "fair and equitable treatment" standard in Article 3.1 of the Treaty is an autonomous Treaty standard in must be interpreted, in the light of the object and purpose of the Treaty…"[127]

As discussed previously, the standard has been given various interpretations among scholars and arbitrators. According to OECD the result is that the standard should be interpreted in each case, meaning that every treaty between parties should be examined very closely. What should be observed is the intent of the parties when signing the treaty, the wording and the context of the treaty and finally the negotiations history between the parties.[128] However, for tribunals to find a certain degree of violation of the host state and find a certain threshold for the violation the host state have committed, this situation will lead to very unstable environment for the investor itself.[129] The reason to attempt to interpret the FET standard as an autonomous self-contained standard is the unclear minimum standard and the hope to leave the international minimum standard behind.[130]

## 5 The Fair and Equitable Treatment's principles

As discussed in the previous chapter, tribunals have been moving away from the debate over the fair and equitable treatment and the relationship with the minimum standard of treatment because of the unclear situation between those elements. To resist this unclear situation, tribunals have been identifying specific elements of the standard by taking into account different factual contexts[131] to which the FET standard has been applied.[132] These principles can be analyzed in five categories.[133] The first is the investor's legitimate expectations, second transparency, third is due process, fourth concerns acting in good faith and fifth deals with

[126] Ibid., at para. 291.
[127] Ibid., at para. 309.
[128] OECD, 'International Investment Law: A Changing Landscape' (above fn. 33) 73.
[129] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 8.
[130] Kläger (above fn. 38) 60.
[131] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 61.
[132] Dolzer and Schreuer (above fn. 60) 145.
[133] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (above fn. 10) 26.

freedom from coercion and harassment.[134] Each category will be discussed in details in following chapters.

### 5.1 Legitimate expectations in general

Legitimate expectations is an accepted concept in many legal systems[135] and is considered, by many tribunals, to be a key element in fair and equitable treatment.[136] The investor has certain expectations in relation to the host state's behavior which should be protected and he must be able to rely on statements and decisions made by officials and public agencies.[137] In the beginning of the investment the investor is aware of certain elements concerning the host state. These elements mostly reflect the host state's legislative and the administrative framework[138] which mainly consist of legislation, treaties, licenses and contractual undertakings.[139] The investor must take these elements into account when he is making a decision to invest in the host state and through the whole investment itself. These expectations have to be legitimate so the investor's investment can be protected by investment law.[140] In *Thunderbird* v. *Mexico*[141] Thunderbird was engaged in a business operating gaming facilities,[142] and sought license to operate in Mexico.[143] The Tribunal stated that the investor's expectations were not legitimate because gambling was an illegal activity. The Tribunal declared:

> It cannot be disputed that Thunderbird knew when it chose to invest in gaming activities in Mexico that gambling was an illegal activity under Mexican law. By Thunderbird's own admission, it also knew that operators of similar machines (Guardia) has encountered legal resistance from SEGOB. Hence, Thunderbird must be deemed to have been aware of the potential risk of closure of its own gaming facilities and it should have exercised particular caution in pursuing its business venture in Mexico.[144]

There are many types of investment but most frequently they involve economy projects. These projects are often based on business concessions, foreign-owned manufacturing enterprises and service providers. Investments have a certain time duration, some have long time duration, for example the energy industry, but others do not have any time limitation at

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[134] Dolzer and Schreuer (above fn. 60) 145.
[135] Kläger (above fn. 38) 165-66.
[136] Newcomb and Paradell (above fn. 1) 279.
[137] Kläger (above fn. 38) 165-66.
[138] Vasciannie (above fn. 7) 164-5.
[139] Dolzer and Schreuer (above fn. 60) 145.
[140] Vasciannie (above fn. 7) 164-5.
[141] *International Thunderbird Gaming Corporation* v. *Mexico,* Arbirtal Award of 26 January 2006 (UNCITRAL) <http://www.italaw.com/sites/default/files/case-documents/ita0431.pdf> accessed 7 December 2014.
[142] Ibid., at para. 41.
[143] Ibid., at para. 48.
[144] Ibid., at para. 164.

all. In long time duration investment the investor is most likely to face a risk in relation to the conditions of the investment which can have a negative impact on the investor's operation. The whole question relates to in what degree the FET standard provides a protection of legitimate expectations and what kind of expectations can be considered legitimate.[145]

In arbitral jurisprudence the investor's legitimate expectations are often classified in three categories. First the stable in the legal framework as a whole, second the stability in the administrative conduct and third the stability in contractual relationship with the host state.[146] In the chapters 5.1.1-5.1.3 each category will be described in more details.

### 5.1.1 The stability of the host state legal framework

Tribunals have in many cases concluded that the stability and predictability of the host state legal framework is the key element of fair and equitable treatment.[147] Any change of the legal framework can lead to a violation of fair and equitable treatment. However there is not a requirement that the host state freeze their legal system for the investor's benefits. For example, if the host state needs to adjust environmental regulations to international standards that would not lead to violation of the standard if the legislation is applied in good faith and without discrimination.[148]

An example where the host state did not maintain a stable framework for the investor which led to violation of the FET standard was the *Occidental* v. *Ecuador*[149] case. The company Occidental (OEPC) entered into participation contract with Petroecuador, a corporation owned by the state Ecuador, to undertake exploration for and production of oil in Ecuador. OEPC applied regularly to the SRI (Servicio de Rentas Interns) for the repayment of Value-Added Tax (VAT) which was paid by OEPC on purchases required for its exploration under the contract and for the ultimate exportation of the oil produced. This repayment of VAT was made on a regular basis. In 2001 SRI issued a "Resolution" by rejecting all repayment application by OEPC and other companies in the oil sector by demanding the return of the amounts which was previously repaid. OEPC filed for a lawsuit claiming that these actions were inconsistent with Ecuador's legislation in force.[150] OEPC claimed that Ecuador had frustrated the company's legitimate expectations on the basis of which the investment was made and that was a breach

[145] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 63-4.
[146] Kläger (above fn. 38) 169, 175,180.
[147] Newcomb and Paradell (above fn. 1) 286.
[148] Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (above fn. 27) 374-5.
[149] *Occidental Exploration and Production Company* v. *Ecuador,* Final Award of 1 July 2004 in the Matter of an UNCITRAL Case No. UN 3467 <http://www.italaw.com/sites/default/files/case-documents/ita0571.pdf> accessed 10 November 2014.
[150] Ibid., at paras. 1-4.

of fair and equitable treatment standard.[151] The Tribunal pointed out that the FET standard was not defined in the Treaty between the Parties but in the Preamble it was clear that such treatment was "desirable in order to maintain a stable framework for investment and maximum effective utilization of economic recourses". The Tribunal noted that the framework, including the tax law, under which the investment was made had changed without providing any clarity about its meaning and extent. The state's practice and regulations were also inconsistent with the changes.[152] Therefore, the Tribunal found out that Ecuador had breached its obligation to accord fair and equitable treatment under the Treaty.[153]

Another case where the host state violated the FET standard is the *CMS* v. *Argentina*[154] case. CMS, a US corporation, owned 30% of shares in TGN, an Argentinean gas transportation company. TGN had the right to calculate tariffs in US dollars, convert them to pesos and to regulate tariffs every six months to reflect changes. The license granted to TGN was for 35 years. In the 1990's Argentina faced an economic crisis and permanently terminated the TGN right to calculate tariffs and convert them to pesos. CMS claimed that Argentina had breached the FET standard by changing the stability and predictability of the investment environment. A secured environment was the key to the decision to invest from the beginning.[155] The Tribunal noted that the FET standard was not defined in the Argentina-US Treaty. However, as the Treaty's preamble laid out that the fair and equitable treatment was desired to maintain a stable framework for investment and maximum effective use of economic resources, the Tribunal noted that there was no doubt that a stable environment was a vital element of fair and equitable treatment.[156] In the end the Tribunal stated:

> The measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. The discussion above, about the tariff regime and its relationship with a dollar standard and adjustments mechanism unequivocally shows that these elements are no longer present in the regime governing the business operations of the Claimant. It has also been established that the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision.[157]

[151] Ibid., at para. 181.
[152] Ibid., at paras. 183-84.
[153] Ibid., at para. 187.
[154] *CMS Gas Transmission Company* v. *Argentina*, Award of 12 May 2005, ICSID Case No. ARB/01/8 <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf> accessed 9 November 2014.
[155] Ibid., at para. 267.
[156] Ibid., at paras. 273-4.
[157] Ibid., at para. 275.

The Tribunal found that the disputed measures was a breach of the standard laid down in the Treaty.[158]

These two cases demonstrate that the host state must ensure stable environment for the investor. In this context, predictability in the host state legal framework is also frequently considered to be important element in fair and equitable treatment.[159] For instance in *Metalclad* v. *Mexico*,[160] Metalclad was a US corporation operated through a Mexican subsidiary and received from the Mexican government a permit to construct a hazardous waste landfill in Guadalcazar, Mexico. Few months after the construction began, Metalclad was notified that it was operating unlawfully without a municipal construction permit. Metalclad claimed that it was told by federal officials that they had authority to construct and operate the landfill and the federal officials had assured that the Municipality would issue the permit. The Municipality, however, rejected Metalclad's application and later the Governor issued an Ecological Decree declaring a protected natural area and thus put an end to the landfill.[161] The Tribunal stated that the Mexican authorities "failed to ensure a transparent and predictable framework for Metalclad's business planning and investment".[162]

The Tribunal in *Tecmed* v. *Mexico*[163] also mentioned the predictability of the host state legal framework. Tecmed invested in a waste landfill in Mexico but the Mexican government did not renew the license to operate the landfill. Tecmed considered the action to be expropriation of the investment which was completely lost. The Tribunal stated:

> 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 investment, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with its 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.[164]

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[158] Ibid., at para. 281.
[159] Stephan W. Schill, 'International Law and Justice Workin Papers' (2006) IILJ Working Paper 2006/6, 11 <http://www.iilj.org/publications/documents/2006-6-gal-schill-web.pdf> accessed 13 November 2014.
[160] *Metalclad Corporation* v. *Mexico*, Award of 30 August 2000, ICSID Case No. ARB(AF)/97/1, <http://italaw.com/sites/default/files/case-documents/ita0510.pdf> accessed 13 November 2014.
[161] Ibid., at paras. 28-69.
[162] Ibid., at para. 99.
[163] *Técnicas Medioambientales, TECMED S.A.* v. *Mexico*, Award of 29 May 2003, ICSID Case No. ARB(AF)/00/2 <http://italaw.com/documents/Tecnicas_001.pdf> accessed 13 November 2014.
[164] Ibid., at para. 154.

These four cases establish the host state obligation to offer the investor a stable and predictable environment. The stability and predictability obligation extends to the treatment of the host state given to the investor, not only from the state organs but also from the host state legal framework. At the time when the investor takes decision to invest he will not expect that the legal environment will still be the same throughout his operations. However, he will expect that the host state take into account the fact that his decisions, at the time of the investment were made originally by the law of the state and the state's business environment.[165]

5.1.2 The stability in the host state administrative conduct

The host state administrative conduct mainly deals with revocation of administrative decisions such as a revocation of license given to investor to operate his investment. These decisions also occur when the host state's authorities follow certain procedure but the authority then decides to revoke or depart from the procedure. These situations bring up the question what should prevail, the general public interests or the investor's expectations.[166]

In *Metalclad* v. *Mexico*[167], the Governor issued an Ecological Decree declaring a natural area for the protection of a rare cactus.[168] The Tribunal found the actions of the municipality, by denying the construction permit, was improper and did not take Mexico environmental reasoning for consideration by stating:

> Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluation and assessment, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site.[169]

The Tribunal also declared that "Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill…" Metalclad was merely acting prudently and in the full expectations that the permit would be granted".[170]

[165] Vasciannie (above fn. 7) 172.
[166] Kläger (above fn. 38) 165-66.
[167] *Metalclad* v. *Mexico* (above fn. 160).
[168] Ibid., at para. 59.
[169] Ibid., at para. 86.
[170] Ibid., at para. 89.

In *Tecmed* v. *Mexico*[171] the Tribunal examined the fair and equitable treatment in connection with the investor's expectations and noted that fair and equitable treatment should provide a treatment to the investor which would not affect his basic expectations. The Tribunals stated:

> 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 investment, 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 where relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[172]

These demands set forth by the Tribunal have been considered to be impossible to meet and have received some criticism because of the wide protection the Tribunal gave to Tecmed.[173] Douglas, for example, found it "rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain".[174]

### 5.1.3 The stability in contractual relationship between the investor and the host state

Foreign investment is often made through a contract with the host state. These contracts play a major role between parties, especially between investor and developing countries. A state contract is a contract which is made between the investors and the host state, or an entity of the state and the parties are given control over an economic activity. The most common state contracts are concession agreement but they also cover other activities such as purchase contracts for supplies or services, loan agreements or larges infrastructure projects. A typical contract includes scope and definition, dispute settlement and last but not least the substantive standard of treatment including fair and equitable treatment.[175]

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[171] *TECMED* v. *Mexico* (above fn. 163).
[172] Ibid., at para. 154.
[173] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 65.
[174] Zachary Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: *Occidental, Eureko and Methanex*' 28 (Arbitration International Vol 22. 2006).
[175] United Nations Conference on Trade and Development, 'State Contracts' (UNCTAD Series on issues in international investment agreements, 2004) 1-3, 37 <http://unctad.org/en/docs/iteiit200411_en.pdf> accessed 7 December 2014.

The best known cases concerning a contractual relationship with the host state are *Lauder* v. *Czech Republic*[176] and *CME* v. *Czech Republic*[177] cases.

In *Lauder* v. *Czech Republic*,[178] Mr. Lauder commenced arbitrational proceedings against the Czech Republic claiming that the state, through the Media Council, had violated the United States-Czech BIT. The Czech Media Council granted, in 1993, a license to entity named CET 21 and during the license application proceedings, CET 21 had worked closely with Mr. Lauder. Subsequently, a new joint company, CTNS, was created to represent the foreign investor and a new television station, TV Nova, was established. After this structure was set up, the Czech parliament amended its laws that later made it necessary for CNTS to renegotiate its relationship with CET 21, so that CET 21 was able to terminate its contract with CNTS. In 1999, CET 21 terminated the contract with CNTS, after CNTS, had not submitted the Daily Log regarding the broadcasting the following day.[179] The Tribunal did not find "any inconsistent conduct on the part of the Media Council which would amount to unfair and unequitable treatment". The Tribunal concluded that there was no damage of the decision of CET 21 to terminate the agreement with CNTS. No evidence showed that CET 21 would not have terminated the contract with CNTS if the Media Council had issued a letter which stated that the relationship between the two companies had fully complied with the Media Law.[180]

The Tribunal's conclusion in *CME* v. *Czech Republic*[181] was different from the *Lauder* case. The facts of these two cases are the same and based on the same grounds but CME, a corporation organized under the law of the Netherlands which owned 99,9% equity in CNTS brought the proceeding against the Czech Republic.[182] The Tribunal stated that the Czech Republic had breached the obligation of fair and equitable treatment and noted:

> The Media Council's intentional undermining of the Claimant's investment in CNTS equally is a breach of the obligation of fair and equitable treatment. The Respondent's position that the Media Council also required other broadcasters in the same way to revise the structure of the 1993 split legal arrangement between license-holder and service provider is irrelevant. The facts and circumstances of the legal arrangement of the other broadcasters were not a subject of these arbitration proceedings. Should the Media Council have interfered with the contractual relations of other broadcasters in the same way as it did between CET 21 and CNTS,

[176] *Ronald S. Lauder* v. *Czech Republic*, Final Award of 3 September 2001 in the Matter of an UNCITRAL Arbitration <http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf> accessed 7 December 2014.
[177] *CME Czech Republic B.V.* v. *Czech Republic*, Partial Award of 3 September 2001 (UNCITRAL) <http://italaw.com/documents/CME-2001PartialAward.pdf> accessed 7 December 2014.
[178] *Lauder* v. *Czech Republic* (above fn. 176).
[179] Ibid., at. paras. 1-10.
[180] Ibid., at. paras. 295,303.
[181] *CME* v. *Czech Republic* (above fn. 177).
[182] Ibid., at paras. 1-4.

> these other actions might also be qualified as a breach of law as the case may be. These other cases, however, to the extent that they are realistic, do not legitimate the Media Council's actions and inactions versus CME/CNTS as being fair and equitable. The standard for actions being assessed as fair and equitable are not to be determined by the acting authority in accordance with the standard used for its own nationals… 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.[183]

The above mentioned cases demonstrate that the fair and equitable treatment protects the contractual relationship between the investor and the host state. The degree to which a contractual relationship is protected under the fair and equitable treatment is however still vague. Some cases contain rather broad and general stipulations but some tribunals have gone further by adopting different approaches.[184] A number of tribunals have, for example, observed that the breach of the host state to provide the investor fair and equitable treatment only violates the investor's legitimate expectations if such breach involves the exercise of the state's sovereign power.[185]

In *Joy Mining* v. *Egypt*[186] the dispute arose out of a contract between Joy Mining and Egypt over a project which was located in Egypt's Western Desert and managed by IMC (Egypt's Mining Projects).[187] A disagreement between the parties was related to commissioning and performance tests of an equipment used in the project. The investor had paid the full purchase price of the equipment in accordance with the contract. However, IMC did not release any guarantee as it should have done according to the contract[188] and the investor claimed that IMC actions were a violation of the Treaty between the investor's home state and Egypt.[189] In the Tribunal's conclusion it is noted that this was not the first time that a tribunal dealt with the issue of differences between contract claims and treaty-based claims. The Tribunal stated:

> The Tribunal is mindful that any answer to this question must be case specific as every contract and many treaties are different. However, a basic general distinction can be made between commercial aspects of a dispute and other aspects involving

[183] Ibid., at para. 611.
[184] Kläger (above fn. 38) 185.
[185] Felipe Mutis Télles, 'Conditions and Criteria for The Protection of Legitimate Expectations under International Investment Law' (ICSID Review, 26 October 2012) 7 <http://icsidreview.oxfordjournals.org/content/early/2012/10/26/icsidreview.sis018.full.pdf+html> accessed 13 December 2014.
[186] *Joy Mining Machinery Limited* v. *Egypt,* Award on Jurisdiction of 6 August 2004 <http://italaw.com/documents/JoyMining_Egypt.pdf> accessed 16 December 2014.
[187] Ibid., at paras. 15-16.
[188] Ibid., at para. 19.
[189] Ibid., at para. 22.

> the existence of some form of State interference with the operation of the contract involved.[190]

In the findings the Tribunal denied a jurisdiction because the claims were all contractual and "neither has it been credibly alleged that there was Egyptian State interferences with the Company's contract rights".[191]

These differences of treaty claims vis-á-vis contract claims have brought up some uncertainties in international investment laws because it is often not clear if contractual obligations normally fall within the scope of the BIT which would give contractual obligations more protection. According to Shany, the *Joy Mining* case did not resolve any of those difficulties.[192]

5.2 Transparency

Transparency is a relatively new concept in arbitral awards[193] and is closely related to the notion of legitimate expectations.[194] The concept has been accepted by several tribunals but no rule which describes the extent of the principle has been applied, thus it makes the concept the most troubled element of the fair and equitable treatment standard.[195] Transparency is mostly concerned with the openness and clarity of the host state's legal administration and procedures which means that legal and administration texts must be clear, accessible and explicit. Many IIAs include transparency obligations which usually require the host state to have laws, regulations, procedures and administration easily accessible for the investor.[196] Here are a two examples of BITs which include transparency:

Art. 12(1) in the Canada - Serbia BIT states:

> Each Party shall ensure that its laws, regulation, procedures, and administrative rulings of general applications respecting a matter covered by this Agreement are promptly published or otherwise made available in such manner as to enable interested persons and the other Party to become acquainted with them.[197]

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[190] Ibid., at para. 72.
[191] Ibid., at para. 82.
[192] Yuval Shany, 'Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims' [2005] American Journal of International Law Vol. 99 835.
[193] OECD, 'International Investment Law: A Changing Landscape' (above fn. 33) 118.
[194] Kläger (above fn. 38) 227-228.
[195] Kenneth J. Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' [2010] International Law and Politics Vol. 43:43 83 <http://nyujilp.org/wp-content/uploads/2013/02/43.1-Vandevelde.pdf> accessed 26 December 2014.
[196] Kläger (above fn. 38) 227-229.
[197] Agreement for the Promotion and Protection of Investment (Canada-Serbia) (signed 1 September 2014) Art. 12 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3152> accessed 28 December 2014.

Article 6 in the Australia - Egypt BIT states: "Each Party shall, with a view to promoting the understanding of its law that pertain to or affect investments in its territory by investors of the other Party, make such laws public and readily accessible".[198]

According to above mentioned BITs, transparency is a relatively broad concept and comes in different forms in the agreements. According to Kläger, there is no need to introduce the concept into the general obligation of fair and equitable treatment where transparency requirements are found in investment agreements and the agreements are subject to investor-state arbitration. However, in investment agreements where the concept is missing "it is obvious that a relationship of fairness between the host state and the investor demands at least a minimum of transparency".[199] To give a closer look at the concept and how tribunals have interpreted transparency a few cases will be discussed in the following chapter.

### 5.2.1 Transparency as interpreted by tribunals

The first contentious award which concerned transparency and fair and equitable treatment[200] was *Metalclad* v. *Mexico*[201] case. The Tribunal connected transparency with the notion of legitimate expectations and confirmed the state's responsibility to act in accordance with relevant laws and make sure that all legal aspects were clear and determined. The Tribunal stated:

> Prominent in the statement of principles and rules that introduces the Agreement is the reference to "transparency" *(NAFTA Article 102(1))*. The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investment made, or intended to be made, under the Agreement 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 (whose international responsibility in such matters has been identified in the preceding section) 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.[202]

The Tribunal in *Tecmec* v. *Mexico*[203] also noted:

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[198] Agreement for the Promotion and Protection of Investment (Australia-Egypt) (signed 3 May 2001, entered into force 5 September 2002) Art. 6 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/151> accessed 28 December 2014.
[199] Kläger (above fn. 38) 229.
[200] Ibid., 230.
[201] *Metalclad* v. *Mexico* (above fn. 160).
[202] Ibid., at para. 76.
[203] *TECMED* v. *Mexico* (above fn. 163).

> The Arbitral Tribunal considers that this provision of the Agreement, in the light of the good faith principle established by international law, requires the Contracting Parties to provide to international investment treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expect 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 governs its investment, 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.[204]

The Tribunal in *Metalclad* referred transparency to "all relevant laws" when the Tribunal in *Tecmed* went further by referring transparency to "all rules and regulations" as well as the goals of the relevant policies and administrative practices.[205]

The Tribunal in *PESG* v. *Turkey*[206] went even further than the Tribunal in *Tecmed* by referring transparency to a contractual relationship between the parties. In the case, the claimant participated in the development of the Turkey's energy sector which was privatized in the 1980s by including the participation of foreign investors of the Build-Operate-Transfer (BOT) projects. The dispute arose between the parties over contractual arrangements and negotiations of the BOT projects because of shifting policies and models in Turkey's administration.[207] The Tribunal noted that the FET standard had been breached because there was an evident negligence in the negotiations between Turkey's administration and the claimants. Turkey had not disclosed the agreement in a timely manner and some communications were never looked at. The Tribunal also noted that the claimants were entitled to expect that the negotiations would be handled in a professional manner.[208] Finally, the Tribunal also stated:

> There is thus a cumulative lack of transparency that, short of bad faith, comes at the very least close to negligence, compounded by the fact that various witnesses admitted not having read key documents or taken appropriate action on them for long periods.[209]

Even though the Tribunal dealt with the concept of "negligence" the decision seems to rest in the lack of transparency.[210]

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[204] Ibid. at para. 154.
[205] Vasciannie (above fn. 7) 176.
[206] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi* v. *Turkey*, Award of 19 January 2007, ICSID Case No. ARB/02/5 <http://italaw.com/sites/default/files/case-documents/ita0695.pdf> accessed 26 December 2014.
[207] Ibid., at paras. 13-14.
[208] Ibid., at para. 246.
[209] Ibid., at para. 174.
[210] Vandevelde (above fn. 195) 87.

In a few arbitral awards, tribunals have found some actions which are not in breach of transparency and fair and equitable treatment. For example in *Champion Trading Co. and others* v. *Egypt*[211] the Claimant was a private-owned cotton ginning and trading company in Egypt.[212] In 1997-2003, the Egyptian Government performed five payments to several cotton publicly-owned companies called "Settlement" and following this act of the host state a dispute arose between the parties.[213] The Claimant claimed that the Egyptian Government had compensated a limited group of selected companies and that kind of action was a violation of the international law principle of transparency.[214] The Claimant alleged that the terms of settlement were not clearly known to the public since they were not incorporated or published. These payments that were made in favor of the companies without any criteria and applications were according to the Claimant in breach of the transparency principle under the BIT.[215] The Tribunal stated in its findings:

> The parties are in agreement that each Party has the burden to prove the facts on which it relies to support its claims and defenses. It was therefore the obligation of the Claimants to prove that the Settlements were not made in a transparent manner. The Tribunal notes that the Laws and Decrees regarding the organization of the cotton trading structures, the prices and the Government Centres' purchase and sale mechanism were public, available, or have been published or produced by the Respondent upon the request of the Claimants. The Claimants were in a position to know beforehand all rules and regulations that would govern their investments for the respective season to come. The Claimants have not produced any evidence or even pertinent arguments that Egypt violated the principle of transparency under international law and this claim therefore also has to be denied.[216]

In addition to *Champion Trading and Co*, the Tribunal in *David and Robert* v. *Poland*[217] also denied that transparency was in breach of fair and equitable treatment due to lack of proof. The dispute between the parties related to the construction and intended operation of blood plasma fractionation plant in Poland.[218] In 1995, the Laboratorium Frakcjonowania Osocza (LFO) was created for construction and operation of a fractionation plant in Poland and[219] in 1996 the Claimants signed an investment agreement which contained a mutual right and

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[211] *Champion Trading Company Ameritrade International* v. *Egypt*, Award of 27 October 2006, ICSID Case No. ARB02/9 <http://www.italaw.com/sites/default/files/case-documents/ita0148.pdf> accessed 28 December 2014.
[212] Ibid., at paras. 63-65.
[213] Ibid., at paras. 84-85.
[214] Ibid., at para. 104.
[215] Ibid., at para. 108.
[216] Ibid., at para. 164.
[217] *David Minnotte and Robert Lewis* v. *Poland*, Award of 16 May 2014, ICSID Case No. ARB(AF)/10/1 <http://italaw.com/sites/default/files/case-documents/italaw3192.pdf> accessed 28 December 2014.
[218] Ibid., at para. 1.
[219] Ibid., at paras. 47-48.

obligations with respect to the management and operations of LFO. According to the Claimants the Government of Poland made a few suggestions *inter alia* that LFO would have strong support from the government, the blood plasma products would be delivered from the Government, LFO would have monopoly over the supply of the blood plasma products and finally the Government would guarantee 60% of financing for the fractionation facility.[220] The Tribunal in its findings did not agree with the Claimants and denied a violation of transparency due to lack of evidence. The Tribunal stated:

> The Tribunal must decide on the evidence before it. While there may, arguably, be a general expectations that States will observe basic standards such as reasonable consistency and transparency, more specific expectations must be specifically created and proved. In the present case, the Claimants alleged that there was a legitimate expectations that the Respondent would provide blood plasma under the 1997 Fractionation Agreement. As was noted above, however, the Claimants need to show, not merely that there was a legitimate expectations that blood plasma would be provided, but more precisely that there was a legitimate expectations that it would be provided on demand or at a specific time for the purposes of testing abroad prior to the completion of the fractionation facility in Poland.[221]

These arbitral awards, demonstrate that the notion of transparency is a very broad concept often used by tribunals. Tribunals have also established the connection between transparency and the fair and equitable treatment though these concepts are not closely linked in BITs between parties. The burden of proof also seems to depend on the claimant itself according to the tribunals in the two cases above, *Champion Trading Co.* and *David and Robert,* where the tribunal were very strict over the issue, meaning that the Claimants needed to prove a breach of the concepts.

### 5.3 Due process/Denial of Justice

The notion of due process is a vital element of fair and equitable treatment and includes the concept of denial of justice[222] which is often defined as "any gross misadministration of justice by domestic courts resulting from the ill-functioning of the state's judicial system".[223]

The concept of denial of justice can be traced back to the Middle Ages in Europe. If the people were mistreated in territories other than their own they could appeal to all available local remedies, but if that was impossible, they could turn to their sovereign for support. Since then, the concept of denial of justice has developed through the centuries, and in the 19th century the

[220] Ibid., at paras. 50-51.
[221] Ibid., at para. 193.
[222] Dolzer and Schreuer (above fn. 60) 154.
[223] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 80.

concept was often used especially where the great powers met with weaker states and used military intervention acting on behalf of their citizens. In Latin America the host states began to enter into agreements with foreigners (the Calvo clause) which gave foreigners the opportunity to access the host states' courts. The concept was not given any specific attention during the period between WWII and the 1990s but after that investment arbitration has stretched out in a number of BITs where the denial of justice has been progressively raised and the consequences of violating the concept are very well specified in international treaties.[224] Examples of BITs provisions which include provisions of due process are:

Art. 5(1) of the Denmark-Moroccan BIT which provides:

> Investments of investors of each Contracting Party shall not be nationalized, expropriated or subject to measures having effect equivalent to nationalization or expropriation in the territory of the other contracting party expect for expropriations made for public purpose, on a basis of non-discrimination, carried out under due process of law, and against prompt, adequate and effective compensation.[225]

Art. 6 of the Netherlands–Slovenia BIT provides:

> Neither of Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures depriving nationals of the other Contracting Party of their investment, unless:
>
> a) the measures are taken in the public interest and under due process of law…[226]

The factors which have been considered to cause a violation of the denial of justice according to UNCTAD are: i) denial of access to justice and refusal of courts to decide, ii) unreasonable delay in proceedings, iii) lack of court's independence from legislative and the executive branches of the State, iv) failure to execute final judgment or arbitral awards, v) corruption of judge, vi) discrimination against foreign litigant, vii) failure to give notice of the proceedings and a failure to provide an opportunity to be heard.[227] Denial of justice is also if often conditioned on a prior exhaustion of local remedies.[228]

It should also be added that denial of justice is considered to be a part of customary international law and tribunals have been moving away from the concept due to its unclearness.

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[224] Carlo Focarelli, 'Denial of Justice' *Max Planck Encyclopedia of Public International Law* [MPEPIL] (October 2013) 4-10.

[225] Agreement for Reciprocal Promotion and Protection of Investments (Denmark–Morocco) (signed 22 May 2003) Art. 5(1) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1020> accessed 6 January 2015.

[226] Agreement for Reciprocal Promotion and Protection of Investments (Netherlands–Slovenia) (signed 24 September 1996, entered into force 1 August 1998) Art. 6(a) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2081> accessed 7 January 2015.

[227] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 80.

[228] Dolzer and Schreuer (above fn. 60) 154.

This has led to the fact that the concept of due process and denial of justice have slowly vanished in investment arbitration awards and the fair and equitable treatment have been given more value.[229] In chapter 5.3.1 a number of arbitral awards will be reviewed to explore under what circumstances the concepts of due process and denial of justice have been violated.

5.3.1. Arbitral awards related to due process/denial of justice

In *Middle East Cement Shipping* v. *Egypt*[230] the Claimant was a corporation from Greece[231] and operated through its branch in Egypt, importing and storing cement in a depot ship and packing, docking and dispatching cement within Egypt to private and public sectors. When the Claimant had almost three years left of the investment agreement, the Ministry of Construction of Egypt issued a decree (in 1989) which prohibited import of all kinds of cement in the private and the public sector. The Claimant was therefore prohibited to honor agreements with its suppliers and customers and the most serious thing was the approval of re-exporting Claimant's assets which was withheld to 1995 although clear provisions in Egyptian laws said otherwise.[232] The main dispute in the award was in relation to auction and seizure of the Claimant's ship which the Egyptian Government performed to pay the Claimant's debts.[233] The Claimant claimed the auction and the seizure were illegal acts of the Egyptian Government.[234] The Tribunal found a violation of fair and equitable treatment and gave the standard more relevance because of the special protection granted in the BIT. The Tribunal stated:

> Art. 2.2 of the BIT requires that "Investments by investors of a Contracting Party shall at all times, be accorded fair and equitable treatment and shall enjoy full protection and security, in the territory of the other Contracting Party." This BIT provision must be given particular relevance in view of the special protection granted by Art. 4 against measures "tantamount to expropriation," and in the requirement for "due process of law" in Art. 4.a). Therefore, a matter as important as the seizure and auctioning of a ship of the Claimant should have been notified by a direct communication for which the law No. 308 provided under the 1st paragraph of Art. 7, irrespective of whether there was a legal duty or practice to do so by registered mail with return receipt requested as argued by Claimant (CV 4). The Tribunal finds that the procedure in fact applied here does not fulfill the requirements of Art. 2.2 and 4 of the BIT.[235]

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[229] Stephen M. Schwebel, 'The United States 2004 Model Bilateral Investment Treaty and Denial of Justice in International Law' in Christina Binder, Ursula Kriebaum, August Reinsch and Stephan Wittich (ed.) *International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer* (Oxford 2009) 520-22.

[230] *Middle East Cement Shipping and Handling Co. S.A.* v. *Egypt,* Award of 12 April 2002, ICSID Case No. ARB/99/6 <http://www.italaw.com/sites/default/files/case-documents/ita0531.pdf> accessed 29 December 2014.

[231] Ibid., Chapter. A.1.

[232] Ibid., at para. 5.

[233] Ibid., at para. 83.

[234] Ibid., at para. 132.

[235] Ibid., at para. 143.

In *Petrobart* v. *Kyrzyg Republic*[236] the Tribunal found a violation of the fair and equitable treatment standard as the state intervened in the court proceedings and such an act was a lack of respect for the Claimant's rights under the Treaty.[237]

In *Elettronica Sicula (ELSI) (US)* v. *Italy*[238] the Claimant claimed that Italy, in respect of the company ELSI established in Italy and wholly owned by two American companies, had violated certain provisions of the FCN Treaty between the two parties.[239] First, the Claimant claimed that the Respondent had violated its obligation when it seized and unlawfully requisitioned the ELSI plant and denied the stockholders of the plant to liquidate the ELSI assets, second by allowing ELSI's employees to occupy the plant, third when the Respondent unreasonably delayed ruling on the lawfulness of the requisition, and forth by interfering with the Claimant's bankruptcy proceedings. However, the most important allegation was the claim over the requisition of the ELSI plant by the Mayor of Palermo which is claimed to have frustrated the plan for "orderly liquidation" of the company.[240] The ICJ considered whether the requisition was, or was not, an arbitrary or discriminatory act in the sense of the Supplementary Agreement which the claimant had relied on but in the Art. 1 in the Agreement it said that requisition was an illegal act under Italian law. The Chamber of the ICJ stated:

> Though examining the decisions of the Prefect of Palermo and the Court of Appeal of Palermo, the Chamber observes that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law. By itself, and without more, unlawfulness cannot be said to amount to arbitrariness. The qualification given to an act by a municipal authority (e.g., as unjustified, or unreasonable or arbitrary) may be a valuable indication, but it does not follow that the act is necessarily to be classed as arbitrary in international law…[241]
>
> Arbitrariness is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical property. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal in Palermo conveys any indication that the requisition order of the Mayor was to be regarded in that light. Independently of the findings of the Prefect or of the local courts, the Chamber considers that it cannot be said to have been

[236] *Petrobart Ltd.* v. *Kyrgyz Republic*, Arbitral Award of 29 March 2005 (Arbitration Institute of the Stockholm Chamber of Commerce), SCC Case No. 126/2003 <http://www.italaw.com/sites/default/files/case-documents/ita0628.pdf> accessed 7 January 2015.

[237] Ibid., at para. 76.

[238] *Elettronica Sicula S.P.A. (ELSI)* v. *Italy*, I.C.J, Judgement of 20 July 1989 <http://www.icj-cij.org/docket/index.php?sum=395&code=elsi&p1=3&p2=3&case=76&k=d8&p3=5> accessed 31 December 2014.

[239] Ibid., at paras. 1-12.

[240] Ibid., at paras. 64-67.

[241] Ibid., at paras. 120-130.

> unreasonable or merely capricious for the Mayor to seek to use his powers in an attempt to do something about the situation in Palermo at the moment of the requisition. The Mayor's order was consciously made in the context of an operating system of law and of appropriate remedies of appeal, and treated as such by the superior administrative authority and the local courts. These are not at all the marks of an "arbitrary" act. Accordingly, there was no violation of Article I of the Supplementary Agreement.[242]

In *Mondev* v. *United States*[243] the company, LPA, owned by Mondev and incorporated under the laws of Canada had a contractual relationship with the Boston Redevelopment Authority (BRA) and the City of Boston (the City) which concerned commercial real estate developments. A dispute arose over these contracts and LPA filed a suit in Massachusetts Superior Court against BRA and the City. The trial judge upheld the jury's verdict for the breach of the agreement against the City but gave BRA immunity for suit in international torts. Both the City and LPD appealed to Massachusetts Supreme Judicial Court (SJC) which upheld the trial judge decision in respect to BRA but upheld the City's appeal in the respect of the contract claim. LPA sought for rehearing before the SJC for both claims but both claims were denied, causing losses of LPA's claims. Therefore, the Claimant brought a NAFTA claim against the United States due to the SJC's decision and the acts of the BRA and the City which caused a loss and damages to LPA interests.[244] The Tribunal referred to the *ELSI* case and stated that the criterion put forward in *ELSI* was also useful in the context of denial of justice. The Tribunal went on and noted:

> The Tribunal would stress that the word "surprises" does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.[245]

[242] Ibid., at paras. 120-130.
[243] *Mondev* v. *United States* (above fn. 91).
[244] Ibid., at paras. 1-2.
[245] Ibid., at para. 127.

In *Loewen* v. *United States*[246] the Claimant instigated legal proceedings against a company out of a commercial dispute between the parties. In the trial, the judge repeatedly allowed the Respondent's attorney to make prejudicial references to the Claimant's foreign nationality and make a race-based distinction between the parties. Finally, the judge denied to give the Claimant further instruction to the jury which clearly stated the discrimination.[247] The Claimant instigated arbitral proceedings against the United States and agreed that NAFTA, Art. 1105, had been violated. The Tribunal came into the conclusion that the conduct of the trial was so flawed that it constituted a miscarriage of justice in international law.[248] The Tribunal also noted:

> Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of lack of due process leading to an outcome which offends a sense of judicial property is enough, even if one applies the Interpretation according to its terms.[249]

In the conclusion the Tribunal concluded that the whole trial were obviously improper and discreditable and could not be even to minimum standards of international law and fair and equitable treatment.[250] The Tribunal in *Waste Management* v. *Mexico*[251] referred to *Loewen, Mondev* and *ADF* cases and suggested:

> ...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 property- 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.[252]

The Tribunal also noted when the standard is applied the treatment must be in breach of representations made by the host state and the investor reasonable relied on. The standard is also a flexible one and should be examined in each case.[253]

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[246] *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States,* Award of 26 June 2003, ICSID Case No. ARB(AF)/98/3 <http://www.italaw.com/sites/default/files/case-documents/ita0470.pdf> accessed 2 January 2014.
[247] Ibid., at paras. 3-4.
[248] Ibid., at para. 54.
[249] Ibid., at para. 132.
[250] Ibid., at para. 137.
[251] *Waste Management Inc*. v. *Mexico,* Award of 30 April 2004, ICSID Case No. ARB(AF)/00/3 <http://www.italaw.com/sites/default/files/case-documents/ita0900.pdf> accessed 4 January 2014.
[252] Ibid., at para. 98.
[253] Ibid., at paras. 99-100.

In *Jan de Nul* v. *Egypt*[254] the Tribunal confirmed that the responsibility of the host state triggers the standard of denial of justice which includes exhaustion of local remedies.[255] The Tribunal furthermore mentioned the definition of denial of justice which was adopted by the Tribunal in the *Loewen* case and declared that the definition was a good guidance. It also referred to the test formulated in the *Mondev* case which was also considered useful in this context and the Tribunal stated that "denial of justice may occur irrespective of any trace of discrimination or maliciousness, if the judgment at stake shocks a sense of judicial property".[256]

In some cases claimants have complained about the length of judicial proceedings in domestic courts. Tribunals have not found the situation amounting to breach of fair and equitable treatment although some cases have taken many years.[257] For example, in *Jan de Nul* v. *Egypt*[258] the claimant complained of the excessive duration of the proceedings which took almost ten years[259] and the Tribunal did not consider the action to be a breach of denial of justice.[260]

Same result is seen in *Frontier Petroleum* v. *Czech Republic*[261] where the Tribunal stated that inordinate delay in judicial proceedings can amount to breach of fair and equitable treatment. However, the situation in the case did not meet the required threshold. The total delay in the case was 39 months and that did not constitute a violation of fair and equitable treatment.[262]

5.4 Acting in good faith

Good faith is a fundamental principle in international investment law.[263] If the host state fails to act in good faith and its conduct is serious the violation is most likely to be in breach of the fair and equitable treatment.[264] Tribunals have discussed, in numerous cases, the principle of good faith but no case has rested exclusively on the principle itself.[265] In *ADF Group* v. *United States*[266] the Claimant alleged that the United States had failed to comply with its obligation

[254] *Jan de Nul N.V. Dredging International N.V.* v. *Egypt,* Award of 6 November 2008, ICSID Case No. ARB/04/13 <http://www.italaw.com/sites/default/files/case-documents/ita0440.pdf> 4 January 2014.
[255] Ibid., at para. 191.
[256] Ibid., at para. 193.
[257] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 81.
[258] *Jan de Nul* v. *Egypt* (above fn. 254).
[259] Ibid., at para. 202.
[260] Ibid., at para. 204.
[261] *Frontier Petroleum Services Ltd.* v. *Czech Republic,* Final Award of 12 November 2010 <http://www.italaw.com/sites/default/files/case-documents/ita0342.pdf> accessed 6 January 2014.
[262] Ibid., at para. 334.
[263] Dolzer and Schreuer (above fn. 60) 156.
[264] Newcomb and Paradell (above fn. 1) 294.
[265] Vandevelde (above fn. 195) 97.
[266] *ADF* v. *United States* (above fn. 94).

under Art. 1105 NAFTA and thus breached its obligation to the investor. The Tribunal noted that "the assertion of breach of customary law duty of good faith adds only negligible assistance in the task of determining or giving content to a standard of fair and equitable treatment".[267]

The Tribunal in *Waste Management* v. *Mexico*[268] held that basic obligation of the host state under Art. 1105(1) NAFTA was to act in good faith and not to destroy or frustrate the investor's investment which could amount to a violation of the fair and equitable treatment. The Tribunal stated:

> The Tribunal has no doubt that a deliberate conspiracy- that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement- would constitute a breach of Article 1105(1). A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not to deliberately to set out of destroy or frustrate the investment by improper means.[269]

The good faith principle was discussed in detail in *Siemens* v. *Argentina*[270] where Argentina terminated the investment contract with Siemens on the grounds of Economic-Financial Emergency Law which was approved by the Argentine Congress in 2000. The Claimant was then denied access of Argentina's administrative files.[271] The parties disagreed on the standard of just and equitable treatment as to the facts of the case and discussed in what circumstances the good faith principle applied. Argentina referred to the principle of good faith in the standard of fair and equitable treatment by stating that the standard applied equally to both parties. The claimant held that good faith was an element of the standard which should always be evaluated.[272] The Tribunal found a violation of the good faith principle and stated:

> To conclude the Tribunal finds that the initiation of the renegotiations of the Contract for the sole purpose of reducing its costs, unsupported by any declaration of public interests, affected the legal security of Siemens' investment. The Tribunal also finds that when a government awards a contract, which includes among its critical provisions an undertaking of that government to conclude agreements with its provinces, the same government can not argue that the structure of the State does not permit it to fulfill such undertaking. This runs counter to the principle of good faith underlying fair and equitable treatment.[273]

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[267] Ibid., at para. 191.
[268] *Waste Management v. Mexico* (above fn. 251).
[269] Ibid., at para. 138.
[270] *Siemens A.G.* v. *Argentina*, Award of 6 February 2007, ICSID Case No. ARB/02/8 <http://www.italaw.com/sites/default/files/case-documents/ita0790.pdf> accessed 7 January 2014.
[271] Ibid. at para. 114.
[272] Ibid., at para. 280.
[273] Ibid., at para. 308.

In *Siag and Vecchi* v. *Republic of Egypt*[274] the Respondent claimed that the Claimants had not acted in good faith because they were not nationals of Egypt.[275] The Tribunal did not find a violation of good faith since the Claimants had lost their Egyptian nationality and they were not aware of it until later. The Tribunal confirmed that the principle of good faith was broadly accepted as a part of fair and equitable treatment and therefore analyzed the good faith principle and its position in international investment arbitration by stating:

> Numerous arbitral tribunals have held that, in international investment arbitration, the host State's duty to respect the investor's legitimate expectations arises from its more general duty to act in good faith towards foreigners. The general, if not cardinal, principle of customary international law that States must act in good faith is thus a useful yardstick by which to measure the Fair and Equitable standard. While its precise ambit is not easily articulated, a number of categories of frequent application may be observed from past cases. These includes such notions as transparency, protection of legitimate expectations, due process, freedom from discrimination and freedom from coercion and harassment.[276]

In *Merril & Ring* v. *Canada*[277] the Claimant held that the good faith principle included the obligation of fairness, protection of the investor's legitimate expectations, not to act in an arbitrary and discriminatory manner and the host state responsibility to fulfill its commitments. Breach of the obligations results in the breach of the treaty standard.[278] The Respondent, however, said that the good faith principle and legitimate expectations were not an independent source of obligation as the investor declared. The Tribunal in its conclusion noted that the general principles of law had a role in the discussion and stated:

> Even if the Tribunal were to accept Canada's argument to the effect that good faith, the prohibition of arbitrariness, discrimination and other questions raised in this case are not stand-alone obligations under Article 1105(1) or international law, and might not be a part of customary law either, these concepts are to a large extent the expression of general principles of law and hence also part of international law. Each question will have to be addressed on its own merits, as some might be closely related to such principles while other issues are not. Good faith and the prohibition of arbitrariness are no doubt an expression of such general principles and no tribunal today could be asked to ignore these basic obligation of international law. The availability of a secure legal environment has a close connection too to such principles and transparency, while more recent, appears to be fast approaching that standard.[279]

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[274] *Waguih Elie George Siag and Clorinda Vecchi* v. *Egypt*, Award of 1 June 2009, ICSID Case No. ARB/05/15 <http://www.italaw.com/sites/default/files/case-documents/ita0786_0.pdf> accessed 8 January 2015.
[275] Ibid., at para. 11.
[276] Ibid., at para. 450.
[277] *Merril & Ring* v. *Canada* (above fn. 102).
[278] Ibid., at para. 155.
[279] Ibid., at para. 187.

The good faith principle is the obligation tribunals are most likely to find to have been breached.[280] After analyzing the conclusions in previous arbitral awards, a violation of the good faith principle appears where the host state fails to provide the investor secure legal environment and by frustrating and destroying the investor's investment. However, there is no violation of the good faith principle if the investors are not aware of certain circumstances in the host state and they believe they are acting in good faith.

### 5.5 Freedom from coercion and harassment

Coercion and harassment is considered to be the most serious violation made by the host state officials.[281] It has been accepted by tribunals that according to the fair and equitable treatment standard the host state, by its own regulatory authorities, must grant the investor freedom from coercion and harassment.[282]

The Claimant in *Renée Rose* v. *Peru*[283] alleged that the actions of the Peruvian authorities involved bad faith, coercion, threats and harassment because of the lengthy tax inspections which were performed by the SBS (Superintendency of Banking Administration) that triggered false rumors and speculation about the Claimant's solvency. The Claimant also argued that the state's actions constituted coercion and harassment where the state prosecuted the Claimant's shareholders and the lawsuits were irrational and numerous.[284] The Tribunal could not conclude that the tax inspections of SBS were more frequent than usual and did not agree that it would amount to coercion and harassment against the investor[285] nor the prosecutions of the shareholders.[286]

In *Desert Line* v. *Yemen*[287] the dispute arose between the parties over a settlement agreement where the Respondent pressured the Claimant to accept lesser payments than the sums due under Yemeni Arbitral Award. The Claimant claimed that the agreement should be declared null and void because the Respondent's behavior amounted to coercion which was a

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[280] Martin Paparinskis, 'Good Faith and Fair and equitable treatment in International Investment Law' 1 <http://www.academia.edu/9548279/Good_Faith_and_Fair_and_Equitable_Treatment_in_International_Investment_Law> accessed 7 January 2014.
[281] McLachlan, Shore and Weiniger (above fn. 11) 242.
[282] *Saluka* v. *Czech Republic* (above fn. 124) at para. 308.
[283] *Renée Rose Levy De Levy* v. *Peru*, Award of 26 February 2014, ICSID Case No. ARB/10/17 <http://www.italaw.info/sites/default/files/case-documents/italaw3109.pdf> accessed 14 January 2014.
[284] Ibid., at para. 182.
[285] Ibid., at para. 382.
[286] Ibid., at para. 386.
[287] *Desert Line Projects LLC* v. *Yemen*, Award of 6 February 2008, ICSID Case No. ARB/05/17 <http://www.italaw.com/sites/default/files/case-documents/ita0248_0.pdf > accessed 14 January 2015.

breach of fair and equitable treatment.[288] The Tribunal found a violation of fair and equitable treatment and stated:

> The settlement agreement according to which the prevailing party in an arbitral proceedings renounces half of its rights without due consideration can only be valid if it is the result of an authentic, fair and equitable negotiation… the subjection of the Claimant's employees, family members, and equipment to arrest and armed interference, as well as the subsequent, peremptory "advice" that it was "in [his] interest" to accept that the amount awarded be amputated by half, falls well short of minimum standards of international law and cannot be the result of an authentic, fair and equitable negotiation.[289]

These cases demonstrate that fair and equitable treatment includes the principle of freedom from coercion and harassment. Any pressure of the host state and forcing the investor to perform certain activities which are unfair to the investor are considered breach of fair and equitable treatment. However, tax inspections of the host state are not considered to be a violation of the fair and equitable treatment.[290]

In addition, according to UNCTAD, if the actions of the host state's laws can be justified and proper there is no violation of the standard. However, if the host state's action is based on no lawful grounds and causing harm to the investor, there is no doubt that the standard has been violated. The threshold which constitutes a breach is very high if the host state's actions are repeated or amounting to conspiracy to take or frustrate the investment.[291]

## 6 The FET standard in relation with other standards in international investment agreements

Investment arbitration has had a major impact on substantive standards in international investment agreements. Some standards have become more and more important while other have slowly vanished. Some standards are easy to interpret while others are more complicated and have evolved mostly through practice.[292]

In IIAs the FET standard is the most common standard and is often combined with other international standards while in other agreements the standard is a stand-alone standard.[293] It is important to discuss the interrelationship between the standards in investment agreements[294] to

[288] Ibid., at para. 146.
[289] Ibid., at para. 179.
[290] Dolzer and Schreuer (above fn. 60) 160.
[291] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 83.
[292] Cristoph Schreuer, 'Introduction: Interrelationship of Standards' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford 2008) 1.
[293] Kläger (above fn. 38) 281.
[294] Schreuer 'Introduction: Interrelationship of Standards' (above fn. 292) 1.

investigate how fair and equitable treatment fits into the international investment structure.[295] In this chapter, the relationship of other substantive standards with the FET standard will be discussed in more detail.

## 6.1 National Treatment

### 6.1.1 National Treatment in general

The concept of national treatment is based upon a notion that the host state is obliged to grant the foreign individuals the same protection as it does to its own nationals. National treatment dates back to European colonial policies where the host states sought for protection of their nationals which were abroad. These situations had direct consequences for state sovereignty and the rights of the state to enforce its legislation and exercise its territorial jurisdiction. The aliens expected to be treated in the same way as the nationals and be subjected to the host state's local laws and they were supposed to benefit from long-lasting residence in the host country. The national treatment concept started to develop in the 19th century and became established in treaty law. In the 20th century even more development took place when several countries had recognized in their constitutions the same rights for foreign nationals as their own nationals. Today national treatment clauses can be found in most treaties, especially treaties which concern trade and economic matters.[296] For example Art. III GATT provides national treatment on internal taxation and regulation and Art. III(4) has the requirement that the products which are imported into another territory of another contracting party shall have the same treatment as other products of national origin in respect of all laws and regulations.[297] Art. 1102(1) NAFTA provides national treatment for the investor in comparable circumstances:

> Each Party shall accord to investors of another Party treatment no less favourable than it accords, in like circumstances, to its own investors with respect to establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[298]

However, the same requirements in GATT of comparable products and in NAFTA of similar circumstances are not established in typical BITs provisions.[299] For example, Art. 3(1) in the Germany–Bangladesh BIT provides: "Investments by nationals or companies of either

[295] Kläger (above fn. 38) 281.
[296] Raúl Emilio Vinuesa, 'National Treatment, Principle' *Max Planck Encyclopedia of Public International Law [MPEPIL]* (April 2011) at paras. 1-21, 36.
[297] The General Agreement on Tariffs and Trade (GATT) (signed 30 October, entered into force 1 January 1948, amended 1 January 1995) Art. III (4) <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> accessed 21 January 2015.
[298] NAFTA (above fn. 29) Section A, Art. 1102(1).
[299] Kläger (above fn. 38) 282.

Contracting Party shall enjoy full protection as well as security in the territory of the other Contracting Party".[300]

These different types of provisions in NAFTA, GATT and BITs define when the national treatment standard has been violated. Though these factors seem to be very simple there are very complex issues underlying which have not been answered in existing case law.[301] Kläger mentions that these different provisions are subject to several expectations and give justification of discrimination and argues that in the investment environment it "appears to be much more demanding task to determine the comparability of investors or investments than it is in the context of products or services".[302]

Generally, when tribunals analyze the violation of the national treatment they first begin to determine whether the foreign investor and the domestic investor are in "a like situation" or "in like circumstances". Secondly, tribunals have to determine whether the treatment which is accorded to the foreign investor is not less favourable than the treatment which is given to the domestic investor. Thirdly, if the treatment is less favourable the tribunals must determine whether the differentiation can be justified. As mentioned above, these factors are not as easy as they seem, and tribunals must at all levels take into account all legal and factual contexts of the issue.[303]

The national treatment clause is very important in the investment environment and due to the different texts in international agreements it has been very difficult to apply the standard. The majority of tribunals have agreed that the national treatment is based on nationality but not on an objective criteria.[304] The standard is based on a non-discrimination obligation which in most cases are extremely difficult to prove. The parties who may claim a discrimination are the foreign investor which is treated in a less favourable way than a national investor.[305]

### 6.1.2 National treatment in connection with fair and equitable treatment

As discussed above, national treatment protects an alien from discrimination on the basis of its nationality[306] and in recent years the national treatment standard has been eclipsed by other

[300] Agreement on the Promotion and Protection of Investments (Germany-Bangladesh) (signed 6 May 1981, entered into force 14 September 1986) Art. 5 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/264> accessed 21 January 2015.
[301] Dolzer and Schreuer (above fn. 60) 199.
[302] Kläger (above fn. 38) 283.
[303] Dolzer and Schreuer (above fn. 60) 199.
[304] Andrea K. Bjorklund, 'National Treatment' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford 2008) 58.
[305] Tudor (above fn. 2) 186.
[306] Bjorklund (above fn. 304) 30.

international standards, for example the standard of fair and equitable treatment. There are various reasons for this. First, the FET standard does not, like the national treatment standard require "like" situations and circumstances. Second, the FET standard does not require discrimination based on nationality. Third, if the state has expropriated the investor's investment the discrimination is a factor which should be taken into account when assessing the situation.[307] According to Tudor the FET standard was created to offer investors more favourable treatment than national treatment when the situations are harsh, injurious and unfair for the investor and, generally, these two standards in are often separated in case law.[308] Scholars and arbitrators have discussed the relationship between the national treatment and fair and equitable treatment standard. For example Dr. Mann wrote about the connection between those two standards and concluded:

> …it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment…so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty.[309]

The NAFTA arbitration awards have also been discussed over the years and tribunals have not reached the same conclusions about the relationship between Art. 1102(1) and Art. 1105 NAFTA which provides national treatment and fair and equitable treatment. In *S.D Myers* v. *Canada*[310] the majority of the Tribunal noted that the breach of the Art. 1102 NAFTA "essentially established a breach of Art. 1105 as well".[311] The Tribunal in *Loewen Group Inc* v. *United States*[312] however, disregarded the view in *S.D Myers* case. It interpreted the FET standard and stated that the standard was not a free-standing obligation, only to the extent as recognized by customary international law. Even though Art. 1105 NAFTA is violated that does not means that other provisions of NAFTA are breached.[313]

This unclear situation in the NAFTA arbitration awards, over the debate whether the fair and equitable treatment is a free-standing obligation or as a part of customary international law, may be traced to the FTC interpretation (discussed in chapter 4.2) which is still considered to be vague and unclear. The FTC interpretation has not concluded the matter according to

[307] Ibid., 58.
[308] Tudor (above fn. 2) 187.
[309] Mann (above fn. 108) 243.
[310] *S.D Myers Inc.* v. *Canada*, Partial Award of 13 November 2000 (UNCITRAL) <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf> accessed 22 January 2015.
[311] Ibid., at para. 266.
[312] *Loewen Group* v. *United States* (above fn. 246).
[313] Ibid., at para. 128.

previously discussed arbitral awards and the FET standard is still left wide open for tribunals to interpret in different ways.

When all the factors above have been examined it must be said that the national treatment and the fair and equitable treatment standard are quite distinct from each other.[314] According to UNCTAD the FET standard should not be confused with the national treatment and most-favoured-nation principles. National treatment mainly deals with discrimination measures based on nationality while the FET standard deals with non-discriminatory measures based on the foreign investor's gender, race or religious belief and the host state's conduct to terminate or frustrate the investment.[315] This means that the FET standard can be violated even though the foreign investor is treated in the same way as the national investor. Similar situation appears when the national treatment standard is violated even though the foreign investor is treated in a fair and equitable manner. Tudor also explains that problems which can arise when national treatment offers minimum level for the FET standard and offers a very low treatment which is considered to be insufficient for the investors and dangerous.[316] The factors which the standards are considered to have in common are not so distinct from another. First, they can be violated at the same time and second, they both contain a certain form of discriminatory treatment.[317] In the end Tudor points out that tribunals should only follow the FET standard in arbitration awards. National treatment which provides minimum standard of treatment can cause confusion and "deteriorate the meaning and guarantees offered by the FET standard".[318]

## 6.2 Most-favoured-nation clause

### 6.2.1 Most-favoured-nation clause in general

The most-favoured-nation clause (MFN) has played a role in international law for centuries. The aim of the MFN is for the parties to treat each other "in a manner at least as favourable as they treat third parties". MFN, like national treatment, is found in trade and economic treaties and in most international investment treaties. Both treatments refer in some clauses to "like circumstances" or "like products".[319] For instance, in Art. I GATT the MFN treatment is established and refers to "like products":

> …any advantage, favour, privileged or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded

[314] Kläger (above fn. 38) 285.
[315] UNCTAD, 'Fair and Equitable Treatment' (above fn. 4) 82.
[316] Tudor (above fn. 2) 189.
[317] Kläger (above fn. 38) 285.
[318] Tudor (above fn. 2) 189.
[319] Dolzer and Schreuer (above fn. 60) 206-207.

> immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[320]

The MFN clause is also established in Art. 1103(1) NAFTA and like national treatment refers to "like circumstances" in Art. 1102(1). Article 1103(1) provides:

> Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[321]

The treaties above show the similarity between MFN treatment and national treatment. These standards are both considered relative as they create a non-discrimination obligations to other foreign nationals. Over the years MFN treatment have been discussed by various commentators and arbitrators. The question has arisen whether the MFN treatment in BITs should be applied to all treatments or if it is limited to special treatments[322] and in what circumstances the investor can invoke the other substantive standards provided in the treaty.[323]

6.2.2 The most-favoured-nation clause in connection with fair and equitable treatment

Usually, the FET standard and MFN treatment standard are two separate clauses in BITs and have no special reason to be associated with each other. However, there are a few occasions where the standards are combined. First, the parties could demand that the minimum level of the FET standard is set by reference to the MFN treatment. Second, if the FET standard does not exist in BIT but MFN treatment does, the foreign investor can rely on the MFN treatment in order to claim treatment according to the FET standard. In order to fulfill these requirements the host state must have signed other BITs which contain the FET standard. That allows the investor to received better treatment from other BITs if the BIT signed by his home state is inadequate.[324] The relationship between the FET standard and the MFN treatment was a discussed in *MTD* v. *Chile.*[325] The BIT between Denmark and Croatia contained obligations to award permits subsequent to approval of investment and to fulfillment of contractual obligations. The Claimant held that the situation should be a part of fair and equitable treatment and a better treatment which was offered in other applicable BIT between Chile and Malaysia

[320] GATT (above fn. 297) Art. I.
[321] NAFTA (above fn. 29) Section A, Art. 1103(1).
[322] Andreas R. Ziegler, 'Most-Favoured-Nation (MFN) Treatment' in August Reinisch (ed.) *Standards of Investment Protection* (Oxford 2008) 86, 60.
[323] Kläger (above fn. 38) 287.
[324] Tudor (above fn. 2) 189-90.
[325] *MTD* v. *Chile* (above fn. 44).

should be applied to MTD. The Tribunal agreed with the Claimant and combined the MFN clause with the fair and equitable treatment in the same provision of the BIT between Chile and Malaysia.[326] The same result appeared in *Bayindir* v. *Pakistan*[327] where the Claimant referred to other applicable BITs between Pakistan and Switzerland. The Tribunal agreed with the Claimant and extended the fair and equitable treatment to the Pakistan-Switzerland BIT.[328] The Tribunal noted:

> Neither in its Reply nor at the jurisdictional hearing, did Pakistan dispute Bayindir's assertion that the investment treaties which Pakistan has concluded with France, the Netherlands, China, the United Kingdom, Australia, and Switzerland contains an explicit fair and equitable manner clause… Under these circumstances and for the purpose of assessing jurisdiction, the Tribunal considers, prima facie, that Pakistan is bound to treat investments of Turkish nationals "fairly and equitably".[329]

The FET standard and the MFN treatment have the strongest position of all the international standards. The reason is that the MFN treatment is considered the most international of all standards and has provided for much wider protection than national treatment. The strength of the MFN treatment and the FET standard lies in the opportunity for the investor to rely on MFN clause when the FET standard is missing in the BIT. Then the investor is able to rely on other standards in other BITs which the host state has signed with other third parties.[330]

### 6.3 Arbitrary and discriminatory measures

#### 6.3.1 Arbitrary and discriminatory measures in general

The arbitrary and discriminatory measures, or the non-impairment standard, is often available for the investor in BITs and other multilateral investment treaties.[331] The standard is generally combined with fair and equitable treatment or the national and most-favoured-nation treatment.[332] An example of this combination is provided in Art. 3(b) in Canada–Slovakia BIT:

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[326] Ibid., at. paras. 103-4.
[327] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Pakistan,* Award of 27 August 2009 ICSID Case No. ARB/03/29 <http://www.italaw.com/sites/default/files/case-documents/ita0075.pdf> accessed 28 January 2015.
[328] Ibid., at paras. 163-7.
[329] Ibid., at paras. 231-2.
[330] Tudor (above fn. 2) 192-3.
[331] Heiskanen Veijo, 'Arbitrary and Unreasonable Measures' in August Reinisch (ed.) *Standards of Investment Protection* (Oxford 2008) 87.
[332] Kläger (above fn. 38) 288-9.

> Measures referred to in subparagraph (a) shall be equitable, neither arbitrary nor unjustifiably discriminatory, in good faith, of limited duration and may not go beyond what is necessary to remedy the balance of payments situation.[333]

An additional example, where arbitrary and discriminatory measures are stand-alone provision, is provided in Art. 3(2) Albania-Lithuania BIT:

> Neither Contracting Party shall by arbitrary or discriminatory measure impair the management, maintenance, use, enjoyment or disposal of investments made by investors of the other Contracting Party.[334]

Other BITs contain the words "unreasonable or discriminatory" measures rather than "arbitrary and discriminatory" measures.[335] For example Art. 2(2) United Kingdom-Northern Ireland BIT provides:

> ..Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.[336]

Although the non-impairment standard is not expressed in the same way in BITs and other treaties there are three elements which they have in common. First, the standard applies to investment but not to investors. Second, the standard applies to measures but not to treatment. Third, the measures which "impair" the investment are in breach of the standard.[337] Although these different elements consist in investment treaties, the idiosyncratic meaning of the standard has not yet become clearer. Due to this unclear provisions in BITs and other treaties, tribunals have used the classical definition of the standard[338] which was set forth in the *ELSI*[339] case where the Tribunal stated: "Arbitrariness is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety".[340]

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[333] Agreement for the Promotion and Protection of Investments (Canada-Slovakia) (signed 27 July 2010, entered into force 14 March 2012) Art. 3(b) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/634> accessed 29 January 2015.
[334] Agreement on the Promotion and Protection of Investments (Albania-Lithuania) (signed 28 March 2007, entered into force 7 December 2007) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/20> accessed 29 January 2015.
[335] Newcomb and Paradell (above fn. 1) 299.
[336] Agreement for the Promotion and Protection of Investments (United Kingdom-Northern Ireland) (signed 4 July 2001) Art.2(2) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/67> accessed 29 January 2015.
[337] Newcomb and Paradell (above fn. 1) 300.
[338] Kläger (above fn. 38) 289.
[339] *ELSI* v. *Italy* (above fn. 238).
[340] Ibid., at para. 128.

The interpretation of the World Court has been widely accepted although the case had arisen under the US-Italy FCN Treaty and the reason is that arbitrary conduct is considered to be enough to breach the FET standard.[341]

6.3.2 Arbitrary and discriminatory measures in connection with fair and equitable treatment

Arbitrary and discriminatory measures play an important role in the FET standard. Although the measures are generally established in a specific clause in BIT, arbitral tribunals have considered the prohibition as a part of fair and equitable treatment.[342] Scholars have also agreed and Schreuer said that it was "undeniable that the prohibition of arbitrary and discriminatory measures are related to the fair and equitable treatment standard".[343]

The issue between those two elements has been discussed in various cases. For instance, the Tribunal in *Loewen* v. *United States*[344] found a violation of fair and equitable treatment under discriminatory treatment and stated that a "decision which is in a breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law".[345] In a similar way, the Tribunal in *Saluka* v. *Czech Republic*[346] stated that the non-impairment standard did not differ greatly from a violation of fair and equitable treatment. The standard only identifies more specific elements such as, operation, management, maintenance, use, enjoyment or disposal of the investment by the investor.[347] The Tribunal found a violation of the non-impairment standard and, at the same time, violation of fair and equitable treatment.[348] The Tribunal in *CMS* v. *Argentine*[349] related fair and equitable treatment with the non-impairment standard and noted that "any measures that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment".[350] The Tribunal in *Waste Management* v. *Mexico*[351] stated that the fair and equitable treatment was "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".[352]

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[341] Schill (above fn. 159) 167-8.
[342] Ibid., 167.
[343] Christoph Schreuer, 'Protection against Arbitrary or Discriminatory Measures' Chapter 10 189 <http://www.univie.ac.at/intlaw/wordpress/pdf/93.pdf> accessed 29 January 2015.
[344] *Loewen Group* v. *United States* (above fn. 247).
[345] Ibid., at para. 135.
[346] *Saluka* v. *Czech Republic* (above fn. 124).
[347] Ibid., at paras. 460-1.
[348] Ibid., at para. 465.
[349] *CMS* v. *Argentina* (above fn. 154).
[350] Ibid., at para. 290.
[351] *Waste Management* v. *Mexico States* (above fn. 251).
[352] Ibid., at para. 98.

Even though most of the cases discussed above show that tribunals have connected the elements together, other tribunals have drawn clearer distinction between the standards.[353] In *Genin* v. *Estonia*[354] the BIT required that the government did not impair the investment by acting in an arbitrary and discriminatory way. The Tribunal stated that "customary international law does not, however, require that a state treat aliens as favourably as nationals". The Tribunal further noted that the Bank of Estonia was not specifically targeted in a discriminatory way and in order to find a breach of fair and equitable treatment the host state's behaviour must have amounted to bad faith.[355] In *Duke Energy* v. *Equador*[356] the Respondent said that the non-impairment standard was a part of fair and equitable treatment.[357] The Tribunal did not agree and stated:

> In view of the structure of the provisions of the BIT, the Tribunal has difficulty following Ecuador's argument that there is only one concept of fair and equitable treatment which encompasses a non-impairment notion. The Tribunal will thus make a separate determination to decide whether the contested measures were arbitrary...[358]

In conclusion, in a number of arbitral awards the non-impairment standard is connected with fair and equitable treatment. This has especially been agreed by the NAFTA parties since NAFTA does not contain a special clause for arbitrary and discriminatory measures. In other arbitral awards the standards are treated separately and that may indicate that the standards should be regarded as two distinct standards.[359]

### 6.4 Full protection and security

#### 6.4.1 Full protection and security in general

The full protection and security standard (FPS) is found in many international instruments and comes in different forms and patterns.[360] In older treaty practice the FPS standard was typically a stand-alone provision but nowadays the standard is often combined with the FET standard.[361] Art. 1105(1) NAFTA is a classic example where the two standards are combined: "Each Party shall accord to investments of investor of another Party treatment in accordance with

[353] Schill (above fn. 159) 168.
[354] *Alex Genin* v. *Estonia* (above fn. 110).
[355] Ibid., at paras. 368-71.
[356] *Duke Energy Electroquil Partners* v. *Equador*, Award of 18 August 2008, ICSID Case No. ARB/04/19 <http://www.italaw.com/sites/default/files/case-documents/ita0256.pdf> accessed 14 December 2014.
[357] Ibid., at para. 272.
[358] Ibid., at para. 377.
[359] Dolzer and Schreuer (above fn. 60) 194-5.
[360] Ibid., 161.
[361] Mclachlan, Shore and Weiniger (above fn. 11) 247.

international law, including fair and equitable treatment and full protection and security".[362]

Other BITs contain the FPS standard, the FET standard and also the non-impairment standard in one clause, for example in Art. 2(2) Israel–Georgia BIT:

> Investment made by investors of each Contracting Party shall be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures…[363]

Some BITs however contain the FPS standard and the non-impairment standard without the FET standard. For instance Art. 3(1) in Croatia-Latvia BIT:

> Each Contracting Party shall extend in its territory full protection and security to investments and returns of investors of the other Contracting Party. Neither Contracting Party shall hamper, by arbitrary and discriminatory measures…[364]

The examples above show that the standard comes in many forms in investment treaties. A question may arise whether these different formulations in the treaties have led to various interpretations of the standard, especially as regards, the relationship with fair and equitable treatment.[365] The answer is positive because the standard has raised some issues in treaty practice and in some cases, tribunals have connected the standards together while others found that the standards were separated.[366]

The FPS standard is best known for protecting the investor and his assets from physical harm. Often the police forces and the judicial and administrative system of the host state are involved to secure the investor physical safety. Today the standard has extended beyond the physical security, providing more abstract security which makes the standard more similar to the FET standard.[367]

### 6.4.2 Full protection and security in connection with fair and equitable treatment

The relationship between the FPS standard and the FET standard has not been very clear. In arbitral awards, tribunals have different opinions whether the FPS standard is an autonomous standard or is related to the FET standard. Some argue that the two standards are independent,

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[362] NAFTA (above fn. 29) Section A, Art. 1102(1).
[363] Agreement for the Promotion and Reciprocal Protection of Investments (Israel-Georgia) (signed 19 June 1995, entered into force 18 February 1997) Art. 2(2) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1320> accessed 4 February 2015.
[364] Agreement on the Promotion and Reciprocal Protection of Investments (Croatia-Latvia) (signed 17 August 2002, entered into force 25 May 2005) Art. 3(1) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/870> accessed 4 February 2015.
[365] Cordero Moss Giuditta, 'Full Protection and Security' in August Reinisch (ed.) *Standards of Investment Protection* (Oxford 2008) 134.
[366] Dolzer and Schreuer (above fn. 60) 161.
[367] Giuditta (above fn. 365) 132-3.

while others indicate their relationship. In treaties, the standards are either connected or separated. Although the standards are treated separately in BITs, arbitral practice does not seems to have followed the wording and the context of the provisions.[368] In *Siemens* v. *Argentine*[369] the Tribunal found a violation of the standards[370] although they were two separate provisions in the Treaty[371] and confirmed that the FPS standard was wider than "physical" protection and was rather a "legal security".[372] A similar situation emerged in *Occidental* v. *Ecuador*[373] were the Tribunal confirmed the relationship between the standards and stated:

> The Tribunal holds that the Respondent has breached his obligations to accord fair and equitable treatment under Article II (3) (a) of the Treaty. In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.[374]

In *Wena Hotels Ltd.* v. *Egypt*[375] the Tribunal found a violation of both fair and equitable treatment and full protection and security on the grounds that Egypt was aware of the Egyptian Hotel Company (EHC) seizing the investor's hotel and took no action to prevent ECH actions.[376]

In the following awards, tribunals seems to connect the standards together even though they are two separate standards in BITs. However, Schreuer doesn't agree and in his opinion the standards are different obligations listed in separate documents, and should therefore be distinguishable. In addition, the roles of the standards are different. The FET standard is more an obligation for the host state to cease certain procedures while the FPS standard is a framework which is created to grant the investor the security he needs.[377] Kläger mentioned that this situation is not free from doubts. The FET standard has evolved and today the focus is more on how that host state complies with their obligations rather than to cease certain procedures. It has also been submitted that the FPS standard is related to the exercise of police power but the FET standards extents more too administrative decision making of the host state.

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[368] Schreuer, 'Introduction: Interrelationship of Standards' (above fn. 292) 4.
[369] *Siemens* v. *Argentina* (above fn. 270).
[370] Ibid., at para. 309.
[371] Ibid., at para. 301.
[372] Ibid., at para. 303.
[373] *Occidental* v. *Ecuador* (above fn. 149).
[374] Ibid., at para. 187.
[375] *Wena Hotels Limited* v. *Egypt*, Award of 8 December 2000, ICSID Case No. ARB/98/4 <http://www.italaw.com/sites/default/files/case-documents/ita0902.pdf> accessed 6 February 2015.
[376] Ibid., at para. 84.
[377] Schreuer, 'Introduction: Interrelationship of Standards' (above fn. 292) 4.

This may reflect the differences between the standards but "a guarantee of full protection and security seems to add little to a fair and equitable treatment clause in an investment agreement".[378]

## 6.5 Expropriation

### 6.5.1 Expropriation in general

Prior to the 1950's expropriation was the most common claim in investment disputes. The typical situation of expropriation was when the host state nationalized the investor's assets without compensation.[379] At this time, expropriation was mostly direct but today the concept has become very rare[380] and now indirect expropriation has become a more growing concept which is often described as equivalent, tantamount, creeping or virtual and what effect the measures have on the investor's property.[381]

In modern treaties, expropriation is accepted by host states and their right to expropriate alien property. The legality of these measures which the host states may perform has been conditioned in four requirements. First, the host state measures must serve a public purpose. Second, the measures may not be arbitrary and discriminatory. Third, the procedure of expropriation must follow the principle of due process and fourth, adequate, prompt and effective compensation must be accompanied which is often the market value of the expropriated investment.[382] These requirements are for example established in Art. 6. Netherlands-Belarus BIT:

> Neither of the Contracting Parties shall take any measures of expropriation, nationalization or any other measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the measures are taken in the public interest, on a non- discriminatory basis, are not contrary to any obligations assumed by the Contracting Party taking such measures, and are taken under due process of law, and provided that provisions be made for compensation. Such compensation shall represent the fair market value of the investments affected, immediately before measures were taken or became known, whichever was the earliest, and shall include interest at a normal commercial rate until the date of payment.[383]

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[378] Kläger (above fn. 38) 295.
[379] McLachlan, Shore and Weiniger (above fn. 11) 265-6.
[380] Dolzer and Schreuer (above fn. 60) 101.
[381] Newcombe and Paradell (above fn. 1) 324-6.
[382] Dolzer and Schreuer (above fn. 60) 99-100.
[383] Agreement on Encouragement and Reciprocal Protection of Investments (Netherland-Belarus) (signed 11 April 1995, entered into force 1 August 1996) Art. 6 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/313> accessed 9 February 2015.

Other examples of classical formulation in BIT contain government measures that have "similar" or "same" effect and are "equivalent" or "tantamount" to expropriation[384] like Art. 5(1) in Korea-Nicaragua BIT provides:

> Investments of investors of one Contracting Party shall not be nationalized, expropriated or otherwise subjected to any other measure having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for public purpose and social interest, and against prompt, adequate and effective compensation.[385]

The debate over the legality of these requirements and to what extent other factors should be taken into account have been controversial among arbitral tribunals. Some have been rather restrictive while others have extended the approach by embracing some other factors such as, the host state's intentions, transparency, consistency and the foreign investor's legitimate expectations and proportionality. This criteria are not perfectly clear and distinguishable from each other which leaves the concept of expropriations undoubtedly unclear.[386]

### 6.5.2 Expropriation in connection with fair and equitable treatment

Indirect expropriation and the FET standard are closely related concepts. The connection appears most clearly when both standards are related to the breach of legitimate expectations.[387] For example, in *Auzurix* v. *Argentina*[388] the Tribunal referred to the investor's legitimate expectations in the reasoning dealing with expropriation[389] and also in the reasoning concerning the FET standard.[390]

Other tribunals have tried to find an explanation of the differences of direct expropriation and fair and equitable treatment.[391] The Tribunal in *PSEG Global Inc. and others* v. *Turkey*[392] noted:

> The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequences of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly

[384] Newcombe and Paradell (above fn. 1) 332.
[385] Agreement on the Promotion and Protection of Investments (Korea-Nicaragua) (signed 15 May 2000, entered into force 22 June 2001) Art. 5(1) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1813> accessed 10 February 2015.
[386] Kläger (above fn. 38) 296.
[387] Ibid., 296-7.
[388] *Azurix Corp* v. *Argentina* (above fn. 19).
[389] Ibid., at para. 316.
[390] Ibid., at para. 372.
[391] Kläger (above fn. 38) 297.
[392] *PSEG* v. *Turkey* (above fn. 206).

> support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.[393]

The relationship between indirect expropriation and fair and equitable treatment has been described[394] in the case of *Sempra Energy* v. *Argentine*[395] where the Tribunal noted:

> It must also be kept in mind that on occasion the line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin, particularly if the breach of the former standard is massive and long-lasting. In the case of doubt, however, judicial prudence and deference to State functions are better served by opting for a determination in the light of the fair and equitable treatment standard. This also explains why the compensation granted to redress the wrong done might not be too different on either side of the line.[396]

The *Sempra* case is a good example of how the FET standard was used in a more flexible way since the indirect expropriation claim was too difficult to achieve because of the high threshold of the expropriation standard.[397] When both cases are examined the Tribunal's arguments submit that the scope of the expropriation test is much narrower than the scope of fair and equitable treatment. It also seems that tribunals are more unwilling to find an indirect expropriation because it is easier to find a violation of the fair and equitable treatment which explains the greater popularity of fair and equitable treatment in connection with expropriation standards.[398]

## 6.6 Umbrella clause

### 6.6.1 Umbrella clause in general

Umbrella clauses in investment treaties are provisions which protect commitments between the contracting states and the foreign investors.[399] If the host state breaches an investment contract the treaty is also considered to be violated and can be raised in investment arbitration.[400] Most BITs contain the umbrella clause provisions[401] and the classic example is in Art. 2(2) in the

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[393] Ibid., at para. 238.
[394] Kläger (above fn. 38) 297.
[395] *Sempra Energy International* v. *Argentina*, Award of 28 September 2007, ICSID Case No. ARB/02/16 <http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf> accessed 12 February 2015.
[396] Ibid., at para. 301.
[397] Katia Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developements' in August Reinisch (ed.) *Standards of Investment Protection* (Oxford 2008) 111.
[398] Kläger (above fn. 38) 298.
[399] María Cristina Gritón Salias, 'Do umbrella clauses apply to unilateral undertakings?' in Christina Binder, Ursula Kriebaum, August Reinsch and Stephan Wittich (ed.) *International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer* (Oxford 2009) 490.
[400] Dolzer and Schreuer (above fn. 60) 168.
[401] Salias (above fn. 399) 490.

Hong Kong-Sweden BIT which provides, "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party".[402]

The umbrella clause has been discussed in many arbitral awards and has been interpreted in different ways. The main controversial issue has been over, when and in what circumstances, a contract between the parties may be protected under the treaty.[403] The first BIT from 1959 between Germany and Pakistan contained the umbrella clause and prior to 2003, arbitral practice and scholars, most usual used the German view when interpreting the clause. The first arbitral award which departed essentially from the normal understanding of the clause[404] was the *SGS* v. *Pakistan*[405] case. In the case Art. 11 of the Switzerland-Pakistan BIT was interpreted and it provided: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party". The Claimant noted that the clause had a "mirror effect" which means that breach of the clause was immediately a breach of an international treaty. [406] The Tribunal rejected the Claimant's view and stated:

> The "commitments" the observance of which a Contracting Party is to 'constantly guarantee' are not limited to *contractual* commitments. The commitments referred to may be embedded in *e.g.* the municipal legislative or administrative or other unilateral measures of a Contracting Party. The phrase "constantly [to] guarantee the observance" of some statutory, administrative or contractual commitment simply does not to our mind, necessarily signal the creation and acceptance of a new international law obligation on the part of the Contracting Party, where clearly there was none before.[407]

Ever since this Tribunal's conclusion, the meaning and purpose of the clause have been controversial and has given rise to different interpretations in arbitral jurisprudence.[408] In *SGS* v. *Philippines*[409] the conclusion was quite distinctive but the Tribunal stated that a breach of an investment agreement amounted to a breach of the investment treaty. The Tribunal declared:

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[402] Agreement on the Promotion and Protection of Investments (Hong Kong-Sweden) (signed 27 May 1994, entered into force 26 June 1994) Art. 2(2) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1519> accessed 15 February 2015.
[403] Salias (above fn. 399) 490.
[404] Dolzer and Schreuer (above fn. 60) 167-9.
[405] *SGS Société Générale de Surveillance S.A.* v. *Pakistan*, Award of 6 August 2003, ICSID Case No. ARB/01/13 <http://www.italaw.com/sites/default/files/case-documents/ita0779.pdf> accessed 15 February 2015.
[406] Ibid., at para. 163.
[407] Ibid., at para. 166.
[408] Dolzer and Schreuer (above fn. 60) 169.
[409] *SGS Société Générale de Surveillance S.A.* v. *Philippines*, ICSID Case No. ARB//02/06, Award, 29 August 2009 <http://www.italaw.com/sites/default/files/case-documents/ita0782.pdf> accessed 15 February 2015.

> … Article X(2) makes it a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the *extent* or *content* of such obligations into an issue of international law. That issue (in the present case, the issue of how much is payable for services provided under the CISS Agreement) is still governed by the investment agreement.[410]

These approaches have been widely criticized and many tribunals have support the limitation of the umbrella clause by give protection only against the host state sovereign actions while other tribunals have refused to distinguish the two concepts from each other.[411]

### 6.6.2 Umbrella clause in connection with fair and equitable treatment

The protection of contractual relationship between the foreign investor and the host state is not solely protected by the umbrella clause. The contractual relationship between the parties is also protected by the investor's legitimate expectations[412] which were previously discussed in chapter 5.1.3. This connection with the investor's legitimate expectations may draw a link between the fair and equitable treatment and the umbrella clause because it can allow the investor to bring a contractual claim on the basis of the FET clause. This situation has been discussed among several tribunals and some have agreed with the relationship but some have not.[413] In *Mondev* v. *United States*[414] the Tribunal did not agree with the connection of fair and equitable treatment and the umbrella clause and stated that the "distinction between conduct compliant with or in breach of NAFTA Article 1105 cannot be co-extensive with the distinction between tortious conduct and breach of a contract".[415] In *Eureko* v. *Poland*[416] the Tribunal did not agree that a contract clause could be equated with the fair and equitable treatment clause. It stated:

> It follows that the effect of Article 3.5 in this proceeding cannot be overlooked, or equated with the Treaty's provisions for fair and equitable treatment, national treatment, most-favored-nation treatment, deprivation of investments, and full protection and security. On the contrary, Article 3.5 must be interpreted to mean something in itself.[417]

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[410] Ibid., at para. 128.
[411] Kläger (above fn. 38) 301.
[412] Ibid (above fn. 38) 302.
[413] Tudor (above fn. 2) 196-7.
[414] *Mondev* v. *United States* (above fn. 91).
[415] Ibid., at para. 152.
[416] *Eureko B.V.* v. *Poland*, Partial Award of 19 August 2005 in the Matter of *Ad Hoc* Arbitration <http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf> accessed 22 February 2015.
[417] Ibid., at para. 249.

An example where a tribunal agreed with the connection between an umbrella clause and fair and equitable treatment clause with a restrictive view[418] was the *Impregilo* v. *Pakistan*[419] case. The Tribunal was strict whether the Impregilo could established the facts in the contract with the parties BIT but that would be depend on:

> (a) whether Impregilo was able to establish "attribution" to Pakistan in so far as the acts of other entities were concerned, and
> (b) whether Impregilo was able to meet the threshold for treaty claims outlined above, ie activity beyond that of an ordinary contracting party (*"puissance publique"*).[420]

The Tribunal also added that "the threshold to establish that a breach of the Contracts constitutes a breach of the Treaty is a high one".[421] Another case which is clear about the connection[422] is the *Bayindir* v. *Pakistan*[423]case where the Tribunal noted that "when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty".[424]

In the end it must be noted that it is generally accepted that a breach of contractual obligations amounts to a breach of *pacta sunt servanda* clauses (umbrella clauses) in BITs which offers a broader guarantee for the investor. The investor's legitimate expectation is based on the fact that the host state respects their contractual relationship and if it does not, the violation of legitimate expectations can be based on the FET standard.[425]

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[418] Tudor (above fn. 2) 197.
[419] *Impregilo S.p.A.* v. *Pakistan*, Decision on Jurisdiction of 22 April 2005, ICSID Case No. ARB/03/3 <http://www.italaw.com/sites/default/files/case-documents/ita0422.pdf> accessed 14 December 2014.
[420] Ibid., at para. 266.
[421] Ibid., at para. 267.
[422] Tudor (above fn. 2) 199.
[423] *Bayindir* v. *Pakistan* (above fn. 327).
[424] Ibid., at para. 167.
[425] Tudor (above fn. 2) 199.

## 7 Conclusion

In this essay the fair and equitable treatment standard in international investment agreements has been reviewed and an attempt has been made to answer the questions what is the meaning behind the standard and its purpose and development in international investment law.

It is undisputed that the standard is the most recognized clause in IIAs and is universally accepted.[426] Prior to the twentieth century, investors could only rely on diplomatic protection but in the 1960s investors were granted more protection with the appearances of BITs which gave investors access to investment arbitrations as well. Regardless of BITs the standard is also found in multilateral investment treaties such as NAFTA and ECT and in free trade agreements. Other investment agreements, for example GATT and TRIMS, do not contain the FET standard but include the most-favoured-nation treatment which investors can rely on in the event of damages. Although the standard is found in most BITs and IIAs, the standard has been exposed to numerous risks due to vagueness and different interpretations of tribunals.[427]

To understand the legal basis of the FET standard it is important to investigate the sources of international investment law. The main document which has been generally accepted as describing the sources of international law is Art. 38 of the ICJ which establishes three main basic sources: treaties, customs and general principles of law. In addition to Art. 38 of the ICJ, Art. 42 of the ICSID Convention has played a major role in arbitral disputes and last but not least Art. 31 VCLT Convention which states rules of customary international law which contain methods of interpretations of investment treaties.

Other difficulties in interpretation of the FET standard is whether the standard should be linked to customary international law or if the standard is an independent self-contained standard.

Although tribunals have agreed that the standard is a part of customary international law there have been doubts as to how to define the customary international standard. Some tribunals have used interpretations given in the *Neer* case where the threshold to find a violation of the standard was considered to be very high while other tribunals do not agree and say that the standard is still developing.

Due to these different interpretations of tribunals, international organizations have responded by establishing statements by trying to define the standard and the most recognized

[426] Kläger (above fn. 38) 317.
[427] Ibid., 317.

statements are from the FTC which released its binding interpretation in 2001. However, this binding interpretation has been widely criticized by scholars and arbitrators and some tribunals have gone very far by stating that the interpretation is not binding. Due to this situation the conclusion is, that the FTC interpretation has not solved any problems and the interpretation of the standard is still left unresolved and wide open.

Since the relationship of the FET standard and customary international law is still vague and unclear, tribunals have been moving away from the minimum standard of treatment by taking into account in their conclusions, a different factual context in which the standard has been applied. These elements are investor's legitimate expectations, transparency, due process of law or denial of justice, acting in good faith and freedom from coercion and harassment.

The investor's legitimate expectations are considered to be a key element in fair and equitable treatment. If the investor wants to be protected his decisions have to be legitimate. For example, gaming facilities is not legitimate if gambling is considered to be an illegal activity in the host state. In this respect the investor is not protected by international investment laws. Legitimate expectations have been classified in three categories, the stability in the host state's legal framework, the stability in the host state administrative conduct and the stability in contractual relationship with the host state.

A breach of the investor's legitimate expectations in the host state's legal framework is often found when the host state decides to change the law, for example a tax law, without any clarity about its meaning and extent. Also if regulations are inconsistent with the investor's investment. These situations have led to violations of the FET standard because host states are obliged to provide the investors stable environment. Predictability in the host state is also important factor in relation to the investor's legitimate expectations. Failure to ensure predictable framework, by for example, withdrawal of a license which the host state has provided for the investor, is a violation of the FET standard.

The stability in the host state administrative conduct is also important factor of investor's legitimate expectations. Any revocation of administrative decisions, for example, revocation of a license given to the investor to operate his investment can led to violation of the FET standard. Investors must expect that the host state act in consist manner, free from ambiguity and totally transparently.

The stability in contractual relationship between the host state and the investor and in what circumstances the FET standard could be violated is very unclear in arbitral awards and tribunals have reached different conclusion. Although, it must be said that the FET standard protects the parties contractual relationship, in most cases, but however, in what way the

protection covers is still unclear. For example, some tribunals have gone really far by observing that breach of fair and equitable treatment only violates investor's legitimate expectations if the breach involves the exercise of the state's sovereign power.

Lack of transparency can also lead to a violation of the fair and equitable treatment. Host states must have laws, regulations, procedures and administration easily accessible. Some tribunals have gone much further by stating that all rules, regulations, goals of the relevant policies, administrative practices and contractual relationship should be clear and accessible for the investor. Tribunals have also been very strict over the issue of burden of proof and the claimants must show that transparency has been violated.

Denial of justice is an old concept in the international investment framework. The main causes of violation of the concept in arbitral awards are when the investors are denied access to courts, the right to be heard, discriminated against and when the host states take a decision to seize and requisition the investor's investment. However, delay in judicial proceedings has not been considered a violation of due process. Tribunals have in recent years slowly reduced the importance of the concept and give the FET standard more value instead.

The good faith principle is a broad principle in international investment law. Tribunals have found violations of the concept where the host states have frustrated and destroyed the investor's investments.

Coercion and harassment is considered to be the most serious violation of the host state. Any unlawful action of the host state which prevents the investor to perform certain activities is a violation of fair and equitable treatment. However, tax inspections performed by the host state have not been considered to be a violation of the principle.

The interrelationship with other standards has also been reviewed. The fair and equitable treatment and national treatment are not distinguished from each other according to arbitration awards and scholars and fair and equitable treatment provides greater protection than national treatment. However, the relationship between most-favoured-nation treatment and fair and equitable treatment is closer because were the FET standard is missing in a treaty the investor can usually rely on the most-favoured-nation clause. The connection between the fair and equitable treatment and the non-impairment standard has been accepted by the NAFTA parties but in other arbitral awards the standards are treated separately which indicates that they should be distinguished. The relationship between the FPS standard and the FET standard has been discussed by scholars who say that the standards should be distinguished from each other, while tribunals on the other hand have combined them. The relationship with the expropriation standard and the FET standard have in recent years been distinguish in arbitral awards. The

reason is that the expropriation standard has a higher threshold and is much narrower than the FET standard which makes it easier for tribunals to find a violation of the FET standard. The umbrella clause is also a well-known concept in international investment law and has a close connection with fair and equitable treatment. If the host state does not honor the investment contract the investor's legitimate expectations are violated which is a breach of fair and equitable treatment.

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