

# Fair and Equitable Treatment: an Evolving Standard\*

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*The growing concern of States in order to attract foreign investment into their territories has led to the formulation of a legal structure aimed at encouraging investment through the granting of a secure and stable environment for the investor in the host State. In the core of this structure is the Fair and Equitable Treatment standard which, as a non – contingent standard, constitutes an independent and reliable system for the protection of the investor. However, the application of the true fairness concept underlying the standard seems at times in jeopardy, due to a serious lack of precision regarding its true meaning. Arbitrators and scholars have wandered from one interpretation to another, trying in occasions to fit the standard in existing legal concepts such as the international minimum standard of customary international law or simply creating a whole new meaning by means of self-contained legal figure. The article examines the latest and most decisive attempts to define the standard within modern international law, all of which have contributed to a dynamic but controversial discussion around the topic.*

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## INTRODUCTION

**A**s a result of globalization, States have realized that the attraction of foreign investment into their territories is a decisive element in their economic growth. States alone are not capa-

ble of generating sufficient economic activity to sustain a steady growth in their economy. This is true mainly among developing countries or capital-importing countries.

There is concern among States as to the method of stimulating these invest-

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ment flows into their countries. On the other hand, the investor's decision to make an investment depends on a secure and stable environment in the host State. On this basis, States have agreed upon a set of basic standards for the purpose of granting the investor the security he expects and assuring its continuance over time.

Classical standards such as national treatment or non-discrimination have become insufficient. The reason is based on the concern of investors that because those standards are contingent in nature, the protection granted to them may not reach their basic expectations as the treatment provided by the State to its own nationals –which is the basis of the latter standards– is deficient. Thus, although treated in a non-discriminatory way in relation to the host State's nationals, that treatment violates basic rights that are considered essential for an investment to develop effectively. Therefore, the latter protection is not only a concern of capital-importing countries, but also of capital-exporting countries that desire to protect their investors worldwide.

In order to grant non-contingent protection to the foreign investor, States have, since the 1960's, agreed on bilateral initiatives to assure this protection, constituting a worldwide network of investment agreements. These agreements established a set of standards to grant the foreign investor a safety net for his investment. Some of these standards of protection are the Most-Favored Nation, No Expropriation without due compensation and Fair and Equitable Treatment, the lat-

ter being the object of the present analysis.

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### **There is a worldwide net of bilateral agreements for the protection of the foreign investor.**

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The fair and equitable treatment standard has become the center of discussion in various forums, and most of all among arbitrators who have applied it. It constitutes one of the most important elements available to a foreign investor to protect his investment in a foreign country because it provides him with a certain treatment that the host State must grant regardless of the treatment given to its own nationals.

It is the discussion regarding the true meaning of the standard that has become a main focus in international investment law. Although most investment agreements grant this standard, they do not provide an indication as to what its exact meaning is and what the criterion is by which it must be applied.

Developed countries have become concerned about the real effect this protection will have on their nationals that invest in capital-importing countries. Their worry is based on the fact that the standard has been given many different interpretations in arbitral cases (more prolifically within the scope of Nafta), which is acknowledged in many studies, such as those of the OECD. However, this is not good news, considering that instead of promoting stability and certainty among investors, this situation produces exactly the opposite effect.

There have been, however, some initiatives from States to define the meaning of the standard through an interpretation of the agreements they have signed. Such is the case of Nafta, where the Free Trade Commission issued an interpretation equating the standard to the minimum standard of customary international law. Although an important initiative, it did not contribute to clarifying the meaning of the standard and, moreover, lowered the protection granted to the investor.

#### THE SEARCH FOR A MEANING

The manner in which a treaty structures the standard and its association with other standards will be decisive in defining its meaning.

The latter structure differs from one treaty to another. And due to the vagueness of this structure, which provides no enlightenment in resolving the true meaning of the standard, different treaties and investment agreements have evolved throughout the years with the aim of handing over a greater set of tools for the purpose of using this standard in a more uniform way. It is not clear whether the idea of the parties is to completely elucidate the standard's definition. The fact is that «The attempts to clarify the normative content of the standard itself have, until recently, been relatively few. There is a view that the vagueness of the phrase is intentional to give arbitrators the possibil-

ity to articulate the range of principles necessary to achieve the treaty's purpose in particular disputes. However, a number of governments seem to be concerned that the less guidance is provided for arbitrators, the more discretion is involved, and the closer the process resembles decisions *ex aequo et bono*, i.e. based on the arbitrators notions of 'fairness' and 'equity'<sup>1</sup>.

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**Some governments are concerned that the less guidance provided for arbitrators, the more discretion is involved.**

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Different formulations in different investment agreements and different interpretations by arbitrators have led to a variety of expressions in relation to its true meaning, which ultimately do not contribute to a secure environment for investment.

Recent treaties, such as Nafta (particularly in light of the Free Trade Commission's interpretation that narrowed its meaning) and the United States-Chile Free Trade Agreement, have made important progress in narrowing the scope of the definition of its meaning in their investment Chapters. Nonetheless, this latest tendency has not sufficed for Tribunals to develop a uniform jurisprudence on the meaning of the term. Although Tribunals increasingly rely on other Tribunals' findings, there are still important differences in the approach.

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<sup>1</sup> ORCD, Fair and Equitable Treatment Standard in Internacional Investment Law, 2004, p. 2.

Of particular interest are the views of investors with regard to the standard, as well as that of host States. Investors generally argue the more expansive view, that is, conceiving the standard as a self-contained concept, which will extend far beyond the minimum standard approach that limits it to outrageous behavior by the host State, as was established in the Neer case<sup>2</sup> in the 1920's. On the other hand, the host State's argument will tend to limit its liability precisely to the Neer case understanding.

The main approaches that have been formulated regarding the meaning of the standard are (i) equating it to the international minimum standard that is present in international customary law, (ii) measuring it against international law, including all sources; (iii) considering it as an independent standard based on the plain-meaning approach; or (iv) considering it as an independent rule of customary international law.

#### THE INTERNATIONAL MINIMUM STANDARD APPROXIMATION: A DOOR TO CUSTOMARY LAW

When States agree upon the fair and equitable treatment standard and include it in an investment agreement, they are dealing with the fairness and equity con-

cept that is already present in their own legal systems, which they view as a common standard. However, and for the purpose of attaining the status of a common standard at the level of international obligations, an important deal of uniformity in relation to its significance is decisive, which will be achieved through the determination of its main elements.

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#### States are dealing with the fairness and equity concept already present in their legal systems.

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One of the main theories that exists to define the Fair and Equitable Treatment standard is the one that considers the standard to be a part of the international minimum standard required by international law, which, for many States, is a part of customary international law.

The latter conclusion derives from a set of sources in which there is a capital-exporting State perspective on the issue. And although at the doctrinal level this is an approximation on which there is important literature, it is salient to point out that «it cannot readily be argued that most States and investors believe fair and equitable treatment is implicitly the same as the international minimum standard.»<sup>3</sup> That is, at the empirical level there is not a general acknowledgment of countries in

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<sup>2</sup> Neer Claim, United Nations, Reports of International Arbitral Awards, 1926, IV, p. 60. In OECD. The International Minimum Standard in Customary International Law. Annex to Fair and Equitable Treatment Standard in International Investment Law, OECD, 2004.

<sup>3</sup> UNCTAD, Fair and Equitable Treatment. UNCTAD Series on issues in international investment agreements. United Nations. Geneva. 1999. Volume III, p 13.

relation to this approach, as we will establish.

### *The International Minimum Standard*

The international minimum standard is a rule of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property<sup>4</sup>. Moreover, «the international minimum standard sets a number of basic rights established by international law that States must grant to aliens, independent of the treatment accorded to their own citizens»<sup>5</sup>.

The violation of this standard may engender international responsibility for the host State.

The international minimum standard is related to the protection of foreign nationals or aliens in general, and has, due to the remarkable growth in international investment instruments, mainly BIT's, gained an important representation in the area of investment.

This standard had been already recognized by Vattel in the 18th century and was referred to during the 19th and 20th centuries. The decisive ruling regarding this standard was the Neer Claim,<sup>6</sup> which defined the type of treatment of an alien

that would constitute an international crime («outrage, bad faith, willful neglect of duty, an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency»).

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**The international minimum standard is a rule of customary international law that States must respect when dealing with foreign nationals and their property.**

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Since the 20th century, however, the standard's existence was challenged by Latin American countries and other developing countries that asserted the rule of national treatment instead. After World War II, the significance of this standard as an autonomous rule of customary international law has persisted only to the extent of the protection of foreign property and investments (in its relationship to the Fair and Equitable Treatment standard).

#### FAIR AND EQUITABLE TREATMENT. PART OF CUSTOMARY INTERNATIONAL LAW?

The relationship between the fair and equitable treatment standard and the international minimum standard of custom-

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<sup>4</sup> OECD, *The International Minimum Standard in Customary International Law*, Annex to Fair and Equitable Treatment Standard in International Investment Law, OECD, 2004, p. 26.

<sup>5</sup> OECD, *The International Minimum Standard in Customary International Law*, p. 26.

<sup>6</sup> Neer Claim, p. 60. In OECD, *The International Minimum Standard in Customary International Law*, p. 27.

ary international law has been regarded by some investment agreements as tantamount, i.e., as equivalent terminology. For others, the standard is a part of the international minimum standard of customary international law. However, and with the exception of Nafta (through its Free Trade Commission's interpretation of the issue) and those investment instruments that expressly equate the Fair and Equitable Treatment standard to the international minimum standard, such as the US and UK BIT Model, « the vast majority of those containing such clause (Fair and Equitable), about 88 percent, make no mention of international law in connection with it ... In my sample of that approximately 12 percent that mentions international law in connection with fair and equitable treatment, almost half designate international law only as a floor, implying that fair and equitable treatment may require more, but never less, than international law»<sup>7</sup>. 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 ... 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»<sup>8</sup>.

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**The true intention of State parties would have been to accord a higher level of treatment to the investor.**

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As a basis for the analysis, it must be noted that equating the fair and equitable treatment standard with the international minimum standard of customary international law involves that the standard of treatment provided by the State parties is below the one that may be provided if we consider the standard to be self-contained. When the Free Trade Commission in Nafta issued its Interpretative Note, it prohibited only the most extraordinary forms of government misconduct (a conclusion that comes from the Neer case, which relies on egregious, outrageous and shocking conduct). The latter was an interpretation for the specific case of Nafta that must be applied in that context. Nevertheless, in the general area of investment agreements, it becomes difficult to believe that considering the evolution in the investment attraction policy in most States, all those agreements in which the equating of the fair and equitable treatment standard with the international minimum standard is not

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<sup>7</sup> Coe, Jack J., Fair and Equitable Treatment Under Nafta's Investment Chapter, American Society of International Law, Proceedings of the Ninety-Sixth Annual Meeting, March 16, 2002.

<sup>8</sup> Vasciannie, Stephen, The Fair and Equitable Treatment Standard in International Investment Law and Practice, The British Yearbook of International Law, 1999, Oxford, Volume 70 1999 (2000), p. 144.

expressly stipulated, the intention of the State parties was to minimize the treatment that must be granted by the host State in order to commit this most «outrageous» conduct. Such was the Pope and Talbot<sup>9</sup> arbitral tribunal's conclusion, prior to the Free Trade Commission's Note, which although fairly criticized on some issues, in consideration of the Model BIT of 1987 of the United States, which afforded a higher level of protection to the investor, expressed a very valid opinion in the sense that the true intention of the State parties was to accord a higher level of treatment to the investor. The latter conclusion is even more relevant if we take into account that through the Most-Favored Nation Clause included in investment agreements, the investor may demand this high degree conduct from the host State, since it is more favorable treatment.

Currently and «More contemporarily, an ICSID tribunal recently stated that in order to amount to a violation of [a] BIT [guarantee of fair and equitable treatment], any procedural irregularity would have to amount to bad faith, willful disregard of due process of law or an extreme insufficiency of action such that the act in question amounted to an arbitrary act that violates the tribunal's sense of juridical propriety. While some tribunals might not take a position quite as extreme, it does appear

that something close to this standard is generally applied»<sup>10</sup>. This is an arbitral award (Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia) based on a self-contained standard. However, as expressly stated in the treaty, Nafta arbitrators had to deal with the standard equated to international minimum standard of treatment according to customary international law. States have acknowledged that the interpretation imposed by the Free Trade Commission did not equate fair and equitable treatment to the customary international law as defined in the Neer case. In fact, it referred to what customary international law meant at this time, i.e., in its evolved form.

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### **The extent to which customary international has evolved is debatable.**

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Did the findings of the arbitrators in the above case comply with the definition of this standard as stated by the Free Trade Commission, or did they exceed it? To what extent has customary international law evolved? What is the limit between customary international law as it has evolved to this date and a wholly self-contained standard?

In this sense, «while tribunals differ as to whether they refer to a minimum

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<sup>9</sup> Pope and Talbot Inc. vs. Government of Canada, UNCITRAL case (Award April 10, 2001) <http://ita.law.uvic.ca/documents/PopeandTalbot-Merit.pdf>.

<sup>10</sup> Gross Stuart G., Inordinate Chill: Bit's, Non-Nafta MITs, and Host State Regulatory Freedom – An Indonesian Case Study, Michigan Journal of International Law, Spring 2003. Referring to the Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin vs. Republic of Estonia case.

international standard, the bulk of the BIT and NAFTA cases which have dealt with the issue appear to apply a standard close to a minimum international standard. In the situations where a violation was found, evidence was presented showing bad faith, discriminatory intent, and/or *ultra vires* actions on the part of host-State government officials. In all other instances, including instances where host-State actions were not the model of clarity or fairness but which were legally justified and non-discriminatory, no violation was found.»<sup>11</sup>. The latter is a fact, tribunals tend to apply a standard close to the international minimum standard; despite this, many awards, due to the vagueness of the agreement on the issue, have exceeded it.

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**Tribunals tend to apply a  
standard close to the international  
minimum standard.**

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In the *Metalclad* case<sup>12</sup>, the Tribunal found a violation of article 1105 (1) due to a lack of transparency in the Mexican legal process. In reviewing the award of the

tribunal, the Supreme Court of British Columbia considered that «the tribunal has inaccurately read transparency provisions of Nafta Chapter 18 into Chapter 11 and that transparency is not a requirement under customary international law.»<sup>13</sup>

Moreover, «it is clear that the Tribunal proceeded on the basis that the scope of Article 1105 extended beyond norms that have become an accepted part of customary international law. This is evident insofar as its decision does not invoke customary international law as the basis for imposing transparency requirements on Mexico; rather, in its view, these requirements flowed from conventional international law, namely the NAFTA ... The Tribunal had misstated the applicable law to include transparency obligations and it then made its decision on the basis of the concept of transparency»<sup>14</sup>.

The *Metalclad*<sup>15</sup>, *Myers*<sup>16</sup> and *Pope and Talbot*<sup>17</sup> awards «proceed on the basis that a breach of article 1105 can be found for acts that would not be found to have breached the minimum standard of treatment at customary international law»<sup>18</sup>.

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<sup>11</sup> Gross Stuart G., *op. cit.*

<sup>12</sup> *Metalclad Corporation vs. The United Mexican States*. ICSID Case No. ARB (AF)/97/1. (Award August 30, 2000). <<http://ita.law.uvic.ca/documents/MetalcladAward-English.pdf>>.

<sup>13</sup> Nanda Ved P., Fair and Equitable Treatment Under Nafta's Investment Chapter, American Society of International Law, Proceedings of the Ninety-Sixth Annual Meeting, March 16, 2002.

<sup>14</sup> Tollefson Chris, *Metalclad vs. United Mexican States Revisited: Judicial Oversight of Nafta's Chapter Eleven Investor-State Claim Process*, Minnesota Journal of Global Trade, Summer 2002.

<sup>15</sup> *Metalclad Corporation vs. The United Mexican States*.

<sup>16</sup> *S.D. Myers Inc. vs. Canada*. UNCITRAL Case (Second Partial Award 21 October 2002). <<http://ita.law.uvic.ca/documents/SDMeyers-secondPartialAward.pdf>>.

<sup>17</sup> *Pope and Talbot Inc. vs. Government of Canada*.

<sup>18</sup> Thomas J. C., Fair and Equitable Treatment Under Nafta's Investment Chapter, American Society of International Law, Proceedings of the Ninety-Sixth Annual Meeting, March 16, 2002.



Moreover, in the Maffezini case<sup>19</sup>, Spain was held responsible for violating the treatment clauses in its BIT with Argentina when it conducted a loan transaction without enough transparency so as to be fair and equitable to the investor, although the applicable BIT did not refer to international law; therefore, there was no discussion of international custom by the tribunal.

In general, «an analysis of the opinions of the arbitral tribunals, which have attempted to interpret and apply the ‘fair and equitable treatment’ standard, identified a number of elements which, singly or in combination, they have treated as encompassed in the definition of the ‘fair and equitable standard’: due diligence and due process, including non-denial of justice and lack of arbitrariness, transparency and good faith. There is a common understanding among OECD countries that due diligence and due process, including non-denial of justice and lack of arbitrariness, are elements well grounded in customary international law which could be accepted as part of the definition of fair and equitable treatment. There are differing views as of the role of transparency as a new or a possible element of a fair and equitable standard linked to evolving customary law. Most OECD countries’ agreements define it as an obligation under a separate provision. OECD countries seem to consider good faith to be more a

principle underlying the general obligation rather than a distinct obligation to investors pursuant to the ‘fair and equitable treatment’ standard»<sup>20</sup>.

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**For OECD countries, due diligence and due process could be accepted as a part of the definition of fair and equitable treatment.**

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In the scope of Nafta, the interpretation granted by the Free Trade Commission has not been helpful in clarifying things. «Now that in the light of the Notes of Interpretation, a customary international law standard is to be applied by arbitral tribunals in interpreting minimum standards of treatment, how will ‘fair and equitable treatment’ be construed? The basic concepts, of course, are fairness and due process, but as article 1105 stands, its language surely is not a model of clarity. Also, as we have seen, no consistent body of jurisprudence has thus far been developed by arbitral tribunals. As the Metalclad tribunal and the British Columbia court’s decision diverge in interpreting the pertinent concepts, there is no certainty as to how future tribunals will construe the phrase. No reliance can therefore be placed on precedent, for the rationale for tribunal awards is often conflicting and lacks coherence»<sup>21</sup>.

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<sup>19</sup> Emilio Agustín Maffezini vs. The Kingdom of Spain, ICSID Case No. ARB/97/7. (Award November 13, 2000).

<sup>20</sup> OECD, Fair and Equitable Treatment Standard in International Investment Law: Draft Concluding Observations. OECD, September, 2004, p. 3.

<sup>21</sup> Vid. P. Nanda, *op. cit.*

The Free Trade Commission's intention, through the issuance of its Notes, was to restrict the flexibility of arbitral tribunals. However, the international minimum standard's own vagueness as a term did not allow even that, since Tribunals have in practice exceeded its intentional terms.

The whole divergence between most tribunals' decisions seems to confirm that the term is still subject to their own interpretations according to the facts of each case. To many, it seems that tribunals should maintain the opportunity to construe their text. Relying on the principle behind the investment agreement, which is to grant protection to the foreign investor, the restriction of the standard's meaning to customary international law and, therefore, the restriction of the tribunals' own functions, does not help in this respect. «Interpretation must begin with the rules that appear in the Vienna Convention, but it cannot end with the Notes of Interpretation»<sup>22</sup>.

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### **The meaning of the fair and equitable treatment standard is still mainly in the hands of each tribunal.**

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In conclusion, although some investment agreements do equate the fair and equitable treatment to the international minimum standard in customary international law, it cannot be concluded that this is the general meaning that the standard

has adopted in international law. Even Nafta tribunals' that were restricted in their interpretation exceeded customary international law, which leads us to conclude that the meaning is still mainly in the hands of each tribunal, eventually applying a plain-meaning approach to it.

### **A SELF CONTAINED STANDARD?**

The fair and equitable treatment standard conceived as a self-contained standard relies on the idea that the standard of treatment is given its plain meaning, that is, each word contained in the standard must be analyzed on the basis of its own general definition. Therefore, the assessment to be carried out to determine the content of the standard which will be afforded to the foreign investor is based on the proper meaning of the terms «fair» and «equitable». Still, this is only the basis on which the determination will be made. Other elements will be taken into account, most importantly, the facts and special features of the case. This plain meaning approach is concordant with the canons of interpretation of treaties surrendered by international law. It is «no doubt entirely consistent with canons of interpretation in international law»<sup>23</sup>.

A treatment will thus be Fair «when it is free from bias, fraud or injustice; equitable, legitimate... not taking undue advantage; disposed to concede every rea-

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<sup>22</sup> Brower, Charles H., Fair and Equitable Treatment Under Nafta's Investment Chapter. American Society of International Law. Proceedings of the Ninety-Six Annual Meeting, March 16, 2002.

<sup>23</sup> Vasciannie Stephen, p. 103.

sonable claim»; and by the same token, equitable treatment is that which is characterized by equity or fairness ... fair, just, reasonable»<sup>24</sup>.

An important ruling concerning this theory was issued in the Pope and Talbot case, which established that the fairness element in article 1105 is additive to the requirements of international law. The latter conclusion was not based on the wording of article 1105 since the Tribunal recognized that such article suggested otherwise, but the interpretation was tackled on the basis of the consideration of BITs signed by the United States both before and after Nafta, which granted a higher standard of treatment to the investor.

On the other hand, the Pope and Talbot case considered that if we take into account the most-favored nation clause, it becomes absurd to deny an investor the better treatment granted in other investment agreements, considering that through this clause, the investor will have access to this improved treatment. The Pope and Talbot Tribunal considered that the standard set by Nafta was equal to that granted by BITS that preceded Nafta. The Tribunal did not approve the idea that the intention of the parties would have been to deny the investors under Nafta the better treatment existent under BITS.

The plain-meaning approach entails a series of advantages, such as «the con-

siderable advantages of uniformity». After all, why should «fair and equitable treatment» mean something different depending on which BIT applies?<sup>25</sup> This is not a minor issue. It seems that this approach would surely improve the uniformity of the interpretation of the standard issued by arbitral Tribunals. If we consider the standard in its plain meaning, arbitral rulings would become more uniform and may only vary in a little degree according to the facts of each case. It seems much easier to rely on the general meaning granted to a word than to determine what special standards of customary international law are equivalent to the fair and equitable treatment standard. The decision, considering the case's facts, must simply be based on whether the conduct at issue is fair and equitable or unfair and inequitable.

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**It is easier to rely on the general meaning of a word than to determine which standards of customary international law are equivalent to that of the fair and equitable treatment.**

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Another approach to the issue is the view of F. A. Mann<sup>26</sup>, who considered that the obligation of fair and equitable treatment constitutes the overriding obligation.

<sup>24</sup> *Idem.*

<sup>25</sup> Coe Jack C.

<sup>26</sup> F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 *British Yearbook of International Law*, 1981. In Stuart G. Gross: *Inordinate Chill: Bit's, Non-Nafta MITs, and Host State Regulatory Freedom – An Indonesian Case Study*. *Michigan Journal of International Law*, Spring 2003.

This overriding obligation includes other standards, such as the most-favored nation clause and national treatment standards. In his view, these standards are granted to ensure that the fair and equitable treatment standard is not impeded. However, the latter is a minority position. Generally, the most-favored nation and national treatment standards are independent of the fair and equitable treatment standard.

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**A tribunal would not be concerned with a minimum, maximum or average standard.**

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Notwithstanding the latter, Mann states that «it is misleading to equate the fair and equitable standard with the international minimum standard: this is because the terms ‘fair and equitable treatment’ envisage conduct that 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»<sup>27</sup>.

However, to others, «fair and equitable treatment is not to be assessed according to customary international law, but rather represents an expanded, contemporary understanding of customary international law»<sup>28</sup>.

If we analyze the facts, we will appreciate that even those arbitral rulings that based their findings on an investment agreement that equates the standard with the international minimum standard clearly exceeded the terms of that investment agreement, granting the standard a meaning that is beyond the international minimum standard as acknowledged at this time. It seems that Tribunals are more confident in making use of the rules of interpretation of international law and define the standard in consideration of the treaty’s objectives and the facts of the case. In conclusion, they have applied the theory of the fair and equitable treatment standard as a self-contained standard. The reason for this is that most investment agreements, as stated in the preceding Chapter, do not make the fair and equitable treatment standard interchangeable with the international minimum standard while in those that do, there is no equating it with the international minimum standard of customary international law (with some exceptions).

An important view is that of Rudolf Dolzer and Magrete Stevens, who say that «the fact that parties to BITS have con-

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<sup>27</sup> OECD, Fair and Equitable Treatment Standard in International Investment Law, p. 23.

<sup>28</sup> Foy Patrick G. and Robert J.C. Deane, Foreign Investment Protection under Investment Treaties: Recent developments under Chapter 11 of the North American Free Trade Agreement. ICSID review – Foreign Investment Law Journal, Volume 16, Number 2, Fall 2001. In OECD, Fair and Equitable Treatment Standard in International Investment Law, p. 23.

sidered it necessary to stipulate this standard as an express obligation rather than rely on a reference to international law and thereby invoke a relatively vague concept such as the minimum standard is probably evidence of a self-contained standard. Further, some treaties refer to international law in addition to the fair and equitable treatment, thus appearing to reaffirm that international law standards are consistent with, but complementary to, the provision of the BIT»<sup>29</sup>.

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### **In some circumstances, States and foreign investors view lack of precision as a virtue.**

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The consideration of this theory is nevertheless not without difficulties. A plain-meaning approach may become subjective and lack precision. However, «in some circumstances, both the States and the foreign investors may view lack of precision as a virtue, for it promotes flexibility in the investment process». Therefore, it seems that many existent arbitral rulings have headed towards this self-contained standard theory anyway. It might require some extra arbitral rulings to totally define the meaning's standard on the basis of the theory's elements. Professor P. Julliard refers to this: «... the interpretation of the fair and equitable treatment, an imprecise notion – 'notion aux contours

imprécis' – will be progressively developed through the 'praetorian' work of the arbitral tribunals.»

Notwithstanding all the latter, when defining the meaning of the fair and equitable treatment standard, arbitral tribunals must take into account the real intention of parties when signing an investment agreement, which is to grant reliable protection to the foreign investor to stimulate investment in their territory. This will certainly avoid equating it to the international minimum standard, which takes away a real and efficient protection.

Professor Muchlinski states that: «The concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most, it can be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign investors»<sup>30</sup>.

It must be concluded that the fair and equitable treatment standard still remains a vague and undetermined concept that needs further developing by arbitral tribunals. The point, however, is to determine the starting point on the basis of which these arbitral tribunals must rule in the

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<sup>29</sup> Dolzer Rudolf and Magrete Stevens. In *OECD Fair and Equitable Treatment Standard in International Investment Law*, p. 23.

<sup>30</sup> Muchlinski Peter. *Multinational Enterprises and the Law*. 1995, p. 625. In *Fair and Equitable Treatment Standard in International Investment Law*. OECD, September, 2004, p. 24.

future. Will we accept the rules of interpretation of international law and decide based on facts, considering the best protection to be granted to the foreign investor, or will we limit its delimitation to a standard, such as the international minimum, that grants a very basic protection to the investor which already exists in customary international law? Unless the agreement specifically orders the arbitral Tribunal to equate the standard with the international minimum standard, the answer is a self-contained standard approach. It seems that the current evolution in the investment area regarding the protection of foreign investors provides a clear statement: For the sake of the liberalization of investments, investor protection must not regress. This is the intention behind investment agreements, and the interpretation of all standards established therein (including the fair and equitable treatment standard) must be oriented in that direction.

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## **Investor protection must not regress.**

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### CONCLUSIONS

The fair and equitable treatment standard, present in international investment law, has gained importance as a mechanism against unfair and unequal behavior of host States against foreign investors. It has arisen as a fundamental response to a new type of expropriation

(different from the traditional direct and creeping types of expropriation) that could be enacted against the investor.

This new type of expropriation amounts to a behavior of the host State that does not involve a physical taking of property (direct expropriation) or conduct that makes it impossible to make proper use of the property (creeping expropriation). It consists of a certain treatment by the host State that would eventually impair the investor's ability to develop the investment, thus affecting his property rights in regard thereto. For example, a lack of transparency by the host State which does not allow the investor to learn of all regulations that must be complied with, resulting in the above-mentioned impairment.

The fair and equitable treatment standard is often invoked by foreign investors before arbitral tribunals, who claim that although they are not affected by the traditional forms of expropriation, they are incapable of developing their investment due to a host State's conduct that does not allow it.

The main conflict in relation to this standard is the vagueness in which it is conceived. Views issued by scholars and arbitrators, as well as the expression of what is contained in investment agreements, demonstrate that there is no uniformity in the matter, a situation that is present to a greater degree in various cases that have dealt with the issue of determining its true meaning.

The OECD<sup>31</sup> states in this regard that

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<sup>31</sup> OECD, Fair and Equitable Treatment Standard in International Investment Law: Draft Concluding Observations, p. 2.

«because of the differences in its formulation, the proper interpretation of the 'fair and equitable treatment standard' is influenced by the specific wording of the particular treaty, its context, negotiating history or other indications of the party's intent».

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**There is consensus as to the defining elements of the minimum standard in customary international law.**

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Some investment treaties specifically link the standard with the minimum standard of customary international law. If this were the case, there is no doubt that this will be the interpretation to assign to the standard. However, in the case of other agreements, which constitute the majority, no such link is made, implying that the standard may be considered to signify a lot more than the minimum standard of customary international law. There is a common consensus as to what the defining elements are in the minimum standard of customary international law (which, by the way, evolves continuously). Nevertheless, whenever there is no express equating with the minimum standard, there is no general agreement as to what may we consider the «Fair and Equitable Treatment» standard to mean.

In consequence, and although we must await further rulings by arbitral tribunals to better shape the standard, we must assume that thus far to date, the majority of

investment agreements do not equate the standard with the minimum standard of customary international law, and, therefore, are not bound by that interpretation. Moreover, arbitral rulings have exceeded in their interpretation the general elements that constitute that minimum standard of customary international law (for example, reference to transparency), which leads us to believe that they had the intention of elevating the level of protection to the foreign investor and not limiting it to customary international law.

Although investment agreements that equate the standard with the international minimum standard are obliged to make that interpretation, and the fact that there are some arbitral rulings that establish that nexus, these sparse cases do not suffice to transform that interpretation into the general approach to the meaning of the standard. We must take into account international rules of interpretation, the intent of the parties, all of which leads us to realize that a plain-meaning approach must be applied. In relation to the standard's meaning, «il suo contenuto non sembrerebbe essere determinabile in maniera assoluta e definitiva, essendo esso un principio astratto e relativo; il trattamento giusto ed equo assume però un significato concreto quando é inserito in un contesto giuridico particolare.»<sup>32</sup>

It is true, there is a general concern that this approach may not help in dealing with the arbitrariness that may appear when there is no direct guidance for arbi-

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<sup>32</sup> María Rosaria Mauro, *Gli accordi bilaterali sulla promozione e la protezione degli investimenti*. G. Giappichelli Editore, Torino, p 193.

trators. However, this is a view that will be readily corrected through jurisprudence, which has so far established some recurrent elements that are a part of the standard, such as due diligence, due process, non-denial of justice and transparency.

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**When signing an agreement, the real intention of parties is generally to grant the best protection to the investor.**

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The real intention of the parties when signing an investment agreement is, in most cases, to grant the best protection to the investor, allowing the free-flow of investment into its territory. The most important benefit of a plain-meaning approach is that it allows the standard to be interpreted according to that real intention of the parties. In other words, it grants the best protection to the investor, which implies the fairest and most equitable conduct by the host State with regard to the specific facts of the case. Equating the standard with the minimum standard of customary international law is lowering the protection to the most basic elements of customary international law. «In tal senso esso potrebbe essere inteso come il principio di buona fede del diritto interno, per cui l'obbligo di concedere un trattamento giusto ed equo imporrebbe alle Parti di

tenere un comportamento conforme agli obiettivi dell' accordo e quindi, alle Parti contraenti dei BIT's un comportamento che non ostacoli la promozione e la protezione degli investimenti stranieri»<sup>33</sup>. In consequence, the aim of protecting foreign investment is the fundamental issue to be taken into account in the interpretation of the standard. Moreover, «It is in a more general way a functional minimum standard of treatment of private business, quite different, however, from the traditionally known legal minimum standard of the so-called civilized nations»<sup>34</sup>.

Finally, whatever the evolution of the growing jurisprudence of investor-state Tribunals called upon to explore the meaning of fair and equitable treatment may be, other questions in regard to the standard will surely arise. For example, what will be the criteria to determine the compensation to be granted to the affected investor in the event a violation of the standard is detected? Can we apply the elements that arbitrators use to determine the compensation for a direct expropriation (Hull Formula)? Can we equate the violation of the fair and equitable treatment standard with a direct type of expropriation and, therefore, apply fair market value criteria in order to compensate the affected investor?

In this sense, the Chilean model of BIT<sup>35</sup> establishes that where the market

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<sup>33</sup> Mauro María Rosaria, p. 191.

<sup>34</sup> Preiswerk, *New Developments in Bilateral Investment Protection*. In María Rosaria Mauro, p. 191.

<sup>35</sup> Agreement between the Government of the Republic of Chile and the Government on the Reciprocal Promotion and Protection of Investments, reprinted in UNCTAD, *International Investment Compendium*, Volume III, p. 143 – 50. In Stephen Vasciannie, p. 149.



value or property compensation cannot be ascertained, compensation may be determined in accordance with «generally recognized equitable principles of valuation, taking certain factors into account.» Although this is certainly not a clear rule, at least it is dealt with. But what are the criteria when there is no conventional or treaty guidance? The issue becomes even more problematic if we consider that developing and developed countries have a different perspective as to whether the Hull formula must be applied.

In the case of MTD Equity Sdn. Bhd. and MTD Chile S.A. vs. Republic of Chile<sup>36</sup>, in which the only argument by which the State of Chile was charged was a violation of the fair and equitable treatment standard, the Tribunal recognized that the BIT between Malaysia and Chile does not establish the equivalent to the criteria of prompt, adequate and effective compensation for expropriation in the case of breaches of the BIT on other grounds. In this case, the parties agreed to apply the criteria of the Chorzow Factory case ruled by the Permanent Court of Justice that states «that compensation should wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed»<sup>37</sup>.

Although this is a reasonable and just

criterion, could it be applied in those claims in which there is no agreement between the parties and no reference is made to it by the investment agreement? Could the term «adequate» compensation in the Hull Formula amount to wiping out *all consequences* of the illegal act? Moreover, does the fair market value apply or not?

In the Marvin Feldman vs. Mexico case, the Tribunal acknowledged that «Nafta does not provide further guidance as to the proper measure of damages or compensation for situations that do not fall under article 1101 (expropriation); the only detailed measure of damages specifically provided in Chapter 11 is in article 1101 (2-3) ‘fair market value’, which necessarily applies only to situations that fall within that Article 1101»<sup>38</sup>. Considering that there is no criteria to adhere to, the tribunal finally determined damages on a discretionary basis.

Finally, in relation to the amount of compensation to be granted to an investor that has suffered a violation of the Fair and Equitable Treatment standard, a discussion will certainly arise in regard to the possibility that the compensation be calculated in regard to the fair market value of the whole investment, considering that such a violation made it impossible for the investor to develop his investment, which, in practice, is equivalent to confiscating property.

<sup>36</sup> MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case N° ARB/01/7 (Award, May 25, 2004). <[http://ita.law.uvic.ca/documents/MTD-Award\\_000.pdf](http://ita.law.uvic.ca/documents/MTD-Award_000.pdf)>.

<sup>37</sup> Case concerning the Chorzow Factory. <[http://www.worldcourts.com/pcij/eng/decisions/1927.07.26\\_chorzow/](http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow/)>.

<sup>38</sup> Marvin Feldman vs. Mexico. ICSID Case No. ARB (AF) /99/1. (Award December 16, 2002). <[http://ita.law.uvic.ca/documents/feldman\\_mexico-award-english](http://ita.law.uvic.ca/documents/feldman_mexico-award-english)>.