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BEST PRACTICES SERIES

Bulletin #3
Fair and Equitable Treatment

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September 2009

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International Investment Treaties
Best Practice Advisory Bulletins
Foreign Investment for Sustainable Development Program

The author would like to thank Nathalie Bernasconi-Osterwalder for her contribution to this paper.

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This advisory bulletin will:

- Explain the importance of the fair and equitable standard in international investment agreements (IIAs);[1]
- Identify the main approaches for defining fair and equitable treatment in IIAs, and their implications for development policy space; and
- Identify best practice approaches for including fair and equitable treatment, if at all, in IIAs.

[1] The term IIAs includes Bilateral Investment Treaties (BITs) and Investment Chapters in Preferential Trade and Investment Agreements (PTIAs).

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1.0 Introduction to the Fair and Equitable Standard

The obligation to accord "fair and equitable" treatment to foreign investors is a common feature in IIAs. The popularity of the "fair and equitable" treatment standard in IIAs can be attributed to the "beguiling simplicity" (McLachlan, Shore & Weiniger, 2007) of the phrase. Fairness and equity are fundamental principles in virtually every legal system of the world. States are unlikely to concede that they are unable to treat foreign investors in a "fair and equitable" manner, particularly if their intention is to attract foreign capital. However, the rapid rise of investor-state arbitrations challenging state violations of IIAs has revealed the complexity behind this seemingly simple phrase. Respondent states in investor-state arbitrations under IIAs have discovered at times that the minimalist language often used to describe the fair and equitable provision in IIAs can result in expansive obligations imposing a high threshold of protection in favour of the investor.

In fact, the "fair and equitable" treatment standard has emerged as a potent tool[2] used by investors to challenge a range of state conduct that has been adverse to their investment. A recent study (UNCTAD, 2009) noted that "FET [Fair and Equitable Treatment] remains the most relied upon and successful basis for a treaty claim. In all 13 decisions on the merits rendered in 2008, a claim based on FET was addressed by the tribunal" (p. 8).

Today, the fair and equitable treatment standard is found in multilateral,[3] regional,[4] sectoral[5] and bilateral investment treaties (BITs).[6] A study noted "that today BITs that omit reference to fair and equitable treatment constitute the exception rather than the rule"[7] [footnotes omitted] (UNCTAD, 1999, p. 22).

The fair and equitable treatment standard precedes its use in BITs. Commentators often trace the standard from the provisions of the draft Havana Charter for an International Trade Organization 1948, which envisaged that the organization would make recommendations for bilateral or multilateral agreements, inter alia, *"to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another"* (emphasis added).

The modern treaty-based non-contingent formula is found in the draft for a multilateral convention to protect private foreign investment prepared by Hermann Abs and Lord Shawcross in 1959. Article I of that draft provided: *"Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties"* (emphasis added).

The Draft Convention on the Protection of Foreign Property proposed by the Organization for Economic Cooperation and Development (OECD) in 1967 adopted the language of "just and equitable treatment" in setting out basic protections for foreign investors. Likewise, the 1998 OECD multilateral draft treaty on investment issues also contemplated that, with respect to investment protection, the basic standard would include fair and equitable treatment.

[2] In a study considering 19 awards against host states, the host state was sanctioned for unfair or inequitable treatment or for a failure to provide full protection and security in 13 cases; for a failure to provide compensation for expropriation or other deprivation of property in 7 cases; for discriminatory treatment in 5 cases; and for failure to observe contractual or other obligations in 2 cases. A return to the Gay Nineties? The Political Economy of Investment Arbitration, Gus Van Harten, Law Department, LSE, April 2006.

[3] For example, the Multilateral Investment Guarantee Agreement (MIGA), article 12(d) states that MIGA must be satisfied that the host country provides "fair and equitable" treatment and legal protection for the investThment before it will provide investment guarantees MIGA 1998 27 International Legal Materials 1228 [Source: Ibid].

[4] ASEAN Comprehensive Investment Agreement (2009), Art 11 Treatment of Investments.

[5] Article 10(1) of the Energy Charter Treaty and the ECOWAS Energy Protocol.

[6] The majority of BITs contain references to fair and equitable treatment, although the exposition is not always uniform.

[7] "Of some 335 BITs signed up to the early 1990s, only 28 did not expressly incorporate the standard (Khalil, 1992, p. 355). With the further explosion of BITs in the 1990s, to a total of 1,513 by the end of 1997 (UNCTAD, 1998a), the pattern has not changed, so that today BITs that omit reference to fair and equitable treatment constitute the exception rather than the rule."[footnotes omitted from quotation]

The 1992 World Bank Guidelines on Treatment of Foreign Direct Investment stipulate in their article III(2) that: "each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in the Guidelines." The Multilateral Investment Guarantee Agreement (MIGA) also requires the agency to be satisfied that the host state provides fair and equitable treatment to investments before guaranteeing the investment.[8]

The draft for a United Nations Code of Conduct on Transnational Corporations in its 1983 version stated that transnational corporations should receive "fair and equitable and non-discriminatory treatment."

On a bilateral level, a number of U.S. Friendship Commerce and Navigation (FCN) treaties in the 1950s and 1960s also provide for either "equitable" or "fair and equitable" treatment.[9] With the advent of BITs, the inclusion of the fair and equitable treatment standard became a common feature. However, while these BITs adopt the words "fair and equitable" treatment, their formulation in the treaties is not uniform. In particular, there are variations on the standard's linkages with customary international law.

Despite its popularity in both IIA texts and arbitrations, the precise legal meaning of the fair and equitable standard has been the subject of much debate. Much of the uncertainty is caused by the vague language employed by the typical formulation of the fair and equitable standard in treaties[10] which is reflected in the U.K. Model BIT, as follows:

> *Investments of nationals or companies of each 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."*[11]

This paper discusses what has been described as the "elusive" and "stubborn" (McLachlan, et al., 2007) standard of fair and equitable treatment in IIAs; the challenges associated with its interpretation in the light of recent investment treaty arbitration awards; the recent treaty practice of states in response to the rulings of arbitral awards on the standard; and advice for states seeking to negotiate this obligation in their treaties.

[8] The Multilateral Investment Guarantee Agreement (MIGA), article 12(d) states that MIGA must be satisfied that the host country provides "fair and equitable" treatment and legal protection for the investment before it will provide investment guarantees. MIGA (1998) 27 International Legal Materials 1228.
[9] U.S. FCN treaties with the Federal Republic of Germany, the Netherlands and Ethiopia provide for "fair and equitable" treatment, whereas those with Belgium Luxembourg, Greece, Ireland, Pakistan France and Israel call for "equitable" treatment (Ortino et al., 2007).
[10] The Dutch Model BIT contains a similar provision: "Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting States and shall not impair by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by their nationals. Each Contracting Party shall accord to such investment full physical security and protection."
[11] Article 2(2) The UK Model BIT (2005): Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of [Country] for the Promotion and Protection of Investments.

2.0 The Fair and Equitable Treatment Standard in IIAs

The controversy surrounding the fair and equitable standard is mainly due to the fact that many of its formulations contain imprecise and vague language, thus providing space for different interpretations of the content of this standard. A survey of the BITs (UNCTAD, 2007) concluded during the last decade identified the following seven different categories for the "fair and equitable" standard:

1. The fair and equitable standard without any reference to international law or any further criteria;
2. The fair and equitable treatment clause that sets national treatment or most favoured nation treatment as the minimum standard for fair and equitable treatment;
3. The fair and equitable treatment obligation that appears in the same clause as the duty to abstain from impairing the investment through unreasonable or discriminatory measures;
4. The fair and equitable treatment standard that is linked to the principles of international law;
5. The fair and equitable treatment standard that is linked to international law but contains instances of conduct that is an impediment to that standard;
6. The fair and equitable treatment standard that makes the fair and equitable standard contingent on the domestic legislation of the host country; and
7. The fair and equitable treatment standard that refers to the minimum customary international law standard.

These categories are not exhaustive and a number of additional variations of the fair and equitable can be found in treaties.

The first category includes a significant number of BITs that grant covered investments "fair and equitable treatment" without making any reference to international law or to any other criteria to determine the content of the standard. This approach leaves room for ambiguity with respect to the standard of protection to be applied, that is whether the fair and equitable treatment is to be in accordance with the international minimum standard as contained in customary international law or should be treated as an independent standard following the plain meaning approach as is discussed further below. For example, the Cambodia-Cuba BIT (2001) states:

> *Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party.*

This type of formulation leaves room for a high degree of uncertainty with respect to its interpretation.

The second group of BITs expressly provides that such treatment shall not be less favourable than national treatment or most favoured nation treatment granted to the investment or the investor concerned. This standard does not attach itself to the customary international law standard but to the national treatment and MFN standards. For example, Bangladesh-Islamic Republic of Iran BIT (2001) states:

> *Investments of natural and legal persons of either Contracting Party effected within the territory of the other Contracting Party, shall receive the host Contracting Party's full legal protection and fair treatment no less favourable than that accorded to its own investors or to investors of any third State, whichever is more favourable.*

The third category of BITs includes treaties in which the obligation to grant fair and equitable treatment is found in the same clause as the duty to abstain from impairing the investment through unreasonable or discriminatory measures. For example, the Hungary-Lebanon BIT (2001) states:

> *Investments and returns of investors of either 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. Each Contracting Party shall refrain from impairing by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments.*

The fourth category of BITs links the fair and equitable standard to the principles of international law. For example, the France-Mexico BIT (1998) states:

> *Either Contracting Party shall extend and ensure fair and equitable treatment in accordance with the principles of International Law to investments made by investors of the other Contracting Party in its territory or in its maritime area, and ensure that the exercise of the right thus recognized shall not be hindered by law or in practice.*

The reference to the principles of international law would include all sources of international law, including customary international law on State responsibility in respect of aliens, treaty obligations, and general principles of international law.

The fifth category of BITs also links the fair and equitable treatment standard to the principles of international law, but contains additional language that stipulates certain host government conduct that is considered an impediment to achieving that standard. For example, the France-Uganda BIT (2002) provides that fair and equitable treatment shall be in accordance with the principles of international law but also includes additional language that stipulates that certain host government conduct is to be considered as an impediment to the fair and equitable treatment standard. It states:

> *Either Contracting Party shall extend fair and equitable treatment in accordance with the principles of International Law to investments made by nationals and companies of the other Contracting Party on its territory or in its maritime area, and shall ensure that the exercise of the right thus recognized shall not be hindered by law or in practice. In particular, though not exclusively, shall be considered as de jure or de facto impediments to fair and equitable treatment any restriction to free movement, purchase and sale of goods and services, as well as any other measures that have a similar effect.*

Pursuant to this approach, the fair and equitable treatment standard needs to be interpreted within the framework of the principles of international law. However, this approach additionally sets out instances that qualify as "impediments to fair and equitable treatment." The France-Uganda example above provides that "any restriction to free movement, purchase and sale of goods and services, as well as any other measures that have a similar effect" shall be considered impediments to fair and equitable treatment. The language used is extremely broad and, at the same time, erodes the discretion of the tribunal when assessing whether a measure is in breach of the standard, since it directs the tribunal to consider certain actions as an impediment to fair and equitable treatment, independent of the inquiry into equity and fairness.

The sixth category of BITs makes the fair and equitable standard contingent on the domestic legislation of the host country. For example, the BIT between the countries of the Caribbean Common Market (CARICOM) and Cuba (1997) states:

Each Party shall ensure fair and equitable treatment of Investments of Investors of the other Party under and subject to national laws and regulations.

This approach sits in contrast with the reference to international law found in the fair and equitable treatment clause. In the CARICOM-Cuba example above the obligation to accord fair and equitable treatment is to be subject to the national laws and regulations, rather than in accordance with an international law standard.

The seventh category includes recent agreements that provide for a more precise approach regarding the scope of the fair and equitable treatment standard. For example, the recent U.S. and Canadian Model BITs have seen modifications in the aftermath of the interpretations of the North American Free Trade Agreement (NAFTA) tribunals on the fair and equitable treatment standard. Article 1105(1) of NAFTA (1992) provides that the parties "shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Despite the reference to international law, this was interpreted by some NAFTA tribunals[12] as a standard independent of the customary international law standard, as is discussed further below.

These recent treaty formulations obligate the contracting parties to accord covered investments treatment in accordance with the minimum customary international law standard, and include expressly the concepts of fair and equitable treatment and full protection and security. Both fair and equitable treatment and full protection and security are defined in the clause. For example, the BIT between the United States and Uruguay (2005) states:

Article 5:

Minimum Standard of Treatment

1. *Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
2. *For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*
   a. *"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*
   b. *"full protection and security" requires each Party to provide the level of police protection required under customary international law.*
3. *A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.*

The treaty also contains an elaboration of the customary international law standard that Article 5 shall be interpreted in accordance with in Annex A.

[12] For example, Pope & Talbot Incorporated v. Canada, Award on Damages, IIC 195 (2002), 31st May 2002, Ad Hoc Tr., UNCITRAL.

Annex A

Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

The tribunal is directed to apply the minimum customary international law standard in this formulation, which reduces scope for uncertainty.

Summary

The typical formulation in IIAs—as used in the first of the seven categories above—provides for "fair and equitable treatment" without any further qualification. This approach creates space for a host of different interpretations of the standard. Similarly, even a reference to international law may leave room for ambiguities as noted in the context of Chapter 11 NAFTA arbitrations. Respondent states in IIA arbitrations have learnt that minimalist language can at times translate into expansive obligations towards investors. Some states have therefore begun to clarify and define the standard, as seen in the last category above. The fallout from an increasing number of states using greater clarification in IIAs is the deduction that if countries choose the typical broad formulation, they knowingly opt for a broad obligation that goes further than a customary international law-based standard. The premise of this argument is that if states had intended something different they would have explicitly stated this in the treaty, and therefore the tribunal should not write the treaties for the parties by adding in words.

3.0 The Meaning and Scope of the Fair and Equitable Treatment Standard

3.1 The Different Approaches to Interpreting Fair and Equitable Treatment

IIAs often include the fair and equitable treatment obligation without any reference to the standard of interpretation that needs to be applied. This sparseness of the language has contributed to the intense debates on the legal meaning of the "fair and equitable" standard in IIAs.

The core issue in debate is whether the typically vague fair and equitable treatment standard found in IIAs reflects customary international law or offers an autonomous standard that is different. This issue initially gained significant attention through NAFTA interpretation of fair and equitable treatment under Article 1105(1) of NAFTA. In response to these interpretations, the NAFTA Free Trade Commission (FTC), a body composed of the state parties with the power to adopt binding interpretation, issued a note of interpretation confirming that the "concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of aliens" in Article 1105(1) of NAFTA.

The recent arbitral awards outside the NAFTA context have illustrated the breadth of interpretation that can be ascribed to the fair and equitable treatment standard. This lack of predictability makes it difficult for states to assess the range of conduct that will violate the fair and equitable treatment standard in IIAs. At least three different types of approaches to interpreting fair and equitable treatment can be identified. The first recognizes that the obligation to grant foreign investment "fair and equitable treatment" in IIAs is not different from the obligation to treat the investment in accordance with the customary international law standard. The second focuses on a broader international law standard, including treaty obligations, customary international law, state practice and general principles of international law. The third approach is that, in the absence of any indication to the contrary, the "fair and equitable treatment" should be given its plain meaning independently. The interpretation will depend upon the formulation of the fair and equitable treatment clause in the relevant IIA, since this determines scope for arbitral tribunals to adopt different interpretations.

Those in favour of an independent concept of fair and equitable treatment argue that that it is unlikely for a treaty to use an expression such as "fair and equitable treatment" to denote a well-known concept such as the minimum standard of treatment in customary international law (Schreuer, 2005). On the other hand, there is also evidence, largely in the form explanatory notes and statements, supporting the argument that the fair and equitable treatment standard should be interpreted as equivalent to the international minimum standard of customary international law.[13]

The difference in the application of the interpretative approaches can be significant. If the fair and equitable standard is to be seen as equivalent to the customary international law standard, then it will be subject to an objective test. The customary international law standard provides comparatively more predictability, though certainty is not absolute since arbitral tribunals have treated its evolution in different ways (Borchard, 1940).

[13] The Notes and Comments to Article 1(a) of the OECD Draft Convention on the Protection of Foreign Property of 1967 which refers to fair and equitable treatment provides: "the standard [fair and equitable treatment] conforms in effect to the 'minimum standard' which forms part of customary international law" (OECD Draft Convention on the Protection of Foreign Property, 1967, 7 I.L.M. 117, 1968, at 120. The passage is quoted in the Dissenting Opinion of arbitrator Asante to AAPL v. Sri Lanka, Award 21 June 1990, 30 I.L.M. 628, 1991 at 639). The Swiss Foreign Office of 1979 is also on record stating that the fair and equitable standard refers to the classical principle of international public law according to which states must give foreign investors and investments the benefit of the international minimum standard (Annuaire Suisse de Droit International 178, 1980).

3.1.1 Fair and equitable treatment and customary international law

The application of the classic exposition of customary international law on the treatment of aliens is found in the early twentieth-century cases, such as in *Neer v. Mexico* (1926). In *Neer v. Mexico*, the Mexico/United States Claims Commissioners held that "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." The issue for the tribunal was whether the failures of the Mexican authorities in apprehending and punishing the murderers of an American citizen were enough to give rise to "an international delinquency." The Commission ultimately found that it was not so. The application of the Neer test to determine the customary international law in IIA arbitrations has not been uniform. While some tribunals have relied on it as an articulation of the customary international law standard,[14] others have held that the standard has since evolved.[15]

Another frequently cited case in the IIA arbitrations is ELSI (*United States v. Italy*) (1989). The case involved the temporary requisitioning by the Mayor of Palermo of an industrial plant belonging to an Italian company owned by U.S. shareholders. A chamber of the International Court of Justice (ICJ) had to apply a treaty clause prohibiting arbitrary or discriminatory treatment; therefore the fair and equitable treatment concept was not itself in issue. The ICJ said: "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law [...] It is wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety." In this case, the ICJ did not find the standard violated by Italy.

The *Pope and Talbot* (2001) tribunal noted that the ICJ in the ELSI case had "moved away from the Neer formulation" by leaving out the requirement that "every reasonable and impartial person be dissatisfied" among other things. This highlights the evolution towards a higher threshold of investor protection against state conduct. Following this approach, the tribunal in *Mondev v. U.S.* (2002) rejected the standard as formulated in the Neer case and stated that "the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in 1920s." More recently, the tribunal in *Glamis v. U.S.A.* (2009)[16] found that the claimant had failed to discharge the burden of proving that the customary international law standard had evolved since it was articulated in the *Neer* case. The *Glamis* tribunal determined that proving a violation of the fair and equitable treatment standard "requires an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or manifest lack of reasons."

3.1.2 Fair and equitable treatment as an independent standard

Interpreting the fair and equitable standard in accordance with the plain or ordinary meaning of the term makes it more subjective than the customary international law approach. This approach allows a tribunal considerable discretion in assessing if the state's conduct amounts to a violation of fairness and equity.

[14] For example, Glamis Gold Ltd.v United States of America, before the ICSID in accordance with the UNCITRAL Arbitration Rules, award dated 14 May 2009. Full opinion available U.S. Department of State (http://www.state.gov/documents/organization/125798.pdf with confidential information redacted.
[15] For example, Mondev International Ltd v. United States, Award, ICSID Case No ARB(AF)/99/2; IIC 173 (2002).
[16] For example, Mondev International Ltd v. United States, Award, ICSID Case No ARB(AF)/99/2; IIC 173 (2002).

The interpretation of treatment standards in IIAs, like any other process of treaty interpretation, is carried out in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (the "Vienna Convention"). This includes the ordinary meaning of the treaty's terms, their context and the object and purpose of the treaty.[17]

The "ordinary meaning" approach is likely to provide limited guidance to tribunals, as the tribunal in MTD (2004) found by quoting the *Concise Oxford English Dictionary:* "In their ordinary meaning, the terms *'fair and equitable'* [...] mean *'just,' 'even-handed,' 'unbiased,' 'legitimate.'*" Thus, the approach leads only to equally broad synonyms.

The preambular statements and objectives in IIAs also assume significance in the interpretation pursuant to the Vienna Convention. IIAs typically contain narrow objectives in the preambles focusing on investor protection and economic cooperation between states. Some tribunals have relied on preambular objectives such as those relating to the maintenance of a stable framework for the investment to interpret the fair and equitable standard in a more expansive, investor-friendly fashion.

Thus, a wide range of state conduct can be found to violate the fair and equitable standard, as we will see from the growing number of investor-state arbitration awards described below. Although IIA arbitration awards are not binding on subsequent tribunals, they provide an important insight on how certain fair and equitable formulations in treaties are likely to be interpreted.

3.2 The Arbitration Awards

The cases relating to fair and equitable treatment can be divided into two broad categories. The first set of cases relate to the treatment of investors by the courts of the host state. The second category deals with administrative decision-making. Arbitral tribunals have had to decide if the state conduct, including decisions of its executive and courts, has resulted in a violation of this standard. A range of state measures have been reviewed by IIA arbitral tribunals, including measures relating to a hazardous waste disposal site in Mexico;[18] populist television channels in the Czech Republic;[19] the building of a new town in Chile;[20] and the conduct of a jury trial in Mississippi.[21]

The process of the adjudication of these rights has also exposed considerable divergences in the approach of arbitral tribunals. For the purpose of this analysis, the decisions of the host state courts are dealt with separately from the administrative conduct.

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[17] For example, Mondev International Ltd v. United States, Award, ICSID Case No ARB(AF)/99/2; IIC 173 (2002).

[18] The context for numerous disputes to date: Azinian, Davitian & Baca v. United Mexican States (Award) 5 ICSID Rep 269 (NAFTA, 1998, Paulsson P, Civiletti & von Wobeser); Metalclad Corp v. United Mexican States (Award) 5 ICSID Rep 209 (NAFTA, 2000, Lauterpacht P, Civiletti & Siqueiros); Tecnicas Medioambientales Tecmed SA v. United Mexican States (Award) (2004) 43 ILM 133 (ICSID (AF), 2003, Grigera Naon P, Fernandez Rozas & Bernal Verea); Waste Management Inc v. United Mexican States (Award) (2004) 43 ILM 967 (NAFTA/ICSID (AF), 2004, Crawford P, Civiletti, & Gómez).

[19] Lauder v. Czech Republic (Award) 9 ICSID Rep 62 (UNCITRAL, 2001, Briner C, Cutler & Klein); CME Czech Republic BV v. Czech Republic (Partial Award) 9 ICSID Rep 121 (UNCITRAL, 2001, Kühn C, Schwebel & Hándl).

[20] MTD Equity Sdn Bhd & anor v. Republic of Chile (Award) (2005) 44 ILM 91 (ICSID, 2004, Sureda P, Lalonde & Oreamuno Blanco).

[21] The Loewen Group Inc and Raymond L Loewen v. United States of America 7 ICSID Rep 421 (NAFTA/ICSID (AF), 2003, Mason P, Mikva & Mustill)

3.2.1 Assessing the decisions of the host state courts under the fair and equitable treatment standard

In *Azinian v. Mexico* (1999), the tribunal accepted that, in principle, the host state could be liable for the decisions of its courts for breach of the fair and equitable standard, but the claims failed because they had not complained about their treatment by Mexican courts but rather of the executive conduct. The Mexican state authorities had annulled a concession contract awarded to a company in which the claimants were shareholders, and the Mexican Federal Court had upheld the annulment. The tribunal held that the claimants had not alleged a denial of justice claim against the courts, and therefore their claim under this head failed. However, the tribunal drew expressly upon the defined limits of the responsibility of states for the acts of judicial organs in customary international law. It opined that a denial of justice may be caused by a failure to entertain a suit, undue delay, inadequate administration of justice or a clear and malicious misapplication of the law.

The cases of *Mondev* (2002) and *Loewen* (2003), both pertaining to the American legal system, illustrate the circumstances in which state courts may be sanctioned for breach of fair and equitable treatment. The NAFTA tribunal in *Mondev* (2002) interpreted fair and equitable treatment under the prism of customary international law. It held that "in applying the international minimum standard, it is vital to distinguish the different factual and legal contexts presented for decision. It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal" (para. 126). Under this standard, an attack on the substantive outcome of the national court decision will only succeed if it is clear that there has been judicial impropriety, rather than merely a mistake of law.

In *Loewen* (2003), the Canadian claimant alleged that the trial by jury in the Mississippi courts, which awarded its American competitor USD$500 million in damages, was unfair and discriminatory. The investor complained that he was unable to appeal, because local procedural rules required him to post a bond of 125 per cent of the amount of the judgment in order to secure a stay of execution pending appeal, and an application to relax that requirement was refused by the court. The Loewen (2003) tribunal found that the discrimination at the trial stage "was a disgrace." (para 119) However, it then proceeded to consider whether, in the light of the subsequent proceedings, the judicial process as a whole as applied to the claimant "amounted to an international wrong." (para 142) The tribunal applied an exhaustion of local remedies standard finding that the claimant had failed to discharge his burden of demonstrating that he had pursued domestic remedies by not proceeding to the Supreme Court.

The Loewen tribunal (2003) was clear that "[t]here was unfairness here towards the foreign investor" (para. 241) but noted that "we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation [referring to the remedies that the investor could have pursued, before coming to this tribunal]. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort" (para. 242).

The Loewen (2003) decision demonstrates that tribunals may take different approaches to administrative and court decisions. Loewen, for instance, required the exhaustion of local remedies, i.e. to appeal the challenged decision in the domestic higher court first. Administrative decisions, however, have been examined by tribunals without the need to challenge them in a domestic process first.

Summary

The awards discussed above test the decisions of host state courts for a violation of the fair and equitable treatment standard. At the root of this standard is the occurrence of a denial of justice, which as described by the Azinian tribunal may be pleaded as a failure to entertain a suit, undue delay, inadequate administration of justice or a clear and malicious misapplication of the law. Decisions such as Loewen, demonstrate that—at least if the fair and equitable treatment standard is defined as a customary international law standard—tribunals may require that investors exhaust the domestic appeals processes before alleging a violation of due process at the international level.

3.2.2 Assessing administrative conduct under the fair and equitable treatment standard

The second major category of cases involving the standard of fair and equitable treatment has been the review of administrative conduct. The majority of such cases have been concerned with the granting or withholding of licences for investments, or a change in regulation affecting the investment climate. Arbitral tribunals have primarily referred to two types of factors to assess the treatment accorded to investors:

a. *Legitimate expectations.* This concept is concerned with assessing the treatment accorded to an investor by reference to the law of the host state at the time of the investment, together with any specific assurances that the investor may have received at the time of investment in reliance upon which he decided to invest.
b. *Due Process.* This concept is concerned with the character of the decision-making process that is whether the administrative decision was reached through a fair process or if the host state used its administrative powers for improper purposes or inconsistently. At the more extreme end of the spectrum are cases of coercion and harassment by state officials, bad faith and discrimination.

The discussion below shows how these concepts have been used in determining the so-called autonomous fair and equitable standard under IIAs. The degree to which these principles also form part of the modern day customary international law standard is an area of uncertainty, with tribunals adapting to different approaches.

(A) Legitimate expectations and the state of the law at the time of investment

The tribunal in *Tecmed v. Mexico* (2003) defined the scope of the fair and equitable treatment standard based on an autonomous interpretation under the Spain-Mexico BIT as well as under principles of international law and the good faith principle. It stated that the fair and equitable treatment provision "in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations" (para. 154).

The government measures at issue in *Occidental v. Ecuador* (2004) and *CMS Gas Transmission Co v. Argentina* (2005) were found to violate the fair and equitable treatment standard because they altered the legal and business environment under which the investment was made. In *Occidental* the tribunal held that "[t]he stability of the legal and business framework is ... an essential element of fair and equitable treatment" (para. 183). The US-Ecuador BIT[22] provided for fair

[22] Article 2(3)(a) of the US-Ecuador BIT

and equitable treatment that should not be less than international law. The tribunal found that Ecuador had breached the standard when its tax agency decided that Occidental Exploration and Production Company was not entitled to claim reimbursement for VAT on oil exports, despite the fact that it had been so entitled when it originally made its investment. The tribunal found that Ecuador's failure to provide a stable and predictable regulatory framework violated both the general international law and treaty standard.

In *CMS* (2005), the tribunal held that "fair and equitable treatment is inseparable from stability and predictability" and referred to the preamble in the relevant BIT, which recited that it is desirable "to maintain a stable framework for investments and maximum effective use of economic resources." The claimant challenged the emergency laws and arrangements following the monetary crisis in Argentina, which imposed the devaluation of the peso on tariff arrangements. CMS claimed that at the time it made its investment it was entitled to the calculation of tariffs in U.S. dollars, conversion into pesos at the time of billing, and periodic adjustment of tariffs in accordance with the U.S. Producer Price Index. The tribunal found that the new laws and arrangements introduced by the Argentine government breached the standard. The US-Argentina BIT[23] contained a reference to fair and equitable treatment, which provides for such treatment not to be less than that required under international law. In this respect the CMS tribunal even went so far as to state that this very expansive interpretation of the fair and equitable treatment was in line with customary international law. It stated that the "[T]reaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law" (para. 284).

In *Continental Casualty Co. v. Argentina* (2008), the tribunal listed several factors to be evaluated for purposes of a claim based on the protection of legitimate expectations under the fair and equitable treatment standard in the US-Argentina BIT, including the specificity of the undertaking relied upon; generality of statements that engender reduced expectations; unilateral modification of contractual undertakings by governments; and centrality to the protected investment and impact of the changes on the operation of the foreign-owned business in general.

Despite emphasizing the relevance of the host state's obligations to maintain a stable and predictable legal framework and to protect the investor's legitimate expectations, a few tribunals have taken steps to clarify (and apparently limit) these obligations. In *Duke Energy et al. v. Ecuador* (2008), having acknowledged that the investor's expectations about the stability of the legal and business environment are an important element of fair and equitable treatment standard, the tribunal emphasized the following limitations:

> *To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest. (para 320)*

Applying this reasoning, the tribunal, in *Duke Energy* (2008) found that Ecuador had indeed failed to accord fair and equitable treatment to the investor by not implementing a specific payment guarantee that had expressly been promised in one of the investment contracts.

[23] Article 2(2)(a) of the US-Argentina BIT

In *Bayinder v. Pakistan* (2009), the tribunal found guidance in prior decisions including Saluka (2006), Generation Ukraine (2003), and *Duke Energy v. Ecuador* (2008). It held that the claimant could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time it agreed to the revival of its contract with the country's national highway authority.

Summary

As explained earlier in this paper, the scope of the fair and equitable treatment standard may vary based on whether the tribunal is applying the standard as a reflection of customary international law or an autonomous standard. Moreover, the views of tribunals differ on the status of customary international law in this context. The following elements have been considered when assessing a breach of fair and equitable treatment:

i. ***The investor must accept foreign law as it finds it:*** It is for the host state to decide for itself the legal framework it will apply to foreign investments upon its territory. Thus, the issue is a government's failure to abide by or implement the law or regulatory program at the time the investment made.[24]
ii. ***The impact of specific representations made to the investor:*** The making of specific representations has been a material factor in the decision in favour of the investor in a number of the recent cases.[25] Conversely, the absence of specific representations can be an important factor in leading to a finding that the standard has not been breached.
iii. ***A legitimate scope for regulatory flexibility:*** The protection of legitimate expectations must be qualified by the need to maintain a reasonable degree of regulatory flexibility on the part of the host state to respond to changing circumstances in the public interest. As the tribunal in *Saluka* (2006) observed: "No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."

(B) Due process in administrative decision-making

The second category of cases has been concerned with the treatment of the investor in the decision-making process itself. The awards recognize a general duty on the part of the regulatory authorities to accord due process to the foreign investor. In *Biwater v. Tanzania* (2008), the tribunal found that a series of public announcements condescending the investor's poor performance and announcing that a new public entity would be taking over the service were in violation of the fair and equitable standard. The tribunal noted that, despite its poor record, the investor "still had a right to the proper and unhindered performance of the contractual termination process [and] the Republic's public statements at this time constituted an unwarranted interference in this" (para. 314). Article 2 of the UK-Tanzania BIT provided for a fair and equitable treatment clause that did not make any reference to any international law or customary international law. The tribunal stated that, while the standard in the treaty is to be treated as an autonomous standard, the content of such a standard is not materially different from customary international law (para. 592). It noted that the lack of definition of the fair and equitable standard in the treaty gives the tribunal "much lattitude" (para 592) in its interpretation. The tribunal stated that it must judge the respondent's conduct in accordance with the principles of the standard applicable to the case, that is legitimate expectations; good faith; and transparency, consistency and non-discrimination.

[24] See MTD Equity Sdn Bhd and MTD Chile SA v. Chile, Award, ICSID Case No ARB/01/7; IIC 174 (2004); GAMI Investments, Inc v. Mexico, Final Award, Ad hoc—UNCITRAL Arbitration Rules; IIC 109 (2004)
[25] See specifically, MTD Equity Sdn Bhd and MTD Chile SA v. Chile, Award, ICSID Case No ARB/01/7; IIC 174 (2004)

In *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan* (2008), the tribunal noted the fair and equitable treatment standard in treaties[26] is "intentionally vague in order to give tribunals the possibility to articulate the range of principles to achieve the treaty's purpose in particular disputes" (para. 583). It found that standard encompasses, inter alia, the following concrete principles: (a) the state must act in a transparent manner; (b) the state is obliged to act in good faith; (c) the state's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; (d) the state must respect procedural propriety and due process. The tribunal found the Kazakh government in violation of the fair and equitable treatment standard as it did not act vis-à-vis the investors in a transparent manner and with respect for due process. The tribunal also stated that it found the distinction between the treaty standard and the minimum customary international law standard "theoretical," and that the two were not materially different in content (para. 611).

The elements that can be distilled from the decisions include: discrimination; lack of transparency; use of powers for improper purposes; inconsistency; coercion and harassment by state officials; and bad faith. It is difficult to list all the elements that may breach this standard. It also remains uncertain as to which of these elements form part of the evolved customary international standard if this is applied, as opposed to the autonomous treaty one.

i. ***Discrimination:*** In *S. D. Myers Inc v. Canada* (2002), the NAFTA tribunal agreed that the failure to accord national treatment to Myers[27] also amounted to a failure to accord fair and equitable treatment. The panel applied the customary international law standard in that case. Similarly, the *Saluka* tribunal (2006) found that the Czech Government's preferential treatment to the local state-owned bank, and failure to deal with the investor in a constructive manner, was a breach of the standard.
However, fair and equitable standard does not necessarily always coincide with discriminatory behaviour. In *Methanex Corporation v. United States* (2005) the tribunal found that international law did not prohibit all distinctions between nationals and foreigners, and the burden was on the claimant to establish a specific rule of customary international law prohibiting discrimination of the type of which the complaint was made.

ii. ***Transparency:*** A failure to act in a transparent manner in administrative decision-making was a central consideration for the tribunals in *Metalclad Corp v. Mexico* (2000) and *Genin et al. v. Estonia* (2001). However, the emphasis on transparency does not excuse the investor from carrying out due diligence. The investor's failure to do so in *MTD v. Chile* (2004) led it to invest money without adequately investigating the risks that the necessary zoning changes would be made to allow the planned development to proceed. The tribunal found that the investor should bear the loss attributable to those business risks which the investor assumed.

iii. ***Use of powers for improper purposes:*** Whether the powers exercised by the host state administrative body have been misused for improper purposes has also been a factor that tribunals have considered.[28] The *Metalclad Corp* (2000) tribunal found that the respondent state agency's conduct in cancelling the contract for the construction of a motorway was not motivated by political considerations in contravention of a previous rival regime's policies in the *Bayindir* award (2009).

[26] In this case, the relevant Turkey-Kazakhstan BIT did not contain a fair and equitable treatment standard but the obligation was imported through the use of a Most Favoured Nation (MFN) clause

[27] In S.D. Myers, Canada changed its regulation permitting PCB waste exports to the United States where the importer had gained prior U.S. government approval. It did so only days before the U.S. approval granted to S.D. Myers, Inc. was to take effect. S.D. Myers, Inc. was not consulted about the impending change even though Canadian documents show that officials focused on S.D. Myers, Inc., and were aware that the regulatory change could not be justified under domestic law or the NAFTA. MST allegations include lack of good faith and lack of procedural or substantive fairness in Canada's changing its existing regulations.

[28] For example, in Metalclad Corp v. Mexico (2000) Award, Ad hoc—ICSID Additional Facility Rules; ICSID Case No ARB(AF)/97/1; IIC 161 (2000)

iv. ***Inconsistency:*** A decisive factor in the *MTD v. Chile* (2004) case was the inconsistency of conduct vis-à-vis the investor between the host state agencies: encouragement and approval of the investment by the Foreign Investment Commission on the one hand, and denial of the necessary zoning permits on the other.

v. ***Coercion and harassment by State authorities:*** A more serious failure of investor treatment can occur when the individual is subjected to coercion and harassment by State officials.[29] In the *Bayindir* arbitration (2009), the claimant alleged that it had been expelled from its site by armed soldiers, and that its staff was prevented from accessing their documents; however, the tribunal did not find that the evidence proved such coercive behaviour had taken place.

vi. ***Bad faith:*** The arbitral decisions are clear that it is not necessary to establish bad faith on the part of the host state for a claim under this head to succeed.[30] However, if the government does act in bad faith, it will be likely to satisfy the standard. Conversely, a good faith effort on the part of the state agencies to fulfil the requirements of host state law will be a powerful indication that the standard has been met.

(C) Factors which may indicate standard not breached

The findings of arbitral tribunals have also assisted in clarifying the countervailing factors that may indicate that the standard has not been breached.

i. ***Legitimate scope of regulatory action:*** In weighing the state's regulatory interest, tribunals have considered in particular whether there is an objective basis for the administrative decision in question; whether the impact on the foreign investor is disproportionate; and whether the alleged right asserted by the investor has a firm basis in host state or international law.

ii. ***Objective basis for decision:*** In *Alex Genin et al. v. Republic of Estonia* (2001), the tribunal held that the Bank of Estonia's revocation of the claimant's licence did not violate the standard. The tribunal found that even though the Bank's conduct failed to meet the standards of international best practice, the Bank had good cause to revoke the licence.

iii. ***No disproportionate impact on foreign investor:*** Another factor that may mitigate against a finding of a breach of the fair and equitable standard is the level of impact of the host government measure on the investor: If it does not have a disproportionate impact on the foreign investor, but rather falls equally on everyone in the host state, the chances for a tribunal to find a breach will be smaller (*Pope & Talbot Incorporated v. Canada*, 2002).

iv. ***Investor conduct and duty to investigate:*** A final category of cases where tribunals have held the standard not breached, or have at least significantly moderated the consequences of any breach, is where the investor's own conduct has to some extent contributed to its loss. Thus, in *MTD v. Chile* (2004), the tribunal found that half of the responsibility for the investor's losses lay with the investor's own failure to investigate properly the Chilean planning laws applicable to the proposed investment, and reduced the damages accordingly.
In *International Thunderbird v. Mexico* (2006), the investor had provided incomplete and misleading information to the State regulator, and knew that there was a risk that its planned investment, which involved gaming activities, might breach host state law. The tribunal famously stated: "Bilateral Investment Treaties are not insurance policies against bad business judgments." The tribunal insisted that the investor take responsibility for meeting in full the requirements of local law, ignorance of the law being no defence.

[29] See for example, Pope & Talbot Inc v. Canada, Award on the Merits of Phase 2, Ad hoc—UNCITRAL Arbitration Rules, IIC 193 (2001).
[30] See for example, Pope & Talbot Inc v. Canada, Award on the Merits of Phase 2, Ad hoc—UNCITRAL Arbitration Rules, IIC 193 (2001).

4.0 Recent Treaty Practice

The above discussion has shown the challenges of interpreting the fair and equitable treatment standard. European countries have traditionally opted for the unqualified "fair and equitable" treatment standard which is at the nub of the uncertainty.[31] However, even a reference to international law or customary international law will not eliminate the uncertainty in view of the decisions of tribunals that have blurred the distinction by finding that the content of treaty and customary international law standards are not materially different, due to the evolution of the latter. At the same time, there are tribunals that continue to apply the customary international law standard as a distinct concept from the autonomous treaty standard by reference to cases such as Neer (1926).

The unpredictability associated with the standard has resulted in modifications in a number of treaty texts, such as the US Model BIT (2004)[32] and the Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA).[33] Article 5 of the FIPA provides:

1. *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.*
2. *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.*
3. *A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*

Similarly, Chapter 11 (Investment) of the ASEAN-New Zealand-Australia Free Trade Agreement in its Article 6 clarifies that the concepts of fair and equitable treatment and full protection and security do not require treatment beyond what is required under customary international law and do not contain any additional rights,[34] similar to the U.S. and Canadian approaches.

The Investment Agreement for COMESA (CCIA)[35] also includes a detailed formulation of fair and equitable treatment. Article 14 of the CCIA obliges states to "accord fair and equitable treatment to COMESA investors and their investments, in accordance with customary international law." Fair and equitable treatment is described in the article to include "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." However, it contains two important provisions guiding the application of the standard of treatment that can assist in preventing an expansive reading of the provision. Article 14 of the CCIA makes clear that the standard to be applied is:

> *the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments and does not require treatment in addition to or beyond what is required by that standard.*

[31] For example, UK and The Netherlands Model BITs.
[32] The U.S. Model BIT contains provisions developed by the U.S. Administration to address the investment negotiating objectives of the Bipartisan Trade Promotion Authority Act of 2002, which incorporated many of the principles from existing U.S. BITs. The U.S. Model BIT is substantively similar to the investment chapters of the free trade agreements the United States has concluded since the 2002 Act. Source: www.ustr.gov
[33] Article 5: Minimum Standard of Treatment
[34] www.asean.fta.govt.nz/chapter-11-investment/
[35] The twelfth Summit of COMESA Authority of Heads of State and Government, held in Nairobi, Kenya, on 22nd and 23rd May 2007, adopted the (CCIA).

This is similar to the examples noted above. However, it also provides that a single international standard of treatment shall not apply to all countries, but that it is understood by the treaty parties that member states:

> *have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 and 2 of this Article do not establish a single international standard in this context.*

The CCIA directs tribunals to take account of the states' level of development in interpreting the fair and equitable treatment standard rather than leaving it to their discretion.

By contrast, the formulation of fair and equitable treatment in Article 11 of the recently concluded ASEAN Comprehensive Investment Agreement (2009) includes greater detail than the traditional approach reflected in the U.K. and Netherlands Models, but remains vague because it does not specify the standard to be applied. This approach is not recommended as it leaves a broad scope for uncertainty. It provides:

Article 11

Treatment of Investment

1. *Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security.*
2. *For greater certainty:*
   a. *fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and*
   b. *Full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.*
3. *A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*

At the other end of the spectrum, some states have decided to omit the fair and equitable standard from their IIAs. This approach is not entirely novel. While many treaties contain the fair and equitable treatment standard, there are some that omit this obligation altogether. However, the omission of the fair and equitable standard in the investment chapter of the recent India-Singapore Comprehensive Economic Cooperation Agreement (2005) (CEC) is a notable at a time when an increasing number of investment treaty disputes are hinging on the host state's duty to provide "fair and equitable treatment" in particular.

5.0 Recommendations and Conclusions

It may be difficult to understand why a state should shy away from undertaking an obligation to accord fair and equitable treatment to foreign investors in an IIA. Such concepts have long been perceived as integral to an investment climate that is conducive for both for local and foreign investors. While fairness and equity are fundamentals of good governance, the boundaries of these concepts in the arena of investor-state arbitration change due to the discretion most IIAs provide arbitral tribunals. Thus, the finding of the tribunal would depend on the wording of the fair and equitable clause in the treaty, the facts of the case and the interpretative approach applied to the standard. The typically vague treaty formulation of fair and equitable treatment, which does not refer to the customary international law standard, gives a tribunal considerable discretion in determining the principles that breach the obligations. As mentioned earlier, in view of the uncertainty it has generated in the world of investor-state arbitrations, India and Singapore recently omitted the fair and equitable clause in the investment chapter of their Comprehensive Economic Cooperation Agreement.

However, the most common reaction to this uncertainty is the expression in recent treaties that the fair and equitable treatment obligations needs to be interpreted in accordance with the minimum standard under customary international law, and elaborating the types of conduct that would result in its breach. Some treaty texts even go as far as to reiterate their understanding on the meaning of customary international law.

The reference to the customary international law standard can also leave a number of questions. What is the current customary international law standard today? Would all states, irrespective of their particular history and state of development, be expected to reach a single standard of good governance, for example a "one size fits all? Any fair and equitable treatment provision also requires a realistic assessment of the capacity of governance in the host state, in this case developing countries, to meet international standards. Halle and Peterson (2005) also questioned the ability of developing countries to meet the standards of fair and equitable treatment in BITs, which have often been interpreted by tribunals to impose exacting administrative and bureaucratic standards on governments.[36] Therefore, the additional detail in treaties such as the Investment Agreement for the COMESA Common Investment Area (CCIA) addresses a concern in some arbitration decisions that have disregarded the level of development as a factor in assessing the standard of procedural fairness an investor should expect (Mann *et al*., 2006).

The uncertainty surrounding the fair and equitable treatment standard has also indicated the importance of preambles in its interpretation. A host state may wish to consider balanced and broad preambles with references to a state's regulatory powers and development policy space; otherwise it may be exposed to the danger of disproportionate emphasis on investor protection.

The fair and equitable treatment standard is a potent provision frequently used by investors in IIA claims. Indeed, a number of investor claims that have failed to establish a violation of the expropriation provision in IIAs have succeeded for a breach of the fair and equitable provision. Leaving the standard broadly drafted will leave states exposed to a particular tribunal's approach; therefore it is important to define the standard in the treaties in a precise manner that provides predictability for both investor and state.

[36] "The upshot of such provisions—particularly when taken in sum—maybe to impose significant obligations upon host state authorities and agencies, sometimes at all levels of Government. Federal Governments entering into such treaty commitments will need to ensure intra-agency coordination and efficiency, so as to facilitate the passage and operations of foreign investors. Where the internal capacity of Governments to meet such obligations is in doubt, Governments should give careful consideration to international commitments being entered into by its treaty negotiators" (Halle and Peterson, 2005).

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Published by the International Institute for Sustainable Development.

International Institute for Sustainable Development
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