

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

Bilateral Investment Treaties

by

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It is submitted here that the fact that parties to BITs have considered it necessary to stipulate this standard as an express obligation rather than relied on a reference to international law and thereby invoked a relatively vague concept such as the minimum standard, is probably evidence of a self-contained standard.¹⁶⁵ 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 provisions of the BIT. A reference to international law is common not only in U.S. treaties but also in several of the treaties concluded by Belgium-Luxembourg, France and Switzerland.¹⁶⁶ In both U.S. and Swiss practice this reference is often combined with a reference to the applicable provisions of domestic legislation. However, in the North American Free Trade Agreement (NAFTA), the fair and equitable standard is explicitly subsumed under the minimum standard of customary international law.¹⁶⁷

Several of the treaties concluded between developing countries do not contain a fair and equitable clause, nor is such a clause contained in the OIC Agreement. However, the principle is referred to in both the Lomé and the MIGA Conventions.¹⁶⁸

b. Full Protection and Security

Similarly to what was noted above in respect of fair and equitable treatment, the difficulty in giving exact meaning to the phrase "full protection and security" is generally also acknowledged, but for different reasons. First, the lack of clarity may in part stem from the

¹⁶⁵ See the Barcelona Traction case, ICJ Rep. (1970) 32, where the Court ruled that:

Des lois qu'un Etat admet sur son territoire des ressortissants étrangers, personnes physiques ou morales, il est tenu de leur assurer la protection de la loi et assumer certaines obligations quant à leur traitement.

¹⁶⁶ See U.S.-Senegal BIT (1983), at art. II, para. 4. In the BIT with Morocco (1985) the clause provides that investments shall enjoy full protection and security "in a manner consistent with international law."

¹⁶⁷ See North American Free Trade Agreement (NAFTA), reprinted in 32 ILM 289 (1993).

¹⁶⁸ See the Lomé Convention, *supra* note 23, at art. 240 and the Preamble of the MIGA Convention, *supra* note 26.

fact that the origin of the phrase goes back to the FCN treaties which were less detailed than modern BITs.¹⁶⁹ Second, given that the issue of physical protection (and compensation) is normally dealt with elsewhere in the modern treaties,¹⁷⁰ it may be assumed that this provision in some measure serves to amplify the obligations that the parties have otherwise taken upon themselves. Where this is not the case, the standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment as opposed to creating "strict liability" which would render a host State liable for any destruction of the investment even if caused by persons whose acts could not be attributed to the State.¹⁷¹

A number of BITs have followed the OECD Draft Convention and, as noted above in the general clauses on treatment, have combined the principle of full protection and security with the principle of fair and equitable treatment.¹⁷² Of these treaties, some expressly provide that full security and protection shall be enjoyed "in a manner consistent with international law."¹⁷³

c. Non-discrimination

While it is generally recognized that international law requires States to refrain from discriminatory treatment of aliens, it is less clear what in fact constitutes such treatment. As noted earlier, differential treatment between nationals and aliens and between different groups of aliens *inter se* does not lead to infringement of international law standards. Moreover, even unjustifiable differentiation may not

¹⁶⁹ The standard formula of the FCNs concluded by the U.S. usually provided that nationals of each Party would receive "the most constant protection and security" and added that this "would be in no case less than that required under international law." See R. Wilson, *The International Law Standards in Treaties of the United States* 92-93 (1953).

¹⁷⁰ Most of the German and French BITs have in fact incorporated the full protection and security standards in the expropriation clause. See ch. 4, *infra*.

¹⁷¹ See *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Award of the Tribunal dated June 21, 1990, reprinted in 6 ICSID Rev.—FILJ 526, 543-48 (1991); see also Dissenting Opinion dated June 15, 1990, *id.* at 582-85. For a discussion of the award, see Vasciannie, *supra* note 127, at 332-54.

¹⁷² See *supra*, text accompanying note 162.

¹⁷³ See U.S.-Morocco BIT (1985), at art. II(3).