A UNIFIED THEORY OF FAIR AND EQUITABLE TREATMENT

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Since the beginning of the decade, international arbitral tribunals have struggled unsuccessfully to define the obligation of "fair and equitable treatment" required by the vast majority of the world's 2,600 bilateral investment treaties (BITs).[1] Although by the end of 2008 more than fifty awards had been issued by international tribunals interpreting that standard,[2] none of them has purported to offer a unified theory of the standard. This article endeavors to supply such a theory.

I. AN EMERGENT FAIR AND EQUITABLE TREATMENT STANDARD

The fair and equitable treatment standard became a consistent feature of investment treaty practice after it appeared in the Havana Charter of 1948.[3] Article 11(2)(a)(i) of the Charter called for the negotiation of international agreements "to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another." Although the Charter never entered into force, it influenced U.S. treaty practice. When the United States inaugurated a program of post-war Friendship, Commerce and Navigation (FCN) treaties, it included in those treaties a requirement that foreign property receive fair and equitable treatment.[4]

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1. UNCTAD identified 2,608 BITs that had been concluded as of the end of 2007. *See* U.N. Conference on Trade and Dev. (UNCTAD), *Recent Developments in International Investment Agreements (2007-June 2008)*, at 2, fig.1, U.N. Doc. UNCTAD/WEB/DIAE/IA/2008/1 (2008).

2. A precise count is impossible because not every award is published, but fifty-four awards applying the standard are identified and discussed herein.

3. Havana Charter for an International Trade Organization, Mar. 24, 1948, 62 U.N.T.S. 26. For an excellent discussion of the history of the fair and equitable treatment standard, see Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT'L L. 99 (1999). The standard occasionally appeared in other treaties prior to 1948. *See generally* KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION (2010).

4. *See, e.g.*, Treaty of Friendship, Establishment and Navigation, U.S.-Lux., art. I, Feb. 23, 1962, 14 U.S.T. 251; Treaty of Friendship, Establishment

The fair and equitable treatment standard soon found its way into codifications of investor rights. The 1959 Draft Convention on Investments Abroad, more commonly known as the Abs-Shawcross Convention, required at article 1 that "[e]ach Party shall at all times ensure fair and equitable treatment to the property of the nationals of other Parties."[5] Article I(1) of the 1967 OECD Draft Convention on the Protection of Foreign Property was worded identically.[6]

Meanwhile, in 1959, Germany concluded the first BIT, with Pakistan.[7] In the 1960s, other countries began to inaugurate their own BIT programs.[8] When Switzerland inaugurated its BIT program in 1961, it included the fair and equitable treatment standard.[9] Soon, other countries included the standard in their BITs.[10] The United States launched its program in 1977,[11] and every U.S. BIT has included the standard.[12] At

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and Navigation, U.S.-Belg., Feb. 21, 1961, art. I, 14 U.S.T. 1284; Convention of Establishment, U.S.-Fr., art. I, Nov. 25, 1959, 11 U.S.T. 2398; Treaty of Friendship, Commerce, and Navigation, U.S.-Neth., art. I(1) Mar. 27, 1956, 8 U.S.T. 2043.

5. Herman Abs & Lord Shawcross, *Draft Convention on Investments Abroad*, 9 J. PUB. L. 116 (1960), *reprinted in* U.N. Conference on Trade and Dev. (UNCTAD), *International Investment Instruments: A Compendium*, 301, U.N. Doc. UNCTAD/DITE/2(Vol. 5) (2000).

6. Organization for Economic Co-operation and Development (OECD), Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, 7 I.L.M. 117, 119.

7. Treaty for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 25, 1959, 24 U.N.T.S. 1963.

8. *See* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 169 (2005) (listing several countries that entered into BITs in the 1960s).

9. Treaty Relating to the Protection and the Encouragement of Investments of Capital, Switz.-Tunis., art. 1, Dec. 2, 1961, RO 1964 67, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_tunisia_fr.pdf.

10. *See, e.g.,* Agreement Concerning the Encouragement of Capital Investment and the Protection of Property, Tunis.-Belg.-Lux. art. 1, Jul. 15, 1964, 561 U.N.T.S. 297; Protocol on the Promotion of the Movement of Capital and Investments, Iraq-Kuwait, art. 2, Oct. 25, 1964, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/kuwait_iraq.pdf.

11. *See* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 209 (1988) (describing the development of the American BIT program).

12. *See* Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 329 (2009) (describing the fair and equitable treatment standard in arbitral practice).

the end of the 1980s, the number of BITs exploded in number. Although fewer than four hundred BITs had been concluded in the thirty years from 1959 to 1989, over the next fifteen years some 2,000 BITs would be concluded.[13] The great majority of these BITs require that covered investment receive fair and equitable treatment.

The fair and equitable treatment standard appears in a variety of contexts in these treaties. Most commonly, a BIT requires that each party provide covered investment with fair and equitable treatment without defining the standard in terms of any other standard. For example, the Switzerland-Czech Republic BIT provides that "[e]ach Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party."[14]

Early BITs frequently linked the fair and equitable treatment standard with a particular substantive norm, most commonly nondiscrimination, and many BITs continue to do so. For example, the BIT between Bangladesh and Iran requires that each party provide covered investment with "fair treatment not less favourable than that accorded to its own investors or investors of any third state, whichever is more favourable."[15]

Some BITs link fair and equitable treatment with customary international law. For example, the BIT between France and Mexico provides that "Each Contracting Party shall undertake to accord in its territory and maritime zone just and equitable treatment, in accordance with the principles of international law, to the investments made by investors of the other Party and to ensure that the exercise of the right so granted is not impeded either de jure or de facto."[16] This suggests that the fair and equitable treatment standard is informed in some way by customary law, but leaves the precise relationship unspecified.

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13. *Id.* at 179.

14. Agreement on the Promotion and Reciprocal Protection of Investments, Czechoslovakia-Switz., Oct. 5, 1990, 1692 U.N.T.S. 365.

15. Agreement on Reciprocal Promotion and Protection of Investment, Bangl-Iran, art. 4, Apr. 29, 2001, *available at* www.unctad.org/sections/dite/iia/docs/bits/bangladesh_iran.pdf.

16. Agreement on the Reciprocal Promotion and Protection of Investment, Fr.-Mex., art. 4(1), Nov. 12, 1994, 2129 U.N.T.S. 196.

The BIT between the United States and Uruguay, which follows the approach of the North American Free Trade Agreement, links the fair and equitable treatment standard with customary law, but makes clear that the former is a component of the latter. It provides that "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[17] To avoid any misinterpretation, that same treaty goes on to state that "[f]or greater certainty" the foregoing provision "prescribes the customary international law minimum standard of treatment of aliens . . . . 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."[18]

By contrast, the fair and equitable treatment also may appear paired with customary law in such a way that no relationship between the two necessarily is suggested. For example, the United States-Grenada BIT provides that "[i]nvestments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."[19] This language permits the inference that fair and equitable treatment may sometimes require more than customary international law.

Differences in the contexts in which the standard appears have made little difference to tribunals interpreting the standard.[20] Rather, the awards have yielded a single coherent the-

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17. Treaty on the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 5(1), Nov. 4, 2005, 44 I.L.M. 268.

18. *Id.* art. 5(2).

19. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Gren., art. II(2), May 2, 1986, S. TREATY DOC. NO. 99-25 (1986).

20. *See* IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 154 (2008) (asserting that "FET [fair and equitable treatment] has only one content which is operating at different thresholds, depending on the context"). Nor have differences in the wording of the standard been treated as significant. For example, in *Parkerings-Compagniet v. Lithuania,* the tribunal held that "equitable and reasonable" has the same meaning as "fair and equitable." Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶ 278

ory of the standard, although perhaps not consciously so.[21] In-

(Sept. 11, 2007), *available at* http://ita.law.uvic.ca/documents/Pakerings.pdf.

21. Tribunals, in fact, have avoided grand theories about the meaning of the fair and equitable treatment standard. Most commonly, any theoretical discussion is limited to a list of examples of the kinds of behavior that violates the standard. Illustrative is the award in *Waste Management v. Mexico,* where the tribunal held that the fair and equitable treatment standard is violated by conduct that is:

> arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), 43 I.L.M. 967. Although this language in fact is a good summary of the kinds of situations in which violations have been found, no larger theory links them together. From all that appears, they have in common only that they constitute violations of the fair and equitable treatment standard.

The scholarly commentary also has been cautious about developing a grand theory of fair and equitable treatment, preferring in most cases, like the tribunal in *Waste Management,* to identify specific principles that are embraced by the standard. Rudolf Dolzer, in an early attempt to take stock of the awards, believed that the awards had developed around two "central lines of application"—consistency of governmental action and stability of long-term arrangements and commitments—although he noted that awards had addressed other concerns as well, such as transparency and due process. Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties,* 39 INT'L LAW. 87, 100, 106 (2005). Christoph Schreuer, at about the same time, suggested that existing awards had yielded principles of transparency, the protection of the investor's legitimate expectations, freedom from coercion and harassment, procedural propriety and due process, and good faith. Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice,* 6 J. WORLD INV. & TRADE 357 (2005); *see also* Barnali Choudhury, *Evolution or Devolution: Defining Fair and Equitable Treatment in International Investment Law,* 6 J. WORLD INV. & TRADE 297 (2005) (concluding that the fair and equitable treatment standard required transparency, due process, and good faith and prohibited breach of legitimate expectations, arbitrary or discriminatory conduct, and acts beyond the scope of legal authority). Jean Kalicki and Suzanne Medeiros found that tribunals had adopted two divergent approaches, one in which the standard protects investors' legitimate expectations and the other in which it prohibits manifestly arbitrary conduct. Jean Kalicki & Suzanne Medeiros, *Fair, Equitable and Ambiguous: What is Fair and Equitable Treatment in International Investment Law* 22 ICSID REV. – FOREIGN deed, no tribunal has explicitly articulated the theory proposed here. The goal of this essay is to articulate that theory and to demonstrate that it is consistent with the holdings and rationales of the awards issued to date.

No claim is made concerning the meaning that the different drafters of BITs specifically intended the fair and equitable treatment standard to have. Instead, this analysis attempts to identify the core meaning that in fact has been assigned to the standard by the existing arbitral awards. Nevertheless, as discussed below, the theory proposed here is consistent with the object and purpose of the BITs.

II. Fair and Equitable Treatment as the Rule of Law

The thesis is that the awards issued to date implicitly have interpreted the fair and equitable treatment standard as requiring treatment in accordance with the concept of the rule of law. That is, the concept of legality is the unifying theory behind the fair and equitable treatment standard.

The concept of the rule of law has a substantive and a procedural dimension. The procedural dimension generally addresses the means by which the state applies the law to a particular individual. This dimension is largely governed by the principle of due process.[22] Due process in general requires that one to whom the coercive power of the state is to be applied receive notice of the intended application and an opportunity to contest that application before an impartial tri-

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Inv. L.J. 24 (2007). A few commentators have attempted to develop the principle of protecting legitimate expectations into a theory of fair and equitable treatment, but as noted below, the doctrine either fails to account for some of the cases or, if stretched to account for all the cases, loses its distinctive content. *See* note 116, *infra.*

Meanwhile, some have expressed concern that the accretion of principles unguided by a coherent theory of fair and equitable treatment has left too much discretion to tribunals. *See generally* J. Roman Picherack, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?* 9 J. World Inv. & Trade 255 (2008).

22. *See, e.g.*, Miguel Schor, *Rule of Law*, *in* 3 Encyclopedia of Law and Society: American and Global Perspectives 1329, 1331 (David Clark ed., 2006) (describing the role of due process within the concept of rule of law); Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga. L. Rev. 1 (2008).

bunal.[23] Due process may entail other requirements as well, such as a right to legal representation.[24]

Customary international law long has required that foreign investors be accorded due process before local courts or administrative agencies. Failure to do so constitutes a denial of justice.[25] Denial of justice—that is, a failure of due process—constitutes a violation of the fair and equitable treatment standard.[26] Thus, fair and equitable treatment requires conduct consistent with the procedural dimension of the rule of law.

The rule of law also has a substantive dimension that is rooted in the nature of the concept. The concept of the rule of law often is defined in opposition to its alternative: the rule

23. Erwin Chemerinsky, Constitutional Law: Principles and Policies 580 (3d ed. 2006). *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

24. *See, e.g.*, Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 26-27 (1981) (holding that due process would require that an indigent litigant have the right to counsel when, if he loses, he would be deprived of his physical liberty); *In re* Gault, 387 U.S. 1, 41 (1967) (concluding that in juvenile delinquency cases that could result in commitment to an institution, the child and parents must be notified of the right to counsel).

25. *See, e.g.*, Alwyn V. Freeman, The International Responsibility of States for Denial of Justice (1938); Jan Paulsson, Denial of Justice in International Law (2005); Andrea Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 Va. J. Int'l L. 809 (2005); Clyde Eagleton, *Denial of Justice in International Law*, 22 Am. J. Int'l L. 538 (1928); Sir Gerald G. Fitzmaurice, *The Meaning of the Term "Denial of Justice,"* 13 Brit. Y.B. Int'l L. 93 (1932).

26. For example, the United States-Uruguay BIT, *supra* note 17, states at article 5(2)(b) that "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" (internal quotations omitted). The tribunal acknowledged that a denial of justice might violate the fair and equitable treatment standard in *Parkerings-Compagniet v. Lithuania.* In several cases, claimants have unsuccessfully argued that the host state was responsible for a denial of justice under article 1105 of the NAFTA. *See, e.g.*, Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶ 154 (Oct. 11, 2002), 42 I.L.M. 85; Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, ¶ 137 (June 25, 2003), 42 I.L.M. 811.

of man.[27] This desire for "a government of laws and not of men"[28] rests on the wish to avoid arbitrariness.[29] In a government of men, the individual is at the mercy of the whims of the rulers. In a government of laws, the rulers are bound by the law, to the end that they may not exercise power arbitrarily. Thus, at its core, the rule of law demands rationality. It is the antithesis of arbitrary government. Thus, a first principle of the rule of law is *reasonableness.*

A law by definition is a generalization;[30] it provides that under a specified category of circumstances, a particular right or duty arises with respect to certain persons. That is, all cir-

27. *See, e.g.,* Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 339, 342 (2008); Iain Stewart, *From 'Rule of Law' to 'Legal State': A Time of Reincarnation?* (Macquarie Law Working Paper No. 2007-12, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1056401.

28. This phrase was used by John Adams in one of his essays published in the *Boston Gazette* as the Novanglus Papers in 1774. *See* JOHN ADAMS, NOVANGLUS NO. 7, *in* 4 THE WORKS OF JOHN ADAMS 99, 106 (Charles Francis Adams ed., 1851). Later, he incorporated it into Article XXX of his draft of the 1780 Massachusetts Constitution. Adams derived the phrase from James Herrington, who in his 1656 *Oceana,* called for an "empire of laws and not of men." JAMES HARRINGTON, *The Commonwealth of Oceana, in* THE POLITICAL WORKS OF JAMES HARRINGTON 170 (John G.A. Pocock ed., 1977). The principle was adopted by the U.S. Supreme Court in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803), where it formed the basis of the court's power of judicial review.

29. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse,* 97 COLUM. L. REV. 1, 7-8 (1997) (identifying non-arbitrariness, security, and transparency as the three central components of the rule of law); *see also* Chesterman, *supra* note 27, at 333; SIMON CHESTERMAN, INST. FOR INT'L L & JUST., THE U.N. SECURITY COUNCIL AND THE RULE OF LAW: FINAL REPORT AND RECOMMENDATIONS FROM THE AUSTRIAN INITIATIVE 2004-2008 3 (2008) *available at* http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/Vertretungsbehoerden/OV_New_York/FINAL_Report_-_The_UN_Security_Council_and_the_Rule_of_Law.pdf.

30. *See, e.g.,* LON L. FULLER, THE MORALITY OF LAW 46 (2d ed., 1969); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 215 (1979); Margaret Jane Radin, *Reconsidering the Rule of Law,* 69 B.U. L. REV. 781, 785, 791-792 (1989); Brian Tamanaha, *A Concise Guide to the Rule of Law* 3 (St. John's Univ. Sch. of Law, Legal Studies Research Paper Series, Paper No. 07-0082, 2007), *available at* http://ssrn.com/abstract=1012051; Waldron, *supra* note 22. Tamanaha suggests that one benefit of generality and consistency is that it will lead to principled, as opposed to arbitrary decision making. Tamanaha, *supra* at 9. Waldron emphasizes that generality promotes nondiscrimination or, in his words, "impersonality and equality." Waldron, *supra* note 22, at 25. On generality as a component of law, see generally KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER (1996).

cumstances within the category shall have the same legal consequence. Like cases shall be treated in a like manner. This is the principle of *consistency*.[31] At a higher level of generality, this principle may be characterized as security.[32] Further, the legal consequence arises with respect to persons regardless of their individual identity. This is the principle of *nondiscrimination*.[33] Finally, for the law to operate, it must be known.[34] This is the principle of *transparency*.

These four principles—reasonableness, consistency (or security), nondiscrimination, and transparency—are the core of the substantive dimension of the rule of law. The law's content is characterized by reasonableness, its structure by consistency and nondiscrimination, and its operation by transparency.

Thus, international arbitral awards interpreting the fair and equitable treatment standard have incorporated the substantive and procedural principles of the rule of law into that standard. The fair and equitable treatment standard in BITs has been interpreted as requiring that covered investment or investors receive treatment that is reasonable, consistent, non-

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31. Within common law legal systems, this principle is embodied in the maxim of *stare decisis* ("Let the decision stand"), which requires that like cases be decided in a like manner. In civil law systems, this principle is somewhat embodied in the concept of *jurisprudence constante*. On the centrality of consistency to the rule of law, see FULLER, *supra* note 30, at 79-81; RAZ, supra note 30, at 214-15; Chesterman, *supra* note 27, at 331; Radin, *supra* note 30, at 785; Waldron, *supra* note 22; Ronald A. Cass, *Property Rights Systems and the Rule of Law*, 2 (Boston Univ. Sch. Of Law, Working Paper No. 03-06, 2003), *available at* http://www.ssrn.com/abstract_id=392783.

32. A system that is consistent or constant is one that is stable. Stability provides security. Consistent application of the law thus secures one's legal entitlements. *See* Waldron, *supra* note 22.

33. The principle of nondiscrimination is captured in the maxim "Equal Justice Under Law," engraved above the entrance to the U.S. Supreme Court Building in Washington, D.C. *See Caldwell v. Texas,* 137 U.S. 692 (1891) ("No State can deprive particular persons or classes of persons of equal and impartial justice under the law . . ."). On the importance of nondiscrimination in the rule of law, see Chesterman, *supra* note 27, at 342 (stating that a core function of the law is that it be more than merely on the books, but equally enforced as well).

34. On the importance of transparency, see, e.g., FULLER, *supra* note 30, at 49-51; RAZ, *supra* note 30, at 214; Radin, *supra* note 30, at 785-6; Waldron, *supra* note 22; Cass, *supra* note 31; John Ohnesorge, *The Rule of Law* 4 (Univ. of Wis. Legal Stud. Res. Paper Series, Working Paper No. 1051, 2007), *available at* http://ssrn.com/abstract=1006093.

discriminatory, transparent, and in accordance with due process. As will be seen, these principles explain virtually all of the awards applying the fair and equitable treatment standard. No award is inconsistent with this theory of the standard.

Understanding fair and equitable treatment as legality is consistent with the purposes of the BITs. BITs essentially are instruments that impose legal restraints on the treatment of covered investments and investors by host states. The very essence of a BIT is a partial subordination of the sovereign's power to the legal constraints of the treaty.[35] Further, individual BIT provisions are themselves a reflection of the principles of the rule of law.[36] For example, the guarantee of national and most-favored nation (MFN) treatment explicitly reflects the nondiscrimination principle; the prohibition on unreasonable and discriminatory measures explicitly reflects the reasonableness principle; the requirement of full protection and security explicitly reflects the security principle; and provisions for investor-state dispute resolution explicitly reflect the due process principle. BIT principles are rule of law principles.

III. Fair and Equitable Treatment in the Arbitral Awards

The principles of the rule of law were characterized in the preceding discussion at a high level of generality. The result is that they have a highly indeterminate scope.[37] For example, the principle of consistency would seem to preclude a host state from changing its policies, but to hold that state policy may never change would be absurd.[38] No concept of the rule

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35. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,* 46 Harv. Int'l L.J. 67, 77 (2005) (noting the concern states have about abrogating their sovereignty within a BIT framework); Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties,* 36 Colum. J. Transnat'l L. 501, 506 (1998) (noting the close relationship between the government and markets in a BIT framework).

36. *See generally* Kenneth J. Vandevelde, Bilateral Investment Treaties: History, Policy and Interpretation (2010).

37. Compare with Justice Oliver Wendell Holmes' famous aphorism that "general propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

38. *See* Cass, *supra* note 31 (stating that the goal of rule of law is to not eliminate discretion altogether, but to find a level of discretion consistent with predictability and constraint).

of law founded on reasonableness could countenance that result.

The task of this section, then, is twofold. First, it seeks to demonstrate that existing arbitral awards, i.e., those rendered through December 2008, applying the fair and equitable treatment standard have rested their decision on the host state's compliance or noncompliance with one or more of the five principles. Second, by examining the circumstances in which states have been found to have violated or not violated the standard, it seeks to identify the extent to which the awards have given more specific content to the five principles.

The ensuing discussion is organized according to the principle being applied in each award. As will be seen, however, many of the awards apply more than one principle. Indeed, a violation of the fair and equitable treatment standard sometimes rests on behavior that is contrary to multiple principles at the same time. In such cases, the award may be discussed below in connection with more than one principle.

A. *Reasonableness*

The reasonableness principle requires that the host state's conduct be reasonably related to a legitimate public policy objective.[39] The standard may be met even where the host state's measure is poorly executed or fails to advance the policy. A violation of the principle of reasonableness is found, however, where the measure is not adopted in pursuit of legitimate host state public policies. A typical violation occurs where the host state's conduct is politically motivated, such as where the state retaliates against the foreign investor for lawful but unpopular behavior.

The tribunal in *S.D. Myers v. Canada*,[40] a case arising under the NAFTA,[41] averred that its duty was to interpret the

39. As the tribunal explained in *Saluka Investments BV v. Czech Republic*, a case arising under the Netherlands-Czech Republic BIT, fair and equitable treatment requires that the host state's conduct "bears a reasonable relationship to some rational policy . . . ." Saluka Invs. BV v. Czech Republic, Partial Award, ¶ 460 (Perm. Ct. Arb. Mar. 17, 2006), *available at* http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf.

40. S.D. Myers, Inc. v. Canada, Partial Award, (NAFTA Arb. Nov. 12, 2000), 40 I.L.M. 1408 (2001).

41. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

requirement of fair and equitable treatment "in light of the high measure of deference that international [law] generally extends to domestic authorities to regulate matters within their own borders."[42] This sentiment was echoed almost immediately by the tribunal in *Waste Management v. Mexico*,[43] another case arising under the NAFTA.[44] Thus, in determining whether the act of the host state is reasonable, a tribunal is not examining the action of the host state for errors of policy or judgment, but looking for acts that are irrational or arbitrary.

Accordingly, in a number of cases, the tribunal has found host state conduct to be lawful because it was undertaken for legitimate regulatory reasons. For example, in *Genin v. Estonia*,[45] a case arising under the United States-Estonia BIT,[46] Estonia had revoked a license held by the investor's bank, thus forcing the bank out of business. The tribunal observed that, to violate the fair and equitable treatment standard, state conduct must reflect "a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[47] The tribunal found that the decision was a reasonable regulatory decision. The Estonian government had legitimate concerns about the management and financial soundness of the bank.

The *Genin* award seemed to suggest that bad faith might be necessary to violate the standard. Yet, Estonia's conduct was found consistent with the standard not simply because Estonia lacked bad faith, but because Estonia acted pursuant to legitimate regulatory concerns. In any event, the clear consensus now is that bad faith is not required to find a violation of the fair and equitable treatment standard.[48]

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42. S.D. Myers, Inc., 40 I.L.M. 1408, ¶ 263.

43. Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), 43 I.L.M. 967.

44. NAFTA, *supra* note 41.

45. Genin v. Estonia, ICSID Case No. ARB/99/2, Award (June 25, 2001), 17 ICSID REV. – FOREIGN INV. L.J. 395 (2002).

46. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Est., Apr. 19, 1994, S. TREATY DOC. 103-38 (1994).

47. Genin, ¶ 367.

48. *See, e.g.,* Duke Energy Electroquil Partners v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, ¶ 341 (Aug. 18, 2008), *available at* http://ita.law.uvic.ca/documents/DukeEcuadorAward_003.pdf; Jan de Nul NV v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, ¶ 185 (Nov. 6, 2008), *available at* http://ita.law.uvic.ca/documents/JandeNulNVaward.pdf;

In *Noble Ventures, Inc. v. Romania*,[49] a case arising under the U.S.-Romania BIT,[50] the tribunal found that fair and equitable treatment "to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor."[51] That is, the tribunal held that the fair and equitable treatment standard embraced other more specific provisions of the BIT. The tribunal stated that it already had found that none of these other provisions had been breached, but then noted that "this in itself cannot lead to the conclusion that the more general fair and equitable treatment standard has not been breached."[52] The tribunal next considered Romania's action in seeking judicial reorganization of the claimant's company, which the claimant alleged had been undertaken not for commercial purposes but in order to effect a rescission of Romania's privatization agreement with the claimant and to regain control of the company. The tribunal held that the decision to initiate the proceedings was not arbitrary, but seemingly the only solution to the company's insolvency and its inability to pay its four thousand employees.[53] Accordingly, no violation was found.

LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 129 (Oct. 3, 2006), 46 I.L.M. 26; Azurix Corp. v. Arg. Republic, ICSID Case No. ARB/01/12, Award, ¶ 372 (July 14, 2006), *available at* http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf; CMS Gas Transm. Co. v. Arg. Republic, ICSID Case No. ARB/01/18, Award, ¶ 280 (May 12, 2005), 44 I.L.M. 1205; Siemens A.G. v. Arg. Republic, ICSID Case No. ARB/02/8, Award, ¶ 300 (Feb. 6, 2007), *available at* http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf.

49. Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (Oct 12, 2005), *available at* http://ita.law.uvic.ca/documents/Noble.pdf.

50. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Rom., May 28, 1992, S. TREATY DOC. NO. 102-36, (1992).

51. Noble Ventures, Inc., ¶ 182.

52. *Id.*

53. *Id.*

In *Parkerings-Compagniet v. Lithuania,*[54] a case arising under the Norway-Lithuania BIT,[55] the tribunal found no arbitrariness in Lithuania's failure to disclose information available to the public because Lithuania had obtained a legal opinion that the claimant could have received from any qualified law firm. The claimant also alleged that the Lithuania had acted arbitrarily when its courts refused to accept *force majeure* as grounds for excusing the investment's obligation to pay a fee due under the investment's parking concession agreement with the city of Vilnius. The tribunal held that an "erroneous judgment" by a court would not violate the treaty in the absence of a denial of justice, that is, a violation of the due process principle.[56]

In *Continental Casualty v. Argentina,*[57] a case arising under the United States-Argentina BIT,[58] Argentina adopted a policy that converted dollar denominated assets into pesos at a rate of 1.4 pesos to the dollar, as opposed to the prior rate of one to one, resulting in a nominal gain in the peso value of the assets, although the real value of the assets in fact declined. Argentina nevertheless imposed a capital gains tax on the increase in nominal value. The tribunal held that the tax was consistent with common tax accounting principles and thus was not arbitrary and did not violate the fair and equitable treatment standard.[59]

In *Pope & Talbot v. Canada,*[60] a case arising under the NAFTA,[61] in an effort to address a trade dispute with the

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54. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), *available at* http://ita.law.uvic.ca/documents/Pakerings.pdf.

55. Agreement on the Promotion and Mutual Protection of Investments, Nor.-Lith., Aug. 16, 1992, *available at* http://www.unctadxi.org/templates/DocSearch.aspx?id=779.

56. Parkerings-Compagniet AS, ¶ 313.

57. Cont'l Cas. Co. v. Arg. Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), *available at* http://ita.law.uvic.ca/documents/Continental-CasualtyAward.pdf.

58. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. NO. 103-2, (1994).

59. Cont'l Cas. Co., ¶¶ 269-270.

60. Pope & Talbot, Inc. v. Can., Award on the Merits of Phase 2 (NAFTA Arb. Apr. 10, 2001), 7 ICSID Rep. 102 (2005).

61. NAFTA, *supra* note 41. Article 1105 of the NAFTA requires treatment in accordance with customary international law, which it defines to include

United States over Canadian exports of softwood lumber, Canada allocated quotas of softwood lumber exports by exporters from certain provinces. The effect was to limit the amount of lumber that the claimant could export. In a very lengthy discussion, the tribunal held that the various aspects of the quota system were reasonable responses to Canada's trade dispute with the United States.[62]

In *ADF Group v. United States*,[63] another case arising under the NAFTA,[64] the tribunal found that a domestic content regulation for steel used in highway construction did not violate the fair and equitable treatment standard. First, such a regulation could hardly be considered *per se* a violation of international law given that all three NAFTA parties as well as many other states imposed domestic content requirements. Thus, these requirements could not be considered "idiosyncratic or aberrant and arbitrary."[65] Second, the mere fact that the program no longer adhered to court decisions applying the predecessor statute, because the statute had been modified over time by Congress, was not "grossly unfair or unreasonable."[66]

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fair and equitable treatment, "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Despite the explicit language of the NAFTA, the tribunal concluded that the fair and equitable treatment standard was not encompassed within the international minimum standard under customary law, but was additive to it. Pope & Talbot, Inc., ¶ 113. The NAFTA Free Trade Commission (FTC) subsequently issued an interpretation of the relevant NAFTA provision, Article 1105, declaring that the fair and equitable treatment standard is not additive to the international minimum standard, but is part of it. Because the tribunal already had found that the conduct of the United States in establishing the quotas was not arbitrary, that portion of the award was not affected by the FTC interpretation. NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions, ¶ 2 (July 31, 2001).

62. Pope & Talbot, Inc., ¶¶ 121, 123, 125, 128.

63. ADF Grp., v. United States, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), 6 ICSID Rep. 470 (2004).

64. NAFTA, *supra* note 41.

65. ADF Grp., ¶ 188.

66. *Id.* ¶ 189.

In *MCI Power v. Ecuador*,[67] a case arising under the United States-Ecuador BIT,[68] the tribunal found that the host state's conduct toward the claimant, which included threatening a tax audit, investigating its legal representative, and instituting litigation against it, consisted of legitimate regulatory acts, rather than harassment.

1. *Politically Motivated Acts Violate the Reasonableness Principle*

Tribunals have found violations of the reasonableness principle where the host state's conduct was politically motivated; that is, where government action was not motivated by legitimate public policy considerations, but by animus toward the investment or investor. In *Tokios Tokeles v. Ukraine*,[69] a case arising under the Lithuania-Ukraine BIT,[70] the tribunal held that retaliation against a covered investment for supporting a political candidate would violate the fair and equitable treatment standard, although the evidence of retaliation in that case was insufficient to establish a treaty violation.

In *Azurix Corp. v. Argentina*,[71] a case arising under the U.S.-Argentina BIT,[72] the claimant had obtained a concession to operate a water distribution system in Buenos Aires. Subsequently, however, disputes arose over the tariffs that could be charged. When, partly as a result of the provincial government's misfeasance, an algae bloom adversely affected the appearance and taste of the water, the province refused to accept any responsibility, blamed the foreign investment, and urged consumers not to pay their bills. At that point, the investment

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67. M.C.I. Power Group L.C. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award (July 31, 2007), *available at* http://ita.law.uvic.ca/documents/MCIEcuador.pdf.

68. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. No. 103-15, (1993).

69. Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004), *available at* http://ita.law.uvic.ca/documents/Tokios-Jurisdiction_000.pdf.

70. Agreement on the Promotion and Reciprocal Protection of Investments, Ukr.-Lith., Feb. 18, 1994, *available at* http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=22476&p_query=&p_tr2.

71. Azurix Corp. v. Arg. Republic, ICSID Case No. ARB/01/12, Award, ¶ 3 (July 14, 2006), *available at* http://ita.law.uvic.ca/documents/Azurix-AwardJuly2006.pdf.

72. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, *supra* note 58.

made what the tribunal regarded as a reasonable request to terminate the concession by mutual agreement, but the province refused and insisted on terminating the concession on the grounds of abandonment.[73] Noting both the refusal of this reasonable request and the fact that Argentina had allowed the tariff regime and algae bloom incident to become politicized,[74] the tribunal found that the fair and equitable treatment standard had been violated. The tribunal also found a violation in the government's urging of customers not to pay their water bill, another politically motivated act.[75]

In *Eureko v. Poland*,[76] a case arising under the Netherlands-Poland BIT,[77] the claimant had acquired a 30 percent interest in a state owned insurance company that was in the process of being privatized, relying upon Poland's commitment to sell the remaining stock, which would enable the claimant to acquire a majority interest. The privatization, however, became politically controversial and Poland decided not to complete it. The tribunal found that Poland had violated the fair and equitable treatment standard by refusing to honor its commitment for "purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character."[78]

In *Biwater v. Tanzania*,[79] a case arising under the United Kingdom-Tanzania BIT,[80] the claimant's investment was awarded a contract to operate the water and sewerage service for the city of Dar es Salaam. After disputes arose concerning performance under the contract, the minister of water and livestock development, who was campaigning for the office of prime minister, called a press conference at which he announced that the contract was terminated; four days later he

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73. Azurix Corp., ¶ 374.

74. *Id.* ¶ 375.

75. *Id.* ¶ 92.

76. Eureko B.V. v. Republic of Pol., UNCITRAL Arb., Partial Award (Aug. 19, 2005), 12 ICSID Rep. 335 (2005).

77. Agreement on Encouragement and Reciprocal Protection of Investment, Neth.-Pol., Sept. 7, 1992, 2240 U.N.T.S. 387.

78. Eureko B.V., ¶ 233.

79. Biwater Gauff, Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award (July 18, 2008), *available at* http://ita.law.uvic.ca/documents/Biwateraward.pdf.

80. Agreement for the Promotion and Protection of Investments, U.K.-Tanz., Jan. 7, 1994, 1957 U.N.T.S. 43.

held a political rally and confirmed that the contract was terminated. The tribunal found this conduct to be "an unreasonable disruption of the contractual mechanisms . . . and motivated by political considerations."[81] Such conduct inflamed the situation and polarized public opinion making it impossible thereafter to follow prescribed procedures under the contract.[82] A week later, Tanzania unilaterally withdrew a value added tax exemption, an act that the tribunal found to be "unreasonable and unjustified."[83] The government then occupied the water company's offices, took control of the operation, and deported senior management. There being no emergency, the tribunal found this action to be "unreasonable and arbitrary, unjustified by any public purpose"[84] and a violation of the fair and equitable treatment standard.[85] The tribunal also found that the appointment of the same minister as regulator of the utility, rather than "an independent, impartial regulator insulated from political influence," constituted a further violation of the standard.[86] As it happened, however, the tribunal held that none of these actions caused compensable damage to the claimant because the position of the investment already was such that contract termination was inevitable.

In *Eastern Sugar v. Czech Republic*,[87] a case arising under the Netherlands-Czech Republic BIT,[88] the Czech Republic, as part of the process of joining the European Union, issued two decrees to regulate the sugar market by, in particular, reducing imports and allocating quotas among domestic producers. One of the decrees was later held unconstitutional and both were ineffectively implemented. Moreover, they allowed new producers to obtain quotas, a decision that the tribunal found to be illogical in light of the decrees' avowed purpose and that the tribunal believed to have been politically motivated. The

81. Biwater Gauff, Ltd., ¶ 500.

82. *Id.* ¶ 627.

83. *Id.* ¶ 502.

84. *Id.* ¶ 503.

85. *Id.* ¶ 615.

86. *Id.* ¶ 615.

87. Eastern Sugar B.V. v. Czech Republic, Partial Award, SCC Case No. 088/2004, (Mar. 27, 2007), *available at* http://ita.law.uvic.ca/documents/ADCvHungaryAward.pdf.

88. Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-Czech Rep., Apr. 29, 1991, 2242 U.N.T.S. 205.

tribunal nevertheless found no violation, holding that the host state is entitled to some measure of interest balancing, inefficiency, trial and error, and imperfection. After the European Union reduced the Czech Republic's country sugar quota, however, the government reduced the claimant's quota by more than the entire reduction in the country quota, thus forcing one company to bear the entire effect of the country quota reduction. The disproportionate reduction appeared to have been in retaliation for a politically unpopular decision to close a plant. The tribunal found the reduction to be unreasonable and discriminatory and, therefore, a violation of the BIT.[89]

In *Vivendi v. Argentina*,[90] a case arising under the France-Argentina BIT,[91] the claimants' investment had obtained a concession to operate a water distribution system undergoing privatization. The tribunal found that, after sharp rate increases and a temporary but harmless discoloration of the water had stirred local opposition, local officials engaged in a campaign to force the investment to accept new terms, such as by encouraging customers not to pay their bills. Further, after the investment sought to terminate the agreement and to institute arbitration under the BIT, Argentina enacted legislation to prevent the investment from pursuing collection lawsuits or enforcing debts, measures that the tribunal found to constitute "a vindictive exercise of sovereign power aimed at punishing . . . [the investment that] cannot plausibly be justified."[92] The enactment of these unjustified measures violated the fair and equitable treatment standard.

In *Pope & Talbot v. Canada,* discussed above,[93] although it did not find Canada's lumber quota system to violate the fair and equitable treatment standard, the tribunal found that

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89. Eastern Sugar B.V., ¶¶ 335, 337.

90. Compagnia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Arg. Republic, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007), *available at* http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf.

91. Agreement on Reciprocal Promotion and Protection of Investments, Arg.-Fr., July 3, 1991, 1728 U.N.T.S. 281.

92. Compagnia de Aguas del Aconquija, S.A. and Vivendi Universal S.A., ¶ 7.4.45 (award is often referred to as *Vivendi II*; award of the first *Vivendi* tribunal was annulled).

93. Pope & Talbot, Inc. v. Can., Award on the Merits of Phase 2 (NAFTA Arb. Apr. 10, 2001), 7 ICSID Rep. 102 (2005).

other conduct by Canada did violate the standard. After Pope & Talbot had notified the Canadian government that it was submitting the dispute concerning the quotas to investor-state arbitration under the NAFTA, the Canadian government imposed unnecessary and onerous reporting requirements on the company and refused to cooperate to find less burdensome alternatives. The government also threatened the company with criminal prosecution for noncompliance with these requirements and wrote internal memoranda in which it mischaracterized the situation, thereby injuring the reputation of the company. The tribunal found that this conduct taken together violated the requirement of fair and equitable treatment, citing the lack of a reasonable basis for the conduct as well as a lack of forthrightness, i.e., a lack of transparency.[94]

As the foregoing discussion indicates, thus far violations of the reasonableness principle have been found only in cases involving conduct motivated by animus toward the foreign investment or investor. Typically, the unlawful conduct is described as retaliatory or discriminatory. Ultimately, the wrong rested on adopting measures for reasons other than the pursuit of legitimate public policies, such as the foreign ownership of the investment.

B. *Nondiscrimination*

Fair and equitable treatment long has been linked to the nondiscrimination principle. Many BITs place the two standards in the same sentence. The notes to the 1967 Organisation for Economic Co-Operation and Development (OECD) Draft Convention on the Protection of Foreign Property suggested that fair and equitable treatment included the nondiscrimination obligation, and in the early 1980s the OECD queried its members as to whether the standard required more than nondiscrimination.[95] The fair and equitable treatment standard, however, appears to prohibit only unreasonable discriminations.

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94. *Id.* ¶¶ 177-81.

95. *See* KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION 201 (2010) (discussing the 1984 OECD report by the International Investment and Multinational Enterprise Committee).

For example, in *Saluka Investments v. Czech Republic*,[96] a case arising under the Netherlands-Czech Republic BIT,[97] four major banks in the Czech Republic were in the process of privatization. The Czech government provided financial assistance to three of the banks, which were locally owned, but not to the one in which the claimant had invested. The tribunal found no reasonable basis for the discrimination, which therefore violated the fair and equitable treatment standard.

In *Eureko v. Poland*, analyzed earlier under the reasonableness principle,[98] the tribunal held that Poland violated the fair and equitable treatment standard by failing to adhere to its privatization commitments. That failure was attributable to what the tribunal referred to as "purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character."[99]

In *Parkerings-Compagniet v. Lithuania*,[100] discussed earlier under the reasonableness principle,[101] the tribunal held that discriminatory conduct violates the fair and equitable treatment standard, although the claimant or its investment must be in like circumstances with the comparator. In that case, however, no comparator existed. The tribunal held, therefore, that it could not determine the existence of a violation. The tribunal noted that other discrimination claims on the basis of nationality would require the same analysis as under the MFN clause and thus would be analyzed under that doctrine.[102]

96. Saluka Invs. BV v. Czech Republic, Partial Award (Perm. Ct. Arb. Mar. 17, 2006), *available at* http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf.

97. Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-Czech Rep., Apr. 29, 1991, 2242 U.N.T.S. 205.

98. Eureko B.V. v. Republic of Pol., UNCITRAL Arb., Partial Award (Aug. 19, 2005), *reprinted in* 12 ICSID Rep. 335 (2005).

99. *Id.* ¶ 233.

100. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), *available at* http://ita.law.uvic.ca/documents/Pakerings.pdf.

101. *See supra* notes 55-57 and accompanying text.

102. *See* Parkerings-Compagniet AS, ¶ 291 (stating that where an MFN clause has been incorporated in a BIT, analysis of fair and equitable treatment is not necessary).

In *Loewen v. United States*,[103] a case arising under the NAFTA,[104] a Canadian investor was sued by a U.S. company in a Mississippi state court. The trial featured numerous references to the Canadian nationality of the investor, and the jury ultimately rendered a $500,000,000 verdict against the investor. The tribunal observed that, under article 1105 of the NAFTA, the United States had a duty to provide a fair trial, free of "sectional or local prejudice."[105] That is, the tribunal recognized the principle of nondiscrimination. Further, the tribunal found that the trial was "improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."[106] The claimant, however, had failed to appeal the adverse judgment. The tribunal held that the BIT protects foreign investment and investors against wrongful conduct by the judicial system as a whole.[107] The claimant had not allowed the U.S. judicial system the opportunity to remedy any deficiencies in the trial and therefore could not complain of a treaty violation.

Finally, in *Methanex v. United States*,[108] another case arising under the NAFTA,[109] the tribunal in *obiter dictum* observed that discriminatory treatment of investment generally would not violate NAFTA article 1105, which includes a requirement of fair and equitable treatment, although discrimination based on sectional or racial prejudice might constitute a violation. Thus, the *Methanex* tribunal questioned whether fair and equitable treatment requires nondiscriminatory treatment, although it did not dismiss the possibility entirely. To hold that the standard does not include the principle of nondiscrimination would represent a unique view of the standard. In any event, as has been noted, the remark was *dictum*. The tribunal found that because California's ban on methyl tertiary-butyl

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103. Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award (June 25, 2003), 42 I.L.M. 811.

104. NAFTA, *supra* note 41.

105. Loewen Group, Inc., ¶ 123.

106. *Id.* ¶ 137.

107. *Id.* ¶ 54.

108. Methanex Corp. v. United States, Final Award (NAFTA Arb. Aug. 3, 2005), 44 I.L.M. 1345.

109. NAFTA, *supra* note 41.

ether applied equally to all investments no discrimination had occurred.[110]

In short, discriminatory conduct violates the fair and equitable treatment standard, but only when it lacks a reasonable justification. Nationality, of course, is not a reasonable basis for discrimination. Discrimination can be justified only by a legitimate, nondiscriminatory purpose.

C. *Consistency*

The fair and equitable treatment standard has been interpreted by investor-state arbitral tribunals to provide a form of security to covered investment. More particularly, the standard requires that host states act in a way that is consistent. Tribunals have made clear that the standard does not impose on host states a general obligation always to act consistently over time. Host states generally have the discretion to change policies. A violation occurs, however, where the host state has promised to act in a certain way or has offered assurances to the investor (or investment) on which it has reasonably relied. That is, the consistency (or security) principle entitles the covered investment or investor to the protection of its legitimate expectations based on such promises or assurances.

Some tribunals have said that such promises or assurances must have been made at the time the investor decided to invest.[111] For example, in *Duke Energy v. Ecuador*, a case arising under the United States-Ecuador BIT,[112] the tribunal refused to find a violation of the fair and equitable treatment standard where the host state was alleged to have violated arbitration

110. Methanex Corp., §IV(21).

111. *See, e.g.*, Duke Energy Electroquil Partners v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, ¶ 340 (Aug. 18, 2008), *available at* http://ita.law.uvic.ca/documents/DukeEcuadorAward_003.pdf; LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 130 (Oct. 3, 2006), 46 I.L.M. 36; Jan de Nul NV v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, ¶ 265 (Nov. 6, 2008), *available at* http://ita.law.uvic.ca/documents/JandeNulNVaward.pdf; BG Group, Plc. v. Arg. Republic, UNCITRAL Arb., Award, ¶ 298 (Dec. 24, 2007), *available at* http://ita.law.uvic.ca/documents/BG-award_000.pdf; Nat'l Grid P.L.C. v. Arg. Republic, UNCITRAL Arb., Award, ¶ 173 (Nov. 3, 2008), *available at* http://ita.law.uvic.ca/documents/NGvArgentina.pdf.

112. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *supra* note 68.

agreements entered into two years after the investment was made.[113] Tribunals have said that the reasonableness of the investor's reliance must be evaluated in light of the "political, socioeconomic, cultural and historical conditions prevailing in the host state."[114] More generally, tribunals limit protection to expectations reasonable under the circumstances.[115]

As already noted, some tribunals have referred to these situations as ones in which the investor or investment has a "legitimate expectation" of certain host state conduct. To the extent that the phrase "legitimate expectations" refers to expectations created by host state promises or assurances, the phrase does not exhaust the meaning of the fair and equitable treatment standard because the standard embraces principles other than the security of expectations. Some tribunals have suggested that the legitimate expectations doctrine may provide a basis for establishing the scope of the fair and equitable treatment standard generally.[116] To the extent that the phrase "legitimate expectations" is intended to summarize the entire fair and equitable treatment standard, it provides an inadequate theory of the standard, because it does not answer the question of when legitimate expectations exist in situations where no promises or assurances have been made.[117] Used in

113. Duke Energy Electroquil Partners, ¶¶ 365-66.

114. *Id.* ¶ 340.

115. *See, e.g.,* Saluka Invs. BV v. Czech Republic, Partial Award, ¶ 304 (Perm. Ct. Arb. Mar. 17, 2006), *available at* http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf; Nat'l Grid, ¶ 175.

116. *See, e.g.,* Tecnicas Medioambientales TECMED S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003), 43 I.L.M. 133 (suggesting that failure to follow through on legitimate expectations by either party could constitute a violation of the fair and equitable treatment standard).

117. For example, the tribunal in *Plama v. Bulgaria* used the legitimate expectations doctrine to explain the fair and equitable treatment standard. It found that investors have a legitimate expectation of good faith, due process, nondiscrimination, a stable investment framework, and transparency. *Cf.* Plama Consortium, Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Award, ¶¶ 176-78 (Aug. 27, 2008) (relying upon the underlying importance of such expectations indirectly through discussion of potential misrepresentations, despite the tribunal's withholding final judgment on the merits of this issue), *available at* http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf. This summary in substance is quite similar to the contention made here that the standard embraces principles of reasonableness (which includes good faith), security, nondiscrimination, due process and trans-

that wider sense, the phrase is little more than a label attached to a conclusion reached on other grounds. That is, once a tribunal has concluded that host state conduct violated the standard, the tribunal merely declares that the investor had a legitimate expectation that such conduct would not occur. Such an approach, however, obscures the true grounds of the award. Thus, the legitimate expectations doctrine is best understood as referring to the situation where the consistency principle is breached by host state conduct inconsistent with prior promises or assurances on which the investor relied, rather than as a complete theory of the fair and equitable treatment standard.

A critical distinction in the cases involving the consistency principle exists between inconsistent behavior over time and inconsistent behavior that occurs simultaneously. Tribunals accept that sovereign states are entitled to change their policies over time. Thus, they find a violation for inconsistent behavior over time principally where the host state has made a commitment to the covered investment or investor not to change its policy or has given assurances with respect to the continuity of its policies on which it has induced the investment or investor reasonably to rely, even if no formal contract exists. By contrast, simultaneous inconsistent behavior has been held to violate the standard even in the absence of a commitment or assurance. The distinction between behavior over time and simultaneous behavior is not a sharp one. Consecutive actions by the host state may be found to violate the

parency. The contention here, however, is that these principles are linked because they are elements of the rule of law and thus incorporating each of them into the fair and equitable treatment standard brings coherence to the standard. Used in the manner of the *Plama* award, the legitimate expectations doctrine does not explain on what basis these principles are legitimate expectations, but simply declares them to be so. To that extent, the legitimate expectations doctrine provides greater flexibility for tribunals because it permits them to add new legitimate expectations at any time. Yet, because it functions as nothing more than a post hoc explanation of the award, it adds nothing to the justification for the award. For different approaches to developing a theory of legitimate expectations, see generally Todd J. Grierson-Weiler & Ian A. Laird, *Standards of Treatment, in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 259 (Peter Muchlinski et al. eds., 2008); Elizabeth Snodgrass, *Protecting Investors' Legitimate Expectations—Recognizing and Delimiting a General Principle*, 21 ICSID REV. - FOREIGN INV. L.J. 1 (2006).

standard where they occur within a relatively short period of time, even if they are not actually simultaneous.

1. *Consecutively Inconsistent Actions: Contracts*

The clearest case of a violation is where the host state enters into a contract with the investment or investor and then repudiates the contract. For example, in *Occidental v. Ecuador*,[118] a case arising under the United States-Ecuador BIT,[119] the claimant entered into a participation contract with a state enterprise to undertake oil exploration and production. The claimant regularly applied for, and received, reimbursement of the value added tax paid by the company. Two years later, however, Ecuador suddenly denied all further reimbursements on the ground that the reimbursement already was accounted for in the participation formula in the contract. The tribunal found, however, contrary to Ecuador's interpretation, that the contract did not account for the reimbursement.[120] In changing the tax policy on which the claimant had legitimately relied in negotiating the contract, Ecuador failed to provide the claimant with stability. Rather, the effect of Ecuador's change in tax policy was to modify the terms of the participation contract with the claimant. The tribunal held that Ecuador had violated the fair and equitable treatment standard because "the stability of the legal and business framework is . . . an essential element of fair and equitable treatment."[121]

Ecuador's change in tax policy resulted in a second claim, *EnCana v. Ecuador*,[122] brought under the Canada-Ecuador BIT.[123] The tribunal noted that, under the fair and equitable

118. Occidental Exploration & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN 3467, Award (July 1, 2004), 12 ICSID Rep. 54 (2005).

119. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, *supra* note 68.

120. Occidental Exploration & Prod. Co., ¶ 110.

121. *Id.* ¶ 183; *accord* Duke Energy Electroquil Partners v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, ¶ 339 (Aug. 18, 2008), *available at* http://ita.law.uvic.ca/documents/DukeEcuadorAward_003.pdf; LG&E Energy Corp. v. Arg. Republic, ISCID Case No. ARB/02/1, Decision on Liability, ¶ 125 (Oct. 3, 2006), 46 I.L.M. 36.

122. EnCana Corp. v. Republic of Ecuador, LCIA Case No. UN 3481, Award (Feb. 3, 2006), 45 I.L.M. 901.

123. Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Ecuador, Apr. 29, 1996, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_ecuador.pdf.

treatment standard, "the State must act with reasonable consistency and without arbitrariness in its treatment of investments. One arm of the State cannot finally affirm what another arm denies to the detriment of the investor."[124] Again here, consistency was found to be an element of the fair and equitable treatment standard. Encana, however, had not made this argument and, therefore, the tribunal did not discuss it further.

In *Bayindir v. Pakistan*,[125] a case arising under the Turkey-Pakistan BIT,[126] Pakistan terminated the claimant's highway construction contract purportedly because of delays in completion. The claimant, however, argued that the true reason was the desire to save money and to utilize a local contractor.[127] In its decision on jurisdiction, the tribunal noted that, an "alleged change in its general policy toward Bayindir's investment is capable of constituting a breach of Pakistan's obligations to accord fair and equitable treatment."[128] The determination of whether Pakistan in fact had violated the obligation was deferred to the merits stage; accordingly this decision does not indicate when a host state is entitled to change its policy.

In *Parkerings-Compagniet v. Lithuania*,[129] discussed earlier under the nondiscrimination principle, the tribunal addressed a claim of inconsistency based on a change in local law. The tribunal held that a state has the right to enact, modify, or repeal a law. It then qualified this general rule by noting that a state may not legislate in a manner that is inconsistent with a prior agreement, such as a stabilization clause, or that is unreasonable, unfair, or inequitable.[130] The tribunal went on to note more specifically that an investor has a right to the protection of legitimate expectations that were reasonable in light

124. EnCana Corp., ¶ 158 (internal citation omitted).

125. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005), *available at* http://ita.law.uvic.ca/documents/Bayindr-jurisdiction.pdf.

126. Agreement Concerning the Reciprocal Promotion and Protection of Investments, Pak.-Turk., Mar. 16, 1995, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/pakistan_turkey.pdf.

127. Bayindir, ¶ 158.

128. *Id.* ¶ 241.

129. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), *available at* http://ita.law.uvic.ca/documents/Pakerings.pdf.

130. *Id.* ¶ 332.

of the circumstances.[131] In that case, Lithuania had given no assurances and did not act in any other way to create a reasonable expectation that the law would remain unchanged. At the time, Lithuania was in transition from its status as a part of the Soviet Union to a new status as a candidate for membership in the European Union. Legislative changes thus were likely, and any expectation that the laws would remain unchanged was illegitimate. The tribunal added that the legislative changes, moreover, were not unfair, unreasonable, or inequitable.[132]

In *Bari Bogdanov et al. v. Republic of Moldova,*[133] the text of the Russia-Moldova BIT[134] linked the fair and equitable treatment standard with nondiscrimination, which the tribunal did not find to exist in that case. The tribunal went on to note, however, that the fair and equitable treatment standard should be interpreted in accordance with its ordinary meaning as well as the object and purpose of the BIT and, therefore, "must be interpreted to cover also any conduct that, even if it is in compliance with the national law of the host country and it is not discriminatory, has unjust or unreasonable results."[135] Citing Professor Christoph Schreuer,[136] the tribunal noted that various criteria have been developed to define the standard, including "the principles of transparency and the protection of the investor's legitimate expectations . . . as well as the principle of good faith."[137] The host state had required a privatized company to transfer certain assets to the state in exchange for shares in certain state owned companies, but such shares effectively were of no value. The tribunal found that this conduct violated fair and equitable treatment in that it "negatively affect[ed] the Claimant's legitimate expectations

131. *Id.* ¶ 333.

132. *Id.* ¶ 337.

133. Bogdanov v. Republic of Mold., Award (Arb. Inst. Stockholm Chamber of Commerce, Sept. 22, 2005), *available at* http://ita.law.uvic.ca/documents/Bogdanov-Moldova-22September2005.pdf.

134. Agreement for the Promotion and Mutual Protection of Investments, Mold.-Russ., Mar. 17, 1998, 29 Tratate Internationale 290, *available at* http://investmentclaims.oup.com/pdf/IC-BT200%281998%29DF.pdf.

135. Bogdanov, at 4.2.4.

136. *See generally* Schreuer, *supra* note 21.

137. Bogdanov, at 4.2.4.

of obtaining compensation, even if not necessarily a fully satisfactory compensation."[138]

Some tribunals have observed that a host state's breach of contract violates the fair and equitable treatment standard only where the breach involves the exercise of sovereign power or *puissance publique.*[139] For example, in the *Duke Energy v. Ecuador* case discussed earlier, the tribunal held that breaches of power purchase agreements by a state-owned enterprise, including nonpayment and the improper imposition of penalties and fines, were the type of breaches that an ordinary party to a contract might commit, rather than acts of sovereign power, and thus did not violate the fair and equitable treatment standard.[140] The tribunal also held, however, that where the Ministry of Finance intervened to provide a payment guarantee, the power of the state was engaged and the breach of this guarantee violated the fair and equitable treatment standard.[141]

Tribunals sometimes find no violation where the host state breaches a contract but provides a remedy in its local courts. For example, in *Waste Management v. Mexico*[142] a case arising under the NAFTA,[143] the claimant concluded a contract with the city of Acapulco under which it would collect and dispose of solid waste. Members of the public, however, had opposed the collection program because they were unwilling to pay the fees assessed to finance the program. Eventually, as a result of this opposition, the city ceased to honor its obligations under the contract, including the payments owed to the investment. The tribunal found that the city had failed

138. *Id.*

139. *See, e.g.*, Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Award, ¶ 51 (Dec. 22, 2003), 20 ICSID Rev.—Foreign Inv. L.J. 391 (2005); Impregilo S.p.A. v. Islamic Republic of Pak., ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 268 (Apr. 22, 2005), *available at* http://ita.law.uvic.ca/documents/impregilo-decision.pdf; Duke Energy Electroquil Partners v. Republic of Ecuador, Case No. ARB/04/19, Award, ¶¶ 342-43 (August 18, 2008), *available at* http://ita.law.uvic.ca/documents/DukeEcuadorAward_003.pdf.

140. Duke Engergy Electroquil Partners, ¶¶ 348, 354, 358.

141. *Id.* ¶¶ 359-60, 364.

142. Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), 43 I.L.M. 967.

143. NAFTA, *supra* note 41.

to fulfill its contractual obligations.[144] The tribunal held, however, that no violation of the fair and equitable treatment standard had occurred. The city's conduct was not "wholly arbitrary or . . . grossly unfair."[145] The city's failure of payment was based on a financial crisis it faced and not on any sectoral or local prejudice. The tribunal also observed that nonpayment of a debt would not violate NAFTA article 1105,[146] "provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem."[147] Thus, the tribunal found no violation for breach of contract where the host state provided a remedy for the breach.[148]

Similarly, in *Parkerings-Compagniet v. Lithuania*,[149] analyzed earlier under the reasonableness and nondiscrimination principles, the claimant alleged that the city of Vilnius had unilaterally terminated the parking concession agreement between the city and the claimant's investment. The tribunal noted that "not every breach of an agreement or of domestic law amounts to a violation of the treaty."[150] It did acknowledge that "[u]nder certain limited circumstances, a substantial breach of a contract could constitute a violation of a treaty."[151] The tribunal explained that, in most such cases, however, a determination by local courts whether the contract was breached is necessary.[152] Should the claim then be submitted

144. Waste Mgmt., Inc., ¶ 115.

145. *Id.*

146. Article 1105 of the NAFTA requires treatment in accordance with customary international law, which it defines to include fair and equitable treatment. NAFTA, *supra* note 42.

147. Waste Mgmt., Inc., ¶ 115.

148. The tribunal also considered an allegation by the claimant that the development bank Banobras had failed to provide a guarantee of the investment's monthly income. The tribunal found, however, that Banobras had never agreed to provide any such guarantee. *Id.* ¶¶ 102-03, 139. Although the tribunal did not phrase it in these terms, Banobras had not behaved inconsistently.

149. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), *available at* http://ita.law.uvic.ca/documents/Pakerings.pdf.

150. *Id.* ¶ 315.

151. *Id.* ¶ 316.

152. The tribunal cited *Generation Ukr., Inc. v. Ukr.,* ICSID Case No. ARB/00/9, Award, (Sept. 16, 2003), 44 I.L.M. 404. In that award, however, the tribunal observed that a claimant's failure to seek redress from national au-

to arbitration under a BIT, the issue would be whether the conduct of the local courts violated the BIT rather than whether the alleged breach violated the BIT. The tribunal seemed to say that a contractual breach violates the fair and equitable treatment standard only if the local court's response to the breach constitutes a denial of justice.

The tribunal addressed as well an argument that Lithuania frustrated the claimant's legitimate expectations that it would protect the integrity of the parking concession agreement by failing to disclose the existence of proposals to change the applicable law. The tribunal found, however, that the legal environment was unpredictable and that claimant should have known that change might occur.[153] The record did not indicate that the city was aware of the substance of the proposed modification, and, in any event, the claimant through counsel could have obtained information about the amendment process. The tribunal did seem to acknowledge that Lithuania's conduct may have violated its duty of good faith under the contract and that its failure to disclose might have breached the contract, but the expectation of contract compliance is not necessarily an expectation protected by the fair and equitable treatment standard.[154] The standard does not convert to a treaty violation "each and every" breach of contract for which the claimant has a remedy under local law.[155]

In *Biwater v. Tanzania*,[156] a case discussed earlier under the reasonableness principle, the claimant's investment was awarded a contract to provide water and sewerage services for the city of Dar es Salaam. Although various government agencies were in arrears on their payments the tribunal noted that this was insufficient to violate the fair and equitable treatment

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thorities may be deemed to disqualify a claim of an indirect expropriation through maladministration by the state, not because of a requirement that local remedies be exhausted, but because such a claim is doubtful in the absence of a reasonable effort by the investor to obtain correction. *Id.* § 20.30.

153. Parkerings-Compagniet AS, ¶¶ 335-36.

154. *Id.* ¶¶ 344-45.

155. *Id.* ¶ 344.

156. Biwater Gauff, Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award (July 18, 2008), *available at* http://ita.law.uvic.ca/documents/Biwateraward.pdf. *See supra* text accompanying notes 79-86.

standard. The investment could have brought collection actions in the local courts or even disconnected water service, which had proven effective in at least some cases when it was done.[157] The contract did not include any provisions that would have created a legitimate expectation on the part of the investment that special arrangements would be available to ensure payment of government agency bills. The claimant also alleged that Tanzania failed to adjust the terms of the contract to address changing conditions, but the tribunal found that nothing had created a legitimate expectation of a renegotiation or review of the contract.[158]

2. *Consecutively Inconsistent Actions: Assurances*

Just as an obligation of consistency may arise from a formal contract, it also may arise from a host state's assurances on which the investment or investor reasonably relies. For example, in *CMS v. Argentina,*[159] a case arising under the United States-Argentina BIT,[160] a U.S. company had invested in an Argentine gas transmission company in the process of being privatized. The U.S. investor was induced to invest by an offer memo describing the tariff regime that would apply to the company. The regime included calculations of the tariffs in dollars and certain future adjustments in the tariff amounts. As a result of a financial crisis, however, Argentina modified the tariff regime. It froze the level of the tariffs and ceased calculating them in dollars. Looking at the object and purpose of the treaty, the tribunal held that "fair and equitable treatment is inseparable from stability and predictability."[161] The tribunal explained that

> [i]t is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dis-

157. *Id.* ¶¶ 635-36.

158. *Id.* ¶ 640.

159. CMS Gas Transm. Co. v. Arg. Republic, ICSID Case No. ARB/01/18, Award (May 12, 2005), 44 I.L.M. 1205.

160. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, *supra* note 58.

161. CMS Gas Transm. Co., ¶ 276.

> pensed with altogether when specific commitments to the contrary have been made.[162]

Accordingly, the tribunal found that the change in the tariff regime contrary to commitments in the offer memo violated the fair and equitable treatment standard.[163]

Essentially the same facts arose under the same treaty in *Enron v. Argentina*.[164] Citing *CMS*, the tribunal observed that the legal framework for investment may evolve, but may not be dispensed with. Thus, Argentina's failure to honor its commitments with respect to the tariff regime violated fair and equitable treatment. These facts also underlay the claim in *LG&E v. Argentina*,[165] a case arising under the same BIT, where the tribunal again found Argentina's actions reneging on its commitments with respect to the tariff regime to violate fair and equitable treatment. In *BG Group v. Argentina*,[166] a case arising under the United Kingdom-Argentina BIT,[167] the tribunal reached the same result, also relying on the rationale in *CMS*.[168]

In *National Grid v. Argentina,* another case arising under the United Kingdom-Argentina BIT, the tribunal adopted a unique approach and held that it must take into account the economic crisis that was occurring at the time Argentina adopted the measures of which the claimant complained. In light of those circumstances, the tribunal concluded that Argentina's breach occurred not when the measures were taken, but at the time that the claimant was required to renounce its legal remedies for those measures.[169] In effect, the tribunal seemed to allow the host state a limited privilege to modify its

162. *Id.* ¶ 277.

163. *Id.* ¶ 281.

164. Enron Corp. v. Arg. Republic, ICSID Case No. ARB/01/3, Award (May 15, 2007), *available at* http://ita.law.uvic.ca/documents/Enron-Award.pdf.

165. LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), 46 I.L.M. 36.

166. BG Group, Plc. v. Arg. Republic, UNCITRAL Arb., Award (2007), *available at* http://ita.law.uvic.ca/documents/BG-award_000.pdf.

167. Agreement for the Promotion and Protection of Investments, U.K.-Arg., Dec. 11, 1990, 1765 U.N.T.S. 34.

168. BG Group, Plc., ¶ 239.

169. Nat'l Grid, P.L.C. v. Arg. Republic, UNCITRAL Arb., Award, ¶ 180 (Nov. 3, 2008), *available at* http://ita.law.uvic.ca/documents/NGvArgentina.pdf.

commitments in light of changes in economic circumstances, a conception of the fair and equitable treatment standard that no other tribunal appears to have adopted.

In *CME v. Czech Republic*,[170] a case arising under the Netherlands-Czech Republic BIT,[171] the claimant entered into a joint venture with a Czech company to operate a television station in the Czech Republic. The Czech company possessed the broadcast license, while the claimant brought capital and expertise to the venture. The Czech government initially approved the arrangement. Subsequently, however, after the television station had become successful, the government asserted that the claimant was broadcasting without a license and demanded that the joint venture arrangement be restructured.[172] The restructuring allowed the Czech company to force the claimant out of the venture. The tribunal held that to eviscerate the arrangement upon which the claimant was induced to invest violated the fair and equitable treatment standard.[173] The Czech government had approved the original structure of the joint venture and could not reverse that approval without violating the standard.

The *CME* case was one of two claims brought as a result of the events surrounding the restructuring of the ownership of the television station. Ronald Lauder, the owner of CME, submitted a claim as an investor, *Lauder v. Czech Republic*,[174] under the U.S.-Czech Republic BIT.[175] The tribunal in *Lauder* ruled against the claimant. The *Lauder* tribunal noted that it already had concluded that the host state's conduct had not violated

170. CME Czech Rep. B.V. v. Czech Republic, UNCITRAL Arb., Partial Award (Sept. 13, 2001), *available at* http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf.

171. Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-Czech Rep., Apr. 29, 1991, 2242 U.N.T.S. 205.

172. CME Czech Rep. B.V., ¶¶ 11-21.

173. CME Czech Rep. B.V., ¶ 624.

174. Lauder v. Czech Republic, UNCITRAL Arb., Award (Sept. 3, 2001), 9 ICSID Rep. 66 (2006).

175. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Czechoslovakia, Oct. 22, 1991, S. TREATY DOC. NO. 102-31 (1992). The Czech and Slovak Federal Republic dissolved on January 1, 1993, resulting in the emergence of two new states, the Czech Republic and the Slovak Republic. Each of the two new states succeeded to the BIT signed on October 22 and thus the United States became a party to two identical BITs, one with the Czech Republic and one with the Slovak Republic.

the prohibition on arbitrary and discriminatory conduct in the BIT.[176] More specifically, the actions of the host state had not constituted an effort to target a foreign investor, but had been based on legitimate regulatory concerns that the station was operating in violation of applicable media law.[177] The tribunal next considered whether the conduct of the Czech Republic had been inconsistent. It noted that "[t]here can not be any inconsistent conduct in a regulatory body taking the necessary actions to enforce the law, absent any specific undertaking that it will refrain from doing so."[178] No such undertaking had been given in that case.[179] Thus, both tribunals were willing to find liability for a violation of a prior commitment, but the *CME* tribunal found a sufficient prior commitment in the original approval of the arrangement, while the *Lauder* tribunal did not.

3. *A Finding of No Promises or Assurances*

Tribunals in other cases also have found that the host state made no promises or assurances that were later violated. In *Plama v. Bulgaria*,[180] a case arising under the Energy Charter Treaty,[181] Bulgaria amended its environmental laws, but the tribunal found that no promises or assurances had been made that such laws would not be amended.[182] Similarly, the claimant could not complain about Bulgaria's tax treatment of certain transactions because that treatment was consistent with existing law. Bulgaria had not created any legitimate expectation that the claimant's investment would be treated differently.[183]

176. Lauder, ¶¶ 293-94.

177. *Id.* ¶¶ 263-64.

178. *Id.* ¶ 297.

179. *Id.*

180. Plama Consortium, Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Award (Aug. 27, 2008) *available at* http://ita.law.uvic.ca/documents/PlamaBulgariaAward.pdf

181. Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95.

182. Plama Consortium, Ltd., ¶ 219.

183. *Id.* ¶ 267.

Similarly, in *Jan de Nul v. Egypt*,[184] a case arising under the Belgium-Luxembourg Economic Union-Egypt BIT,[185] the claimant alleged that the Egyptian prime minister had failed to remedy the allegedly improper behavior of the Suez Canal Authority. The tribunal found, however, that no representations had been made regarding the conduct of the prime minister.[186]

In *Saluka Investments v. Czech Republic*, discussed earlier under the nondiscrimination principle, in anticipation of joining the European Union, the Czech Republic modified its banking regulations to bring them into conformity with EU standards. One effect of the change was to increase the difficulty of meeting capital requirements. The investor, however, similar to the investor in the *Parkerings-Campagniet* case, had been aware at the time of investment that the Czech Republic intended to join the European Union and that changes in banking regulations would be necessary. Nothing indicated that the Czech Republic had committed itself not to change its regulations and, under the circumstances, the investor could not reasonably rely on the regulations' remaining unchanged. The claimant also complained about the Czech Republic's failure to remedy deficiencies in its regulations. The investor, however, had been aware of the deficiencies when it invested, and the record revealed no basis for implying a commitment on the part of the Czech Republic to remedy the deficiencies by a particular date.

The tribunal also found an absence of assurances on which the claimant reasonably could have relied in *Continental Casualty v. Argentina*, a case analyzed earlier under the reasonableness principle. In that case, the tribunal noted that the dispute differed from many of those generated by Argentina's economic crisis of 2001-2002. Unlike in those cases, the claimant here had not been induced to invest by specific commitments made directly to the claimant. The tribunal identified a series of factors to be considered in determining

184. Jan de Nul NV v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award (Nov. 6, 2008) *available at* http://ita.law.uvic.ca/documents/JandeNulNVaward.pdf.

185. Agreement on the Encouragement and Reciprocal Protection of Investments, Belg.-Lux.-Egypt, Feb. 28, 1977, 1130 U.N.T.S. 89.

186. Jan de Nul NV, ¶ 263.

when a host state's conduct gives rise to a claim that "reasonable legitimate expectations" have been defeated.[187] For example, specific undertakings are more likely to generate such expectations than general legislative statements. Unilateral modifications of contracts, when such modifications are aimed at obtaining financial resources, should be carefully scrutinized. The fact that conduct is nondiscriminatory and related to the public interest should be taken into account. Applying these factors, the tribunal found that, for the most part, the claimant had no legitimate expectations that were frustrated by Argentina. Argentina's restructuring of certain government-guaranteed loans might have violated the standard, but the restructuring fell within the defense of necessity. The restructuring of certain treasury bills could not be justified by necessity and thus did violate the fair and equitable standard. The tribunal also noted that the restructuring was unreasonable at the time it was undertaken and thus violated the reasonableness principle as well.[188]

In *MCI Power v. Ecuador,*[189] a case also discussed under the reasonableness principle, the tribunal found that the revocation of an operating permit did not violate the standard. The permit authorized the operation of an electrical generation plant, which the investment no longer owned or operated. Thus, the host state's change in revoking the permit did not defeat any entitlement.[190]

4. *When Reliance Is Not Reasonable*

Cases may arise where the host state gives assurances, but where the investment's or investor's reliance upon them is not reasonable. For example, in *International Thunderbird v. Mex-*

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187. Cont'l Cas. Co. v. Arg. Republic, ICSID Case No. ARB/03/9, Award, ¶¶ 260-61 (Sep. 5 2008), *available at* http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf.

188. A discussion on Argentina's actions can be found *supra* note 57 and accompanying text.

189. M.C.I. Power Group LC v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, (July 31, 2007), *available at* http://ita.law.uvic.ca/documents/MCIEcuador.pdf.

190. *Id.* ¶ 154.

ico,[191] a case arising under the NAFTA,[192] the claimant alleged that the government behaved inconsistently by enforcing its anti-gambling laws against the claimant's operation despite having issued a legal opinion that the operation was legal. The tribunal found, however, that the government's opinion was based on the claimant's misrepresentations about the nature of the games it operated. Thus, the claimant could not reasonably rely on the government's legal opinion.[193]

In *Saluka Investments v. Czech Republic*, discussed earlier, the claimant alleged that the Czech government had issued contradictory declarations of policy with respect to its banking sector and, in particular, with respect to whether state aid would be given to banks undergoing privatization. The minister of finance had expressly stated that no state aid would be provided, although subsequently the Czech government had provided aid to three major banks in the process of privatization, but not to the claimant's bank. The claimant conceded, however, that the minister of finance could not bind future governments. The tribunal held, accordingly, that the claimant could not reasonably rely on any such assurances and that the Czech government's failure to adhere to those assurances did not violate the claimant's treaty rights.

5. *Changes in Laws Resulting in a Violation even in the Absence of Assurances*

Thus, the awards recognize the right of a host state to change its law, in the absence of undertakings to the contrary. Yet, circumstances may arise where changes in the law may violate the fair and equitable treatment standard even in the absence of a promise or assurance to the contrary. In *PSEG v. Turkey*,[194] a case arising under the United States-Turkey BIT,[195] the tribunal found that Turkey had violated the fair

191. Int'l Thunderbird Gaming Corp. v. United Mexican States, Award (NAFTA Arb. Trib. Jan. 26, 2006), *available at* http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf.

192. NAFTA, *supra* note 41.

193. Int'l Thunderbird Gaming Corp., ¶ 148.

194. PSEG Global, Inc. v. Republic of Turk., ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), *available at* http://ita.law.uvic.ca/documents/PSEG-Global-Turkey-Award.pdf.

195. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Turk., Dec. 3, 1985, S. TREATY DOC. NO. 99-19 (1986).

and equitable treatment standard by abusing its authority. The specific conduct, however, consisted of various acts involving a change of position by the host state. Turkey had demanded that agreements be renegotiated and that issues already settled be reopened. Administrative agencies had ignored rights granted by law. The tribunal also found a violation in what it termed "roller coaster" changes in the law. This award perhaps is best explained as holding implicitly that investors have a right to rely on reasonable consistency in the law. A host state may change its policy over time, but "roller coaster" changes violate the principle of consistency or security.

6. *Inconsistent Positions Taken Simultaneously*

The consistency principle also may be violated not by changes in the law over time, but by taking inconsistent positions simultaneously. In *MTD Equity v. Chile*,[196] a case arising under the Malaysia-Chile BIT,[197] Chile had induced a Malaysian company to invest in building a planned community. Subsequently, the Malaysian company learned that construction of the community would violate local zoning laws and thus the work could not be performed. The tribunal held that "approval of an investment by the [Chilean Foreign Investment Commission] for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably."[198] As the tribunal explained, Chile has "an obligation to act coherently and apply its policies consistently."[199] Chile had adopted two inconsistent policies simultaneously—encouraging an investment at the national level that it simultaneously forbade at the local level—and thereby violated the consistency principle.

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196. MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, (May 25, 2004), 12 ICSID Rep. 6 (2007).

197. Convention for the Promotion and Protection of Investments, Malay.-Chile, Nov. 11, 1992, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/chile_malasia_sp.pdf.

198. MTD Equity Sdn. Bhd., ¶ 166.

199. *Id.* ¶ 165.

In *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*,[200] a case arising under the Switzerland-Philippines BIT,[201] the tribunal observed, in its decision on jurisdiction, that "an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues" under the fair and equitable treatment standard. The potential inconsistency here was in acknowledging a debt but declining to pay it.[202] As in *MTD Equity*, the host state was taking two inconsistent positions simultaneously. Alternatively, the case can be conceptualized as involving a change in position contrary to prior assurances. The host state incurred a debt obligation, but subsequently refused to act consistently with the promise of payment. The claimant had a legitimate expectation based on host state assurances that the host state would pay its debt.[203]

In *Saluka Investments*, discussed above, the claimant complained that the Czech government had made conflicting statements in dealing with the claimant's efforts to save its bank. Here, the tribunal found a violation of the fair and equitable treatment standard.[204] Like Chile in *MTD Equity*, the host state had taken inconsistent positions simultaneously.

D. *Transparency*

The transparency principle may be the most conceptually troubled element of the fair and equitable treatment standard. Several tribunals have regarded the fair and equitable treatment standard as requiring transparency, but no rule that describes the extent of transparency required has emerged.

In any event, a few awards have found violations of the fair and equitable treatment standard where the state did not disclose the rules to be applied, whether substantive or procedural, or where the state failed to disclose the reasons for mea-

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200. SGS Société Générale de Surveillance S.A. v. Republic of Phil., ICSID Case No. ARB/02/6, Objections to Jurisdiction (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

201. Agreement on the Promotion and Reciprocal Protection of Investments, Switz.-Phil., Mar. 31, 1997.

202. SGS Société Générale de Surveillance S.A., ¶ 162.

203. *Id.* ¶ 127.

204. Saluka Invs. BV v. Czech Republic, Partial Award, ¶ 419 (Perm. Ct. Arb. Mar. 17, 2006), *available at* http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf.

sures that it had taken or declined to take. Thus, the transparency principle applies not only to host state law, but to host state policy. With respect to policy disclosures, the transparency principle does not seem to require disclosure of internal deliberations, but has been violated where a government refused to disclose its policy once the policy had been adopted. Finally, at least one award has found a violation of the standard where the host state failed to allow access to information needed by the claimant to prosecute an appeal.[205] Presumably because host state laws are more readily accessible than host state policies, claimants have succeeded more often with claims based on nondisclosure of policies than nondisclosure of laws, although the awards are insufficiently numerous to draw any firm conclusions.

In a typical case, the claimant alleges that the host state did not adequately disclose its laws or its policies. Awards in favor of the claimant, however, generally have been issued only where one, and usually both, of the following factors is present: (1) the host state failed to make material disclosures during discussions with the claimant; or (2) the host state's conduct also violated other principles, and thus the lack of transparency was not the sole basis for finding a violation of the fair and equitable treatment standard.

In *MTD Equity v. Chile*,[206] the tribunal held, as discussed earlier, that Chile's inconsistent conduct violated the fair and equitable treatment standard. Alternatively, the tribunal held that the lack of transparency also violated the standard. At the time that Chile induced the investors to invest, it had not disclosed that the project would violate local law. In effect, had Chile disclosed this circumstance, the investor could have made an informed decision whether to invest in light of the risk that the required local approval would not be received.[207] That is, Chile could have complied with the BIT in either of two ways: by having a consistent policy or by disclosing its in-

205. Siemens A.G. v. Arg. Republic, ICSID Case No. ARB/02/8, Award, ¶ 308 (Feb. 6, 2007), *available at* http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf.

206. MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, (May 25, 2004), 12 ICSID Rep. 6 (2007).

207. *Id.* ¶ 163.

consistent policy. Chile did neither and thus violated the fair and equitable treatment standard.

By contrast, in *Parkerings-Compagniet v. Lithuania,*[208] a case arising under the Norway-Lithuania BIT,[209] the tribunal rejected a claim that the BIT was violated by the host state's failure to disclose its intention to modify local law in ways that would adversely affect the claimant's investment. The tribunal explained that the claimant should have known that the legal situation was changing in Lithuania because of the transitional nature of the economy, and that the claimant could have retained local counsel to advise it about the amendment process.[210] The tribunal contrasted this situation before it with the situation, such as in *MTD Equity,* where the state "made assurances or representation [sic] that the investors took into account in making the investment."[211]

In *Champion Trading v. Egypt,*[212] a case arising under the United States-Egypt BIT,[213] Egypt entered into a series of agreements to provide financial assistance to certain companies in Egypt's troubled cotton industry, but did not include the claimants in these settlements. The claimants originally asserted that these agreements violated the fair and equitable treatment standard, but abandoned that claim in favor of an argument that the agreements violated the principle of transparency under international law.[214] The claimants' authority for the existence of a principle of transparency was a WTO case[215] unrelated to the protection of foreign investment and

208. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), *available at* http://ita.law.uvic.ca/documents/Pakerings.pdf

209. Agreement on the Promotion and Mutual Protection of Investments, *supra* note 55.

210. Parkerings-Compagniet AS, ¶ 342.

211. *Id.* ¶ 331.

212. Champion Trading Co. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award (Oct. 27, 2006), *available at* http://ita.law.uvic.ca/documents/Championaward_000.pdf.

213. Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, U.S.-Egypt, S. TREATY DOC. NO. 99-24 (1986).

214. Champion Trading Co., ¶ 104.

215. U.S. – Restrictions on Imports of Cotton and Man-made Fibre Underwear, (WT/DS24/AB/R), Feb. 10, 1997.

the *Tecmed* decision, discussed below.[216] As will be seen, *Tecmed* had based the requirement of transparency on the fair and equitable treatment standard. Thus, the claimants in *Champion Trading* ultimately were relying on the requirement of fair and equitable treatment. The tribunal acknowledged the existence of a transparency principle, but found that the claimants "were in a position to know beforehand all rules and regulations that would govern their investments for the respective season to come."[217]

The award in *Tecmed v. Mexico,*[218] a case arising under the Spain-Mexico BIT,[219] was based on a failure to disclose host state policy. In that case, Mexican officials decided, largely because of community opposition, not to renew a permit held by the claimant's investment to operate a landfill. Mexican officials and the investment had engaged in lengthy discussions concerning the possible relocation of the landfill. Yet, throughout all of these discussions, the officials never revealed that they already had decided not to renew the permit.[220] The tribunal found that Mexico's lack of transparency about its true intentions and the real basis upon which renewal of the permit depended violated the fair and equitable treatment standard.[221]

The *Saluka Investments v. Czech Republic* case, discussed earlier under the nondiscrimination and consistency principle, similarly involved a lack of disclosure.[222] The government had refused to discuss with the claimant its reasons for treating the claimant's investment in a discriminatory manner. The tribunal found this refusal to disclose the rationale for its conduct to violate fair and equitable treatment.[223]

216. *See* text *infra* at notes 218-221. As will be seen, Tecmed had based the requirement of transparency on the fair and equitable treatment standard.

217. Champion Trading Co., ¶ 164.

218. Tecnicas Medioambientales TECMED S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 43 I.L.M. 133.

219. Agreement for the Promotion and Reciprocal Protection of Investments, Spain-Mex., Oct. 10, 2006.

220. Tecnicas Medioambientales TECMED S.A., ¶ 215.

221. *Id.* ¶ 164.

222. Saluka Invs. BV v. Czech Republic, Partial Award, ¶ 407 (Perm. Ct. Arb. Mar. 17, 2006), *available at* http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf.

223. *Id.*

One case involved in part a denial of access to documents. In *Siemens v. Argentina*, a case arising under the Germany-Argentina BIT, Argentina awarded a contract to the claimant's investment to provide certain information technology services.[224] Subsequently, Argentina suspended the contract, refused to pay for work performed, and advanced unsupported arguments to justify the delay. After terminating the contract, Argentina denied the investment access to the administrative file so that an appeal could be filed. The tribunal held that this conduct demonstrated a "lack of transparency . . . particularly when Argentina itself has manifested in these proceedings that at no time had it affirmed that the Contract was rescinded due to the Contractor's fault."[225]

In *PSEG v. Turkey*,[226] a case discussed earlier under the consistency principle, the tribunal held that Turkey's "negligence" in handling negotiations with the claimants violated the fair and equitable treatment obligation.[227] Turkey had failed during negotiations to disclose points of disagreement or to respond to important communications. The tribunal referred to "a cumulative lack of transparency that, short of bad faith, comes at the very least close to negligence."[228] Although the tribunal used the term "negligence," that does not seem to have been critical to the decision. Rather, the decision seemed to rest on the lack of transparency.

In *Maffezini v. Spain*,[229] a case arising under the Argentina-Spain BIT,[230] an official whose conduct was attributable to Spain transferred money from the claimant's bank account without his prior knowledge or approval. The tribunal held that this conduct violated the transparency principle of the fair

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224. Siemens A.G. v. Arg. Republic, ICSID Case No. ARB/02/8, Award, ¶ 84 (Feb. 6, 2007), *available at* http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf.

225. *Id.* ¶ 308.

226. PSEG Global, Inc. v. Republic of Turk., ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), *available at* http://ita.law.uvic.ca/documents/PSEG-Global-Turkey-Award.pdf.

227. *Id.* ¶ 246.

228. *Id.* ¶ 174.

229. Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000), 5 ICSID Rep. 419 (2002).

230. Agreement for the Reciprocal Promotion and Protection of Investments, Arg.-Spain, Oct. 3, 1991, 1699 U.N.T.S. 202.

and equitable treatment standard.[231] The decision is puzzling because it would seem that the real basis for objection was not a violation of transparency, but of the security principle. The government, in effect, had seized the claimant's property. The lack of transparency with which it was done would seem an aggravating factor, but the seizure presumably still would have been wrongful even if the government had disclosed it.

In one case, the tribunal found a violation of the transparency principle, but the award was set aside on the ground that international law, including the fair and equitable treatment standard, does not include a transparency principle. In *Metalclad v. Mexico*,[232] a case arising under the NAFTA,[233] the state of San Luis Potosi denied to the claimant's investment a construction permit needed to operate a hazardous waste disposal site. The claimant had invested based on assurances that the site had been approved, but then subsequently was told that a construction permit would be necessary. The permit ultimately was denied at a meeting of which the claimant received no notice. Thus, Mexico failed to provide transparency with respect to the rules to be applied or the process by which the rules were to be applied. The tribunal found this lack of transparency to violate the fair and equitable treatment standard. This portion of the award subsequently was set aside by the British Columbia Supreme Court, which held that transparency is not an element of customary international law.[234] Because the NAFTA explicitly provides that the fair and equitable treatment standard is part of customary law, transparency could not be an element of that standard either, according to the court. As this section has demonstrated, however, the set aside decision is not consistent with the body of arbitral awards.

231. Maffezini, ¶ 83.

232. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 5 ICSID Rep. 212 (2002).

233. NAFTA, *supra* note 41.

234. United Mexican States v. Metalclad Corp., [2001] B.C.T.C. 664, para. 68 (Can.). The *Metalclad* case was decided under the NAFTA, in which fair and equitable treatment is regarded as a component of customary international law and not a treaty-based standard. Thus, the decision of the British Columbia Supreme Court was addressing the content of customary international law, not a treaty-based standard.

E. *Due Process*

The fair and equitable treatment standard also has been held to require due process, and thus to prohibit a denial of justice.[235] For example, in *Middle East Cement v. Egypt*,[236] a case arising under the Greece-Egypt BIT,[237] the host state seized and auctioned the claimant's vessel without prior notice to the claimant. The tribunal found that this taking of the claimant's property was not in accordance with due process of law and therefore violated the fair and equitable treatment standard.[238]

Although numerous tribunals have recognized that a denial of justice violates the fair and equitable treatment standard, to date no claimant has been successful in raising a denial of justice claim under a BIT. For example, in *Azinian v. Mexico*,[239] a case arising under the NAFTA,[240] the city of Naucalpan de Juarez terminated a contract with the claimant's company because of alleged failures to perform, as well as misrepresentations concerning the company's capacity to perform. When the termination was challenged in the Mexican courts, it was upheld. The claimant did not actually allege a denial of justice by Mexican courts. To avoid any suggestion, however, that the claimant's failure to prevail was based merely on an error of pleading, the tribunal elected to consider whether the claimant could have established a denial of justice by the Mexican courts. The tribunal explained that

> [a] denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to

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235. *See, e.g.,* Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), 43 I.L.M. 967; Jan de Nul NV v. Egypt, ICSID Case No. ARB/04/13, Award, ¶ 187 (Nov. 6, 2008), *available at* http://ita.law.uvic.ca/documents/JandeNulNVaward.pdf; AMTO LLC v. Ukraine, SCC Case No. 080/2005, Award, ¶ 75, (Mar. 26, 2008), *available at* http://ita.law.uvic.ca/documents/AmtoAward.pdf.

236. Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, (Apr. 12, 2002), 7 ICSID Rep. 173 (2005).

237. Agreement for the Promotion and Reciprocal Protection of Investments, Greece-Egypt, July 16, 1993, 1895 U.N.T.S. 173.

238. Middle East Cement Shipping, ¶ 143.

239. Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), 39 I.L.M. 537.

240. NAFTA, *supra* note 41.

> undue delay, or if they administer justice in a seriously inadequate way. . . . There is a fourth type of denial of justice, namely, the clear and malicious application of the law.[241]

In applying this standard, the tribunal was not to act as a court of appeal. "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA."[242]

The tribunal then inquired whether the decision of the Mexican courts constituted a "clear and malicious misapplication of the law."[243] The tribunal found that the misrepresentations concerning the company's capacity to perform were adequate grounds for termination of the contract under Mexican law, and thus there was no misapplication of the law. Accordingly, the tribunal found no denial of justice.

In *Mondev v. United States*,[244] another case arising under the NAFTA,[245] the Boston Redevelopment Authority terminated a contract with the claimant's company to perform urban redevelopment work. When the company sued the authority in Massachusetts state courts, the courts ruled against the claimant, which appealed the decision to the Massachusetts Supreme Judicial Court and lost before that court as well. In considering whether the decision of the Massachusetts courts constituted a denial of justice, the tribunal cited the language quoted above from the *Azinian* case describing the four types of denial of justice.[246] The tribunal then noted that the International Court of Justice in its judgment in the *ELSI* case had defined arbitrariness as "a wilful disregard of due process of law . . . which shocks, or at least surprises, a sense of judicial propriety" and found that language a useful standard for eval-

241. Azinian, ¶¶ 102-03.

242. *Id.* ¶ 99.

243. *Id.* ¶ 103.

244. Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), 42 I.L.M. 85.

245. NAFTA, *supra* note 41.

246. Mondev Int'l Ltd., ¶ 126.

uating denial of justice claims.[247] The tribunal next observed that

> [t]he test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.[248]

The tribunal acknowledged that the standard was "somewhat open-ended," but thought that perhaps no more precise formula could be offered to cover the full range of possibilities.[249] The claimant alleged four grounds on which the decision of the Massachusetts courts constituted a denial of justice. Three of them related to allegations that the court had applied new law or had misapplied procedural law. The tribunal found the supposed new law to be within the limits of common law adjudication and the procedural issues to be within the discretion of the local courts. The fourth ground was that the Massachusetts courts had held that the public authorities possessed immunity from claims of tortious interference with contractual relations. This, within broad limits, was a matter for each state to decide, and the tribunal was unpersuaded that the decision in this case constituted a denial of justice.

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247. Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), 1989 I.C.J. 15, ¶ 128 (July 20).
248. Mondev Int'l Ltd., ¶ 127.
249. *Id.*

In *Loewen v. United States*,[250] yet another case arising under the NAFTA,[251] the claimants alleged that a state court jury trial in Mississippi in which one of them was the defendant had been tainted by appeals to local favoritism against a foreign party. The tribunal began by quoting the definition of arbitrariness from the *ELSI* case also quoted in *Mondev*.[252] It then explained that

> [n]either State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough.[253]

The tribunal held that a decision that is both in breach of municipal law and discriminatory against a foreign litigant constitutes a manifest injustice.[254] The claim, however, ultimately was denied because the tribunal held that a denial of justice exists only where the claimant has exhausted its local remedies,[255] including the pursuit of available appeals, and the claimants had not appealed.

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250. Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award (June 25, 2003), 42 I.L.M. 811.

251. NAFTA, *supra* note 41.

252. Loewen Group, Inc., ¶ 131 (quoting Elettronica Sicula, 1989 I.C.J. 15, ¶ 128).

253. *Id.* ¶ 132.

254. *Id.* ¶ 135.

255. *Id.* ¶ 137. *See also* Saipem S.p.A. v. People's Republic of Bangl., ICSID Case No. ARB/05/07, Decision on Jurisdiction, ¶ 151 (Mar. 21, 2007), *available at* http://ita.law.uvic.ca/documents/Saipem-Bangladesh-Jurisdiction.pdf; Chevron Corp. v. Republic of Ecuador, UNCITRAL Arb., Interim Award, ¶ 235 (Dec. 1, 2008) *available at* http://ita.law.uvic.ca/documents/Chevron-TexacovEcuadorInterimAward.pdf; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 252 (Nov. 14, 2005), *available at* http://ita.law.uvic.ca/documents/Bayindr-jurisdiction.pdf; Jan de Nul NV v. Egypt, ICSID Case No. ARB/04/13, Award, ¶¶ 256-58, (Nov. 6, 2008), *available at* http://ita.law.uvic.ca/documents/JandeNulNVaward.pdf (noting that exhaustion is not required for a claim based on excessive delay or where no effective remedy in local courts exists).

In *Waste Management v. Mexico*,[256] analyzed above under the consistency principle, the claimant's company had sought to arbitrate its contract dispute with the city of Acapulco. The city refused to advance its share of the costs of arbitration, and the claimant's company, unwilling to bear the entire cost on its own, discontinued the arbitral proceedings. The tribunal found no wrongful conduct in Mexico's refusal to advance the costs.[257] The claimant's company also had filed two separate legal actions in Mexican courts against the bank that had opened a line of credit to secure the contract payments, but it was unsuccessful in both actions. The tribunal found that the decisions of the Mexican courts were not arbitrary, unjust, or idiosyncratic. Rather, the decisions had been reasoned and prompt. Accordingly, there was no denial of justice.[258]

The claimant also alleged that the city's litigation strategy amounted to a denial of justice. The tribunal observed that it is not unusual for litigants to be difficult and obstructive, but that a litigant cannot commit a denial of justice unless its improper conduct is endorsed by the court or the law gives it some extraordinary privilege that results in a lack of due process. The tribunal found no such circumstances in that case. Contrasting its case with the *Loewen* case, the tribunal noted that there was no evidence of discrimination, bias on grounds of sectional or local prejudice, or clear failure of due process.

In *Jan de Nul v. Egypt*, a case arising under the Belgium-Luxembourg Economic Union-Egypt BIT,[259] the tribunal adopted the language quoted above from *Loewen*[260] and *Mondev*.[261] It held that a local court's decision to join two claims related to the same contract, where not done for dilatory purposes, did not constitute a denial of justice. The fact that the court's fifteen-page written opinion was "fairly short," given that the proceedings had taken ten years to complete,

256. Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), 43 I.L.M. 967.

257. *Id.* ¶ 123.

258. *Id.* ¶ 130.

259. Agreement on the Encouragement and Reciprocal Protection of Investments, *supra* note 185.

260. Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award (June 25, 2003), 42 I.L.M. 811.

261. Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), 42 I.L.M. 85.

also did not amount to a denial of justice.[262] The appointment of a second panel of experts after a first panel had made findings unfavorable to the state similarly did not constitute a denial of justice. The decision to appoint a second panel was not arbitrary in light of deficiencies in the first panel's report and the claimant was given an opportunity to argue its position with respect to the appointment.[263] The fact that the court allowed ten years to pass before issuing a judgment was not a denial of justice in light of the complex and technical nature of the dispute. The claimant's allegation that the second panel of experts acted in excess of its authority could not constitute a denial of justice because a tribunal will not review "the scope of the jurisdiction of national authorities or the application of the law" in the absence of discrimination or severe impropriety, neither of which was present in that case.[264] The ruling of the court did not evidence discrimination or a malicious misapplication of the law, and the tribunal would not act as a court of appeal.

In *LLC AMTO v. Ukraine*,[265] a case arising under the Energy Charter Treaty,[266] the claimant alleged a denial of justice in six bankruptcy proceedings against its investment's debtor, none of which resulted in collection of the debt. The tribunal adopted as the standard for denial of justice the language from *Mondev* quoted above.[267] The claimant was precluded from participating in three bankruptcy proceedings because it never received notice, but providing notice was the obligation of the applicant, not the court, and thus no denial of justice occurred. In any event, the claimant's remedy was to initiate its own proceeding, which it did. In that proceeding, the parties were properly heard and the decision was rendered without undue delay. Although the claimant alleged that the court's ruling incorrectly applied the law, the tribunal held that it would not act as a court of appeal.[268] After this fourth

262. Jan de Nul NV, ¶ 199.
263. *Id.* ¶ 201.
264. *Id.* ¶ 206.
265. AMTO LLC v. Ukraine, SCC Case No. 080/2005, Award, (Mar. 26, 2008), *available at* http://ita.law.uvic.ca/documents/AmtoAward.pdf.
266. Energy Charter Treaty, *supra* note 181.
267. AMTO, ¶ 76 (citing Mondev Int'l Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, ¶ 127 (Oct. 11, 2002), 42 I.L.M. 85).
268. AMTO, ¶ 80.

proceeding did not result in payment of the debt, the investment initiated a fifth proceeding. The court ruled against the investment, but this ruling was overturned on appeal. Ultimately the fifth proceeding was consolidated with a sixth proceeding, initiated by another creditor, and any errors with respect to the fifth proceeding were rectified by the Ukrainian court system. The sixth proceeding also ended without payment, but the tribunal found no improper conduct or excessive delay. The tribunal also found no evidence that the courts were improperly influenced by a legislative resolution that the claimant alleged was intended as a signal to the court to rule adversely to the claimant's investment. The resolution affected a number of other enterprises as well as the claimant's investment and was not relied upon by the courts. Its issuance during the bankruptcy proceedings was merely coincidental. Other legislation that affected the bankruptcy proceedings was *bona fide* regulatory legislation the enactment of which did not coincide with any significant date in the bankruptcy proceedings and that may actually have been beneficial to the investment's attempts to obtain payment.

In *Bayinder v. Pakistan*,[269] a case arising under the Turkey-Pakistan BIT,[270] the claimant argued that it did not receive due process before the Pakistani courts, citing a letter written by one government official to another predicting that Pakistan would prevail in a local court action brought by the claimant against a Pakistani government agency challenging the constitutionality of a contract termination. The tribunal rejected this argument. The claimant also alleged that the lack of independence of the Pakistani judiciary was notorious, but the tribunal found no evidence supporting that allegation.[271]

A denial of justice claim also can be raised with respect to an administrative proceeding. For example, in *International Thunderbird v. Mexico*,[272] a case discussed earlier under the con-

269. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005), *available at* http://ita.law.uvic.ca/documents/Bayindr-jurisdiction.pdf.

270. Agreement Concerning the Reciprocal Promotion and Protection of Investments, *supra* note 126.

271. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S., ¶ 252.

272. Int'l Thunderbird Gaming Corp. v. United Mexican States, Award (NAFTA Arb. Trib. Jan. 26, 2006), *available at* http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf.

sistency principle, the claimant alleged that Mexico had violated article 1105, requiring treatment in accordance with international law, when it determined that the claimant's gaming operation violated Mexican law. The tribunal found that the administrative proceeding at which the claimant's operation was found to be illegal involved no arbitrariness or lack of due process. The claimant was given an opportunity to be heard, and the decision rendered cited both the facts and the law upon which it was based. The claimant also had an opportunity for judicial review of the administrative decision, although the appeal was withdrawn. The tribunal noted, "The administrative due process requirement is lower than that of a judicial process."[273] Although the administrative proceeding may have been affected by some irregularities, they were not "grave enough to shock a sense of judicial propriety" and thereby breach the minimum standard.[274] Accordingly, no denial of justice occurred.

In *Genin v. Estonia*,[275] a case analyzed earlier under the reasonableness principle, the Estonian Banking Supervision Department had revoked the banking license of the claimant's investment, an Estonian bank. The bank was given no notice that its license was in danger of revocation and no opportunity to be heard with respect to the proposed revocation. Further, the revocation was effective immediately, leaving the bank with no opportunity to obtain judicial review of the revocation prior to its public announcement. The tribunal nevertheless found that these procedures, although they invited criticism, conformed to Estonian law and did not constitute a denial of due process.[276]

F. *Good Faith*

In a few instances, tribunals have discussed the concept of good faith in finding a violation of fair and equitable treat-

273. *Id.* ¶ 200.

274. *Id.*

275. Genin v. Estonia, ICSID Case No. ARB/99/2, Award, (June 25, 2001), 17 ICSID Rev. – Foreign Inv. L.J. 395 (2002).

276. *Id.* ¶ 365.

ment. Certainly, the obligation of good faith could be regarded as an element of the rule of law.[277]

Yet it is rare that the concept of good faith adds anything to the principle of reasonableness or the other principles embraced within the fair and equitable treatment standard. Indeed, the tribunal in *ADF Group v. United States*,[278] a case arising under the NAFTA,[279] observed that the concept of good faith was of "negligible assistance" in interpreting the standard of fair and equitable treatment.[280] No award in favor of a claimant rests solely on the good faith principle, and it is clear that a violation of the fair and equitable treatment standard does not require bad faith.[281] Thus, in the interest of parsimony, good faith has not been treated here as a core principle of the fair and equitable treatment standard.

Illustrative of the role of good faith is the award in *Tecmed v. Mexico*,[282] a case analyzed earlier under the transparency principle. In that case, Mexico denied to the claimant's investment the renewal of a permit necessary to operate its solid waste disposal facility. The reason for the denial appeared to be pressure from the community to eliminate the facility. The tribunal found that the denial of the permit was either a coercive attempt to force relocation of the facility or a nontransparent attempt to achieve some other undisclosed objective.[283]

277. As the International Court of Justice has observed, "[t]he principle of good faith is . . . one of the basic principles governing the creation and performance of legal obligations." Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69, ¶ 94 (Dec. 20) (internal quotation omitted).

278. ADF Grp., v. United States, ICSID Case No. ARB(AF)/00/1, Award, (Jan. 9, 2003), 6 ICSID Rep. 470 (2004).

279. NAFTA, *supra* note 41.

280. ADF Grp., ¶ 191.

281. *See supra* text accompanying note 48 (listing cases which do not require bad faith to find a violation of the fair and equitable treatment standard).

282. Tecnicas Medioambientales TECMED S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, (May 29, 2003), 43 I.L.M. 133.

283. The reference to coercion in the *Tecmed* award is potentially misleading. States are by their nature coercive institutions. The law is coercive, and the rule of law necessitates that individuals be forced to abide by the law. Thus, a host state does not violate the fair and equitable treatment standard merely by coercing an investor or an investment. The rule of law, however, while it coerces individuals, also restrains the power of the state. The state must use its power to advance its legitimate regulatory objectives. Accord-

The tribunal held that the denial violated the obligation of good faith, which, it said, requires reasonableness, consistency and transparency. That is, "in light of the good faith principle," the fair and equitable treatment standard requires the host state

> [t]o 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 plant its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved there under, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive

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ingly, the violation occurs where the coercion is not related to a legitimate state regulatory objective. For example, in *Pope & Talbot v. Canada,* Award on the Merits of Phase 2 (NAFRA Arb. Apr. 10, 2001), 7 ICSID Rep. 102 (2005), the tribunal found a violation of the fair and equitable treatment standard where Canada had engaged in a campaign of harassment against the claimant. The campaign included burdensome demands for information and threats of criminal prosecution. *Id.* ¶¶ 18-29. Host states may legitimately require investors to provide information, and they may pose the threat of criminal sanctions. The violation occurred, however, because these actions were taken for retaliatory purposes rather than to further legitimate regulatory objectives. *Id.*

the investor of its investment without the required compensation.[284]

Thus, in *Tecmed* the obligation of good faith, as the *ADF Group* tribunal predicted, seems to add little. Rather, the term was used as a collective for other principles that are already embraced within the fair and equitable treatment standard.

The tribunal in *Sempra Energy v. Argentina*,[285] a case arising under the United States-Argentina BIT,[286] referred to the principle of good faith as "the common guiding beacon that will orient the understanding and interpretation" of the obligation of fair and equitable treatment.[287] The tribunal held that the essence of the protection provided by the clause was against treatment that would affect the investor's basic expectations in making the investment. In that case, Argentina had refused to honor the terms of the concession agreement it signed with the investment, adopting measures that changed the manner in which tariffs were set. The tribunal found that this was a substantial change in the legal framework of the investment, violating the fair and equitable treatment standard.[288] Although the tribunal regarded the underlying principle as one of good faith, in this case the good faith principle appears to add nothing to the principle of consistency.

In *Siemens v. Argentina*,[289] a case discussed earlier under the transparency principle, Argentina had entered into a contract with the claimant's investment to provide information technology services. The nature of the services required that Argentina conclude agreements with provincial governments. When Argentina subsequently suspended the contract, one of its justifications was that the structure of the state would not permit it to conclude the necessary provincial agreements.

284. Tecnicas Medioambientales TECMED S.A., ¶ 154.

285. Sempra Energy Int'l v. Arg. Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), *available at* http://ita.law.uvic.ca/documents/SempraAward.pdf.

286. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, *supra* note 58.

287. Sempra Energy Int'l, ¶ 297.

288. *Id.* ¶ 313.

289. Siemens A.G. v. Arg. Republic, ICSID Case No. ARB/02/8, Award (Feb. 6, 2007), *available at* http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf.

The tribunal held that Argentina's lack of good faith violated the fair and equitable treatment doctrine

> The tribunal also finds that when a government awards a contract, which includes among its critical provisions an undertaking of that government to conclude agreements with its provinces, the same government cannot argue that the structure of the State does not permit it to fulfill such undertaking. This runs counter to the principle of good faith underlying fair and equitable treatment.[290]

While Argentina's conduct in failing to conclude agreements necessary to fulfill its commitment to the investor would seem quite clearly to violate a principle of good faith, other BIT principles could be invoked to justify finding a violation of the fair and equitable treatment standard. For example, Argentina's failure to honor its commitment would violate the principle of consistency, that is, the security of the claimant's legitimate expectations. Alternatively, agreeing to do that which cannot be done would seem to violate the principle of reasonableness. The concept of good faith provides an appropriate explanation for the award, but is not essential to it.

In a few awards, the tribunal seemed to believe that the fair and equitable treatment standard included a good faith principle, but found no violation of the principle under the facts of those disputes. For example, in *Waste Management v. Mexico*,[291] discussed above under the reasonableness, consistency, and due process principles, the tribunal observed that a conspiracy by government agencies "without justification to defeat the purposes of an investment agreement" would violate the obligation under article 1105 of the NAFTA "to act in good faith."[292] The claimant had failed to prove the existence of any such conspiracy, however.[293]

In *MCI Power v. Ecuador*, discussed above under the reasonableness and consistency principles, the tribunal held that Ecuador had not acted in bad faith in refusing to sign an arbitration agreement or in refusing to agree with the investor's

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290. *Id.* ¶ 308.

291. Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), 43 I.L.M. 967.

292. *Id.* ¶ 138.

293. *Id.* ¶ 139.

position in a dispute, because Ecuador was under no obligation to do either.[294]

G. *Other Cases*

None of the awards issued through the end of 2008 is inconsistent with the rule of law thesis, although in a few instances tribunals have equated the fair and equitable treatment standard with other standards in a BIT without attempting to articulate any independent content for the fair and equitable treatment standard. They have done so either by holding that a violation of another treaty standard violates the fair and equitable treatment standard or by finding the standard violated by the totality of circumstances, without specifying which circumstances in particular were necessary to finding a violation.

For example, in *ADC v. Hungary*,[295] a case arising under the Cyprus-Hungary BIT,[296] the tribunal found with little discussion that the host state's expropriation of the claimant's investment in a way that violated the expropriation provision of the treaty also violated the fair and equitable treatment standard.[297] In *Wena Hotels v. Egypt*,[298] a case arising under the United Kingdom-Egypt BIT,[299] the tribunal found that Egypt had known of an attempt by certain government officials to seize possession of the claimant's hotels, but took no action to prevent the takeover, to restore the hotels promptly to the claimant, or to impose a substantial punishment on those responsible for the seizure. Egypt's failure to exercise reasonable care to protect foreign investment would constitute a classic example of a violation of the obligation of full protection

294. M.C.I. Power Grp. L.C. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, ¶ 54 (July 31, 2007), *available at* http://ita.law.uvic.ca/documents/MCIEcuador.pdf.

295. ADC Affiliate, Ltd. v. Republic of Hung., ICSID Case No. ARB/03/16, Award (Oct. 2, 2006), *available at* http://ita.law.uvic.ca/documents/ADCvHungaryAward.pdf.

296. Agreement on the Mutual Promotion and Protection of Investments, Cyprus-Hung., May 24, 1989, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/hungary_cyprus.pdf.

297. ADC Affiliate, Ltd., ¶ 290.

298. Wena Hotels, Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), 6 ICSID Rep. 89 (2004).

299. Agreement for the Promotion and Protection of Investments, U.K.-Egypt, June 11, 1975, 1032 U.N.T.S. 31.

and security and, in fact, the tribunal began its discussion by noting that it was addressing the claimant's allegation that Egypt had violated exactly that obligation.[300] Following its discussion of the facts, however, the tribunal concluded that Egypt had violated both the obligation to provide full protection and security and the obligation to provide fair and equitable treatment, without discussing the content of either standard or the relationship between the two.[301] The only cases cited by the tribunal were *American Manufacturing & Trading, Inc. v. Zaire*,[302] and *AAPL v. Sri Lanka*,[303] both of which involved physical destruction of property and neither of which relied upon the fair and equitable treatment standard. The tribunal appears to have concluded that Egypt violated the obligation of full protection and security, an easy decision given the facts found by the tribunal, and that such conduct also violated fair and equitable treatment, but gave no indication of what fair and equitable treatment requires or how that standard is related to the standard of full protection and security.[304]

In *Petrobart v. Kyrgyz Republic*,[305] a case arising under the Energy Charter Treaty,[306] the claimant was a creditor of a state-owned company that produced oil and gas. The state had stripped assets from the company to the detriment of its creditors and had intervened in a judicial proceeding to stay execution of a judgment against the company. The claimant alleged that this conduct violated each sentence of article 10(1) of the Energy Charter treaty, which provides that

> [e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to

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300. Wena Hotels, Ltd., ¶ 79.

301. *Id.* ¶ 95.

302. American Mfg. and Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), 5 ICSID Rep. 11 (2002).

303. Asian Agric. Prods., Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (June 21, 1990), 30 I.L.M. 577.

304. Wena Hotels, Ltd., ¶ 131.

305. Petrobart, Ltd. v. Kyrg. Republic, SCC Case No. 126/2003, Award (Mar. 29, 2005), *available at* http://ita.law.uvic.ca/documents/petrobart_kyrgyz.pdf.

306. Energy Charter Treaty, *supra* note 181.

> make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.[307]

The tribunal declined to analyze the Kyrgyz Republic's actions in relation to each individual element of article 10(1), but noted that "this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments."[308] The tribunal concluded that the actions of the Kyrgyz Republic "failed to accord Petrobart a fair and equitable treatment of its investment to which it was entitled under Article 10(1) of the Treaty."[309] The tribunal thus treated fair and equitable treatment as a collective term for a number of more specific treaty obligations and did not specify which, if any, of those more specific obligations had been violated by the actions of the host state.

The tribunal proceeded in a similar manner in *LLC AMTO v. Ukraine*,[310] a case analyzed earlier under the due process principle. The claimant alleged that the host state violated the treaty by instituting a bankruptcy proceeding in order to collect back taxes from the investment. The tribunal found "no evidence arising from the tax inspection and related bankruptcy proceedings of any unreasonable, disproportionate, arbitrary, or discriminatory conduct, or any breach of [the claim-

307. *Id.* art. 10(1).

308. Petrobart, Ltd., at 76.

309. *Id.*

310. AMTO LLC v. Ukraine, SSC Case No. 080/2005, Award, (Mar. 26, 2008), *available at* http://ita.law.uvic.ca/documents/AmtoAward.pdf.

ant's] legitimate expectations. There was no unfair or inequitable treatment, or any other breach of Article 10(1) ECT."[311]

IV. Conclusion

Tribunals have interpreted fair and equitable treatment to embrace five principles that are elements of the procedural and substantive dimensions of the rule of law: reasonableness, consistency, nondiscrimination, transparency, and due process. While tribunals have interpreted fair and equitable treatment to require treatment consistent with the rule of law the awards have supplied more specific content to these five principles.

The principle of reasonableness requires that host state treatment of covered investment be reasonably related to a legitimate public policy objective. Thus, it is violated by arbitrary conduct, particularly that which is motivated by animus toward the investment or the investor.

The principle of nondiscrimination prohibits discrimination unless it is based on a legitimate public policy objective. That is, while nondiscrimination is treated by tribunals as a principle of fair and equitable treatment, the existing awards have not extended the nondiscrimination principle beyond the reasonableness principle. Rather, the practical significance of the nondiscrimination principle is limited to establishing that nationality is not a legitimate basis for host state conduct.

The principle of consistency permits changes in policy, as long as they are not contrary to commitments made by the government or assurances on which a covered investment or investor reasonably has relied. The principle of consistency also prohibits taking inconsistent positions simultaneously, which may include repeated changes within a short period of time. Consistency thus supplements the principle of reasonableness. Even a reasonable change in policy is prohibited if the investor reasonably relies on promises or assurances that such a shift will not occur.

The principle of transparency has been repeatedly cited, but a coherent theory of this principle has not yet emerged. The principle of transparency is conceptually distinct from

311. *Id.* ¶ 99.

those of reasonableness, nondiscrimination and consistency, although its precise scope remains unclear. Awards in favor of the claimant have been issued in cases where the host state failed to disclose important information to the investor or investment during the course of a negotiation, and usually in cases where the lack of transparency accompanied violations of other principles.

The principle of due process has been repeatedly recognized by tribunals as an element of the fair and equitable treatment standard. Yet, to date, awards have been issued in favor of the claimant under this principle only when the host state provided no judicial review at all. Most claims under the due process principle have alleged a denial of justice, and these all have been unsuccessful.

While the awards applying the fair and equitable treatment standard are explained by the five principles embodied in the concept of the rule of law, these awards have not always given those principles their full potential scope. The principle of consistency in fact permits some inconsistency, while the principle of nondiscrimination permits some discrimination. The principle of transparency rarely has offered a basis for an award in favor of the claimant, except in combination with another principle. The principle of due process similarly has been of little significance to date.

The contours of these principles as they have been developed in the awards perhaps can best be understood by reference to an understanding of the rule of law as resting on the idea of integrity.[312] Integrity requires that action be open and principled.[313] Thus, host state treatment of investment must be reasonable in the sense that it is guided by principle rather than by the identity of the parties involved. Host state treatment of investment violates the idea of integrity when it breaches a commitment or an assurance to the investor, but

312. The concept of law as integrity has been extensively developed by Ronald Dworkin. My use of the concept of integrity, where I rely on a traditional dictionary definition of the term, is not specifically intended to follow Dworkin's, although some commonality exists between them. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

313. The definition of "integrity" in Webster's Dictionary, for example, reflects these two elements. There, the word is defined in terms of adherence to values and of candor. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1174 (3d ed. 1993).

integrity does not require that policies be frozen. It is honesty, not simple stasis, that integrity demands. Discrimination is allowed if principled, not arbitrary. Some degree of transparency is demanded by integrity's call for open and principled conduct.

In short, the existing awards describe fair and equitable treatment in accordance with a broad understanding of the rule of law—an understanding that demands reasonableness, consistency, nondiscrimination, transparency, and due process. The results in the awards, however, can be explained more parsimoniously by a narrower understanding of the rule of law—an understanding that demands open and principled conduct—that demands, in short, that states act with integrity.