Fair and Equitable Treatment: A Key Standard in Investment Treaties

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I. Introduction: Time to Take Stock

It is not clear at this point whether the requirement of fair and equitable treatment forms part of customary law.[1] Nevertheless, in the words of Judge Higgins, "the key terms 'fair and equitable treatment to nationals and companies' . . . are legal terms of art well known in the field of overseas investment protection. . . ."[2] Indeed, in current litigation practice, hardly any lawsuit based on an international investment treaty is filed these days without invocation of the relevant treaty clause requiring fair and equitable treatment.

The almost ubiquitous presence of the clause in recent investment litigation finds its explanation in various reasons. Nearly every claimant or counsel who brings a suit feels tempted to argue that the treatment accorded by the host state was in violation of the standard of fair and equitable treatment. At the least, the invocation is deemed necessary by claimant's lawyers *colorandi causa*, to present a certain flair of an offense to basic notions of justice to its cause. Also, the clause is in its substance closely related to the more specific standards of an indirect expropriation, to a violation of the umbrella clause, or to the standard of national treatment. Whenever one of these standards stands in the foreground of a suit, it appears at this point to be helpful to round out the case and to argue, on an additional basis, in favor of a violation of fair and equitable treatment. Finally, the open-ended language of clauses on fair and equitable treatment gives rise to speculation which assumes that, if only properly argued, it will be possible to identify one or more aspects,

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1. *See* Patrick Juillard, *L'évolution des sources du droit des investissements*, 250 RECUEIL DES COURS 9, at 83, 132 (1994) (arguing that the standard must be considered a principle of general international law, albeit with a minimum substance). *But see* ADF Group, Inc. v. United States, ICSID Case No. ARB(AF)/00/1, 18 ICSID REV. 195, 279 (Jan. 9, 2003) (Feliciano, de Mestral, Lamm, Arbs.). "It may be that, in their current state, neither concordant state practice nor judicial or arbitral caselaw provides convincing substantiation (or, for that matter refutation) of the Investor's position." ADF has argued that current customary law embraces the requirement of fair and equitable treatment. The issue is linked to the debate about the content of both the standard of fair and equitable treatment and of the minimum standard. *Id.*

2. Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803, 858 (Dec. 12) (separate opinion of Judge Higgins).

individually or combined, which may amount to an act of violation. Indeed, a review of some attempts at defining the standard may invite such thinking inasmuch as the approach is so general in nature that the clause may appear to amount to a catch-all provision which may embrace a very broad number of governmental acts.

It will hardly be doubted that efforts to derive juridically operational content of the standard from short-hand definitions of fairness laid down in famous dictionaries will, in view of the circular character of such definitions,[3] not lead very far. However, it does not follow that recourse to the "ordinary meaning" of the term, as required under article 31 of the Vienna Convention on the Law of Treaties,[4] must necessarily become a futile effort.[5] Lawyers and courts, national and international, have always been able to rely on abstract terms and concepts laid down in laws and treaties, and to apply them to the facts presented by the parties. It seems uncontroversial today that the standard is one determined by international law. The existence of a breach of a domestic rule, or the lack of a breach, does not in itself determine whether or not the standard has been violated.[6] The issue is not so clear with respect to the question of whether the breach of another article of an investment treaty was violated or not.[7]

Of course, a degree of caution will be appropriate in the interpretation of the clause so as to avoid implications of a subjective nature not intended by the authors of the clause. Generally, reliance on previous jurisprudence will serve as a useful guide for those authorities which give content to the clause. The difficulty of tribunals constituted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) and other investment tribunals in this respect was simply that no previous body of jurisprudence on the meaning of "fair and equitable" existed, neither for foreign investment law, nor for general international law. However, between the year 2000, beginning with the *Maffezini* decision,[8] and 2004, with *Waste Management II*,[9] a first generation of judicial decisions has been handed down, and it is useful at this point to take stock and to consider the emerging lines and facts of jurisprudence.

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3. For a survey *see* Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BYIL 100, 103 (1999) [hereinafter Vasciannie].

4. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340.

5. *See generally* Hermann Mosler, *General Principles of Law*, *in* 2 ENCYCLOPEDIA OF PUBLIC INT'L LAW, 511, 513 ((Rudolf Bernhardt, ed., 1995). For a judicial method to interpret the concept of equity, *see* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 121 (Feb. 20).

6. *See, e. g., ADF Group*, 18 ICSID REV. at 195; Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002), 42 I.L.M. 85, 106 (Stephen, Crawford, Schwebel, Arbs.).

7. *See*, S.D. Myers v. Canada (Nov. 12, 2000), 40 I.L.M. 1408, 1438, at para 266 (First Partial Award) (Hunter, Chiasson, Schwartz, Arbs.).

> Although (. . .) the Tribunal does not rule out the possibility that there could be circumstances in which a denial of the national treatment provisions of the NAFTA would not necessarily offend the minimum standard provisions, a majority of the Tribunal determines that on the facts of this particular case the breach of article 1102 essentially establishes a breach of article 1105 as well.

8. Maffezini v. Spain, ICSID Case No. ARB/97/7, 16 ICSID REV. 248 (Nov. 13, 2000) (Vicuna, Buergenthal, Wolf, Arbs.).

9. Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3 (Apr. 30, 2004), 43 I.L.M. 967 (2004) (Crawford, Civiletti, Gomez, Arbs.), *available at* www.state.gov/documents/organization/34643.pdf.

II. Origin of the Clause

The origin of the clause seems to date back to the treaty practice of the United States in the period of Treaties on Friendship, Commerce and Navigation (FCN).[10] For instance, article I sec. 1 of the 1954 Treaty between Germany and the United States reads: "Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party and to their property, enterprises and other interests."[11] Subsequent international model drafts for investment treaties have continued to rely on the clause.[12] As is well-known, modern Bilateral Investment Treaties (BIT) are generally characterized by language and rules which is much more specific and tailored to specific issues of foreign investment, whereas FCN's addressed a much broader range of legal concerns. The fact that BITs nevertheless retained the standard should not be seen as accidental against this background. It appears that the authors of the BITs considered that it was desirable to include a general standard, in addition to the specific rules, which would cover such issues and matters relevant for the desirable extent of protection which did not fall under the specific rules.[13]

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10. *See* ROBERT R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 113, 120 (1960). *See also* Vasciannie, *supra* note 3 at 107.

11. Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R.G., 273 U.N.T.S. 4. *See also* Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, 284 U.N.T.S. 110, 114.

12. *See, e.g.*, Hermann Abs & Lord Shawcross, *The Proposed Convention to Protect Private Foreign Investment, A Round Table: Comment on the Draft Convention by its Authors*, 9 J. OF PUB. L. 119 (1960) [hereinafter Abs & Shawcross]. As early as 1948, the Havana Charter for an International Trade Organization called, in article 11(2)(a)(i), for bilateral and multilateral agreements on measures designed "to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another." *See* U.N. CONFERENCE ON TRADE & DEVELOPMENT, INTERNATIONAL INVESTMENT AGREEMENTS: A COMPENDIUM 4 (MULTILATERAL INSTRUMENTS), UNCTAD/DTCI/30 (Vol. I), U.N. Sales No. E.96.II.A.9 (1996) [hereinafter Compendium Vol. I]. In the 1960's, early German and Swiss Bilateral Investment Treaties also relied on the clause, initially on the context of the rules on the transfer of payments (*see* BIT Germany—Malaysia, Dec. 12, 1960, BGBl. 1962, 1064), but starting in 1962 as a general principle of treatment (*see, e.g.*, BIT Germany—Cameroon, June 29, 1962, BGBl. 1963, 991), and Switzerland—Ivory Coast, June 26, 1962, Official Collection (*Amtliche Sammlung*) 1963, 54. Not surprisingly, the 1967 OECD Draft Convention introduced, in article 1, the precise language as the Abs—Shawcross Convention (U.N. CONFERENCE ON TRADE & DEVELOPMENT, INTERNATIONAL INVESTMENT AGREEMENTS: A COMPENDIUM 113 (REGIONAL INSTRUMENTS), UNCTAD/DTCI/30 (Vol. II), U.N. Sales No. E.96.II.A.10 (1996) [hereinafter Compendium Vol. II]. The OECD Draft negotiating Text for a Multilateral Agreement on Investment (MAI) of 1998 contained the following text in its section on investment protection: "1.1 Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. In no case shall a Contracting Party accord treatment less favourable than that required by international law." U.N. CONFERENCE ON TRADE & DEVELOPMENT, INTERNATIONAL INVESTMENT AGREEMENTS: A COMPENDIUM 148 (MULTILATERAL & REGIONAL INSTRUMENTS), UNCTAD/DITE/2 (Vol. IV), U.N. Sales No. E.00.II.D.13 (2000) [hereinafter Compendium Vol. IV].

13. Documents prepared on the multilateral level in the 1970s and 1980s by the developing countries, or under their dominant influence, contained no reference to the standards. *See* Charter of Economic Rights and Duties of States, G.A. 3281, U.N. GAOR, 29th Sess. At 50 (1974);, Asian-African Legal Consultative Committee Revised Draft of Model Agreements for Promotion and Protection of Investments, *reprinted in* U.N. CONFERENCE ON TRADE & DEV., INTERNATIONAL INVESTMENT AGREEMENTS: A COMPENDIUM 115 (REGIONAL INTEGRATION, BILATERAL AND NON-GOVERNMENTAL INSTRUMENTS), UNCTAD/DTCI/30 (Vol. III) (1996) [hereinafter Compendium Vol. III]. The subsequent change in the position of developing states becomes obvious in their bilateral treaty practice containing the standard and, even more, in the adoption of the standard in the 1994 Protocol on Promotion and Protection of Investments coming from States not Parties to

III. The Nature and Function of A Fair and Equitable Treatment Clause: Basic Issues

In its diverse manifestations, the standard of fair and equitable treatment may address manifold types of governmental actions inherently investment-deterring which more specific rules are unsuitable to address. While this is true in principle for all clauses on fair and equitable treatment, generalizations about the standard must be formulated with caution. As with most other standard clauses in investment treaties, no single frozen version exists. Indeed, the variations in this area have been considered to be quite significant,[14] and every type of clause has to be interpreted, in accordance with article 31 of the Vienna Convention on the Law of Treaties, duly taking into account its context, and as appropriate, its history. Some treaties simply prescribe "fair and equitable treatment"; German, Dutch, Swedish and Swiss BITs generally follow this pattern. Others consider the standard as one element of the general rules of international law. France, the United Kingdom, the United States, and, more recently, Canada have followed this approach. Also, article 1105 of NAFTA reads "[e]ach 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."[15] A third version lists fair and equitable treatment side by side with the rules of international law, and some treaties state that fair and equitable treatment must in no case provide for less protection than the rules of international law.

Essentially, the purpose of the clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties.[16] Some treaties even directly tie the clause to the fundamental goal of legal stability. The US-Argentina BIT of 1991, for instance, provides in the preamble that "fair and equitable treatment of investment is desirable in order to maintain a stable framework."[17]

MERCOSUR, *reprinted in* Compendium Vol. II, *supra* note 12 at 527. During earlier decades, the insistence on the Calvo tradition in South America would have stood in the way of such an approach. In between, a 1988 Draft Code of Conduct on Transnational Corporations still seemed to indicate a certain reluctance on the part of developing countries to accept exactly the same language, and the requirement of "fair" treatment had to be placed in brackets. Compendium Vol. I, *supra* note 12 at 712.

14. *See* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 58 (1995); Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 251, 344 (1997).

15. North American Free Trade Agreement, Dec. 8-17, 1992, 32 I.L.M. 605, 639 (entered into force Jan. 1, 1994).

16. *See* also Juillard, *supra* note 1 at 133: ". . . force est de constater que l'imprécision qui affecte des notions telles que le traitement juste et equitable, ou encore la pleine et entière protection et sécurité, ne fait que mettre en lumière l'incapacité où se sont trouvés les Etats à donner un contenu à ces principes."

17. Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, 1991 U.S.T. LEXIS 176, at *11 (entered into force Oct. 20, 1994). Concerning the foundations and nature of the standard of fair and equitable treatment outside of NAFTA, the U.S. State Department has explained its position in 1992 in terms of the standard as a guide to interpretation, as embodying U.S. policy and as replicating European practice and in 2000 as being based on standards found in customary international law. *See* Jack J. Coe, *Fair and Equitable Treatment under NAFTA's Investment Chapter*, AM. SOCIETY OF INT'L LAW PROCEEDINGS OF THE 96TH ANNUAL MTG., 17-19 (Mar. 13-16, 2002). The U.S. Model Treaty of 2004 prescribes, in art. 5, para. 1, 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," adding in para. 21 that this rule "prescribes the customary international law minimum standard of treatment of aliens as the

The systematic location and operation of the clauses in existing investment treaties is reminiscent of general codes in civil law countries which set forth a number of specific rules and complement these with a general clause of good faith as an overarching principle which fills gaps and informs the understanding of specific clauses. Indeed, the substance of the standard of fair and equitable treatment will in large part overlap with the meaning of a good faith clause in its broader setting,[18] with one significant aspect embracing the related notions of *venire contra factum proprium* and estoppel.[19]

One aspect which also deserves attention concerns the question of whether the standard actually contains two standards, namely "fair" and "equitable," with independent meanings of both concepts. While it would not be impossible to argue this way, no evidence of state practice seems to point in this direction. The general assumption so far is, presumably, that "fair and equitable" must be considered to represent a single, unified standard. Indeed, it has been opined that there is no difference between "equitable" and "fair and equitable."[20]

In theory, it would have been possible to understand the requirement of fair and equitable treatment as a short-hand formula for the combined legal effect of all other standards of treatment contained in an investment treaty. For instance, the World Bank Guidelines of 1992 prescribe that each state will extend to investments "fair and equitable treatment according to the standards recommended in [the] Guidelines."[21] The languages of BITs are not based on this pattern, and judicial practice has not reflected such a view of the standard.[22]

A thorny issue in the understanding and the definition of the standard concerns its relationship with other standards and concepts which are contained in BITs or are otherwise deemed relevant for the regime of foreign investment. The generality of the clause easily lends itself to an expansive view of its reach extending to all corners and aspects of an investment setting. At the same time, it is obvious that the clause is not meant to supplant or replace all other segments of an investment treaty.

Thus, an understanding must be developed which both gives meaningful effect to the clause and at the same time respects the independent existence of other standards and concepts.[23]

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minimum standard of treatment to be afforded to covered investments," and that the concept of fair and equitable treatment does not require additional protection and does not create additional substantive rights. To further clarify the scope of art. 5, Annex A defines customary law ("general and consistent practice of States that they follow from a sense of legal obligation"), and also describes the minimum standard to treatment of aliens ("all customary international law principles that protect the economic rights and interests of aliens"). 2004 U.S. Model BIT, *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

18. *See generally* Anthony D'Amato, *Good Faith*, *in* 12 ENCYCLOPEDIA OF PUB. INT'L LAW 599 (Rudolf Bernhardt, ed., 1995).

19. Jorg Paul Müller & Thomas Cottier, *Estoppel*, *in* 2 ENCYCLOPEDIA OF PUB. INT'L LAW 116 (Rudolf Bernhardt, ed., 1995).

20. *See* MARIAN NASH LEICH, 2 CUMULATIVE DIGEST OF U.S. PRACTICE IN INT'L LAW 1981-1988, at 2652 (U.S. Dep't of State Office of the Legal Adviser, 1993).

21. *See* Compendium Vol. I, *supra* note 12 at 247, 248.

22. A Working Paper of the WTO states rather broadly that the standard is considered "to cover the principle of non-discrimination, along with other legal principles related to the treatment of foreign investors, but in a more abstract sense than the standards of MFN and national treatment." WTO Secretariat, *Non-Discrimination Most-Favoured-Nation Treatment and National Treatment*, WT/WGTI/W/118 at 10 (June 4, 2002).

23. One Tribunal considered that the same acts (seizure and auction of an investment) violated the require-

In this context, a key issue concerns the relationship to such standards which are not, or not explicitly, mentioned themselves in investment treaties. The matter has already come to the forefront of litigation and of judgments in deciding whether the notion of transparency is embodied in the standard of fair and equitable treatment. This matter derives its difficulty on the one hand from the conceptual affinity between the two standards ("Can a non-transparent decision be deemed fair and equitable"?) and, on the other hand, the existence of an extensive, independent international debate about not just the necessity but also the extent of transparency as an element of an appropriate investment regime. The Supreme Court of British Columbia in Canada in 2001 considered as invalid that part of the *Metalclad* decision in which the latter assumed that transparency was to serve as a standard by which a NAFTA party should be judged even though the regime on transparency was addressed in a separate part of NAFTA not subject to review by a NAFTA Tribunal.[24] Nevertheless, subsequent tribunals have revisited the point, without discussion of *Metalclad*, and have confirmed that the standard of fair and equitable treatment embodies the requirement of transparency.[25]

Much more attention has been paid to the relationship between the standard of fair and equitable treatment and the concept of a minimum standard which denotes those rules of general international law which a state must always observe in its relations towards aliens.[26]

While it may be argued that a relationship between the two concepts is not self-evident, the issue has come up because the language of some BITs spell out that the concepts have the same meaning ("fair and equitable in accordance with international law"), and the State parties to NAFTA have strictly insisted, in response to judicial rulings to the contrary, that within the NAFTA regime ("treatment in accordance with international law, including fair and equitable treatment"), the two standards must be interpreted so as to have identical content.[27] This position, however, does not answer the question of the relationship outside of NAFTA,[28] because third states are not bound to the NAFTA standard.

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ments both of fair and equitable treatment and of the duty to compensate in case of a measure tantamount to expropriation. *See* Middle East Cement Shipping & Handling Co. S.A. v. Egypt, ICSID Case No. ARB/99/6, 18 ICSID REV. 602 (Apr. 12, 2002) (Böckstiegel, Bernardini, Wallace, Arbs.).

24. "In the present case, however, the Tribunal did not simply interpret the wording of article 1105. Rather, it misstated the applicable law to include transparency obligations and it then made its decision on the basis of the concept of transparency." United Mexican States v. Metalclad Corp., 119 I.L.R. 646, 665, at para. 70 (S. Ct. of B.C. 2001) (Can.).

25. *See* Maffezini v. Spain, ICSID Case No. ARB/97/7, 16 ICSID REV. 248, 274 at para. 83 (Nov. 13, 2000) (Vicuna, Buergenthal, Wolf, Arbs.); Tecnicas Medioambientales TECMED S.A. v. United Mexican States, ICSID Case ARB (AF)/00/2 (May 29, 2003), 43 ILM 133 at paras. 154, 164 (2004); Occidental Exploration and Production Company (OEPC) v. Ecuador, Case No. UN 3467, at para. 185, (London Ct. Int'l Arb. July 1, 2004), *available at* www.asil.org/ilib/OEPC-Ecuador.pdf; Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3 (Apr. 30, 2004), 43 I.L.M. 967 (2004), at para. 98 (Crawford, Civiletti, Gomez, Arbs.), *available at* www.state.gov/documents/organization/34643.pdf.

26. *See* D. Vagts, *Minimum Standard*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 408 (Rudolf Bernhardt, ed, 1997).

27. ADF Group, Inc. v. United States, 18 ICSID REV. 195, 228, 276 (Jan. 9, 2003) (Feliciano, de Mestral, Lamm, Arbs.), Remarkably, the UNCTAD Secretariat has questioned whether the standards are identical. *See* U.N. CONFERENCE ON TRADE & DEVELOPMENT, FAIR AND EQUITABLE TREATMENT 15, UNCTAD/ITE/IIT/11 (Vol. III), U.N. Sales No. E.99.II.D.15 (1999).

28. *See also*, Commentary to the 1967 OECD Draft: "standard required conforms in effect to the "minimum standard" which forms part of customary international law." Abs & Shawcross, *supra* note 12. *But see* OECD, INTERNATIONAL AGREEMENTS RELATING TO INVESTMENT IN DEVELOPING COUNTRIES (1984).

If it is determined, in the light of the specific language of a BIT or otherwise, that the position is the same as for NAFTA, two further issues will have to be addressed before the standard can be given a judicially manageable meaning. Initially, it will have to be recognized that the minimum standard has been described, in abstract but distinct terms, by a ruling of a US-Mexican Commission in 1927 in the *Neer* case[29] which indeed was based on the view that a "minimum standard" will only provide for minimal obligations of the host state and in this sense only provide for minimal protection of the alien. The issue in the context of a contemporary investment treaty is whether the *Neer* ruling on the minimum standard, dealing with the physical security of an alien before 1945, should govern when it comes to the contemporary regime of international law governing foreign investment, be it in the context of customary law or within a treaty. In case it is concluded that a pre-1945 general standard is applicable in principle, the next question would be whether and under which modalities such a standard would have to be applied in an evolutionary manner,[30] in the light of intermediary and contemporary factors.[31]

A recent tendency may be observed to consider the standard as embracing the notions of due process and denial of justice.[32] The 2004 US-Model BIT prescribes: "[The] obligation to provide 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil or administrative proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[33] Presumably, under this view, the standard of fair and equitable treatment incorporates the traditional standard of denial of justice. Practically, the issue is relevant for the interpretation of a freestanding clause on fair and equitable treatment. The International Court of Justice did not address the standard of fair and equitable treatment in *ELSI v. Italy*,[34] nor did it do so in the *Asylum* case.[35] Both cases concerned the standard of arbitrariness.

A central methodological issue for the resolution of these individual questions concerns the process of reasoning by which fact-specific conclusions are drawn from the standard in individual cases. One line of reasoning derives a definition from the essential elements of the standard on the basis of abstract reasoning. A second approach resists an attempt of a broader definition and will decide ad hoc whether a certain conduct satisfies the requirements of the standard. Yet a third approach will attempt to primarily base its decision on

29. L. F. H. Neer & Pauline Neer v. United Mexican States, 4 REP. OF INT'L ARB. AWARDS 60 (1926); AM. J. OF INT. L. 555 (1926). The case addressed a complaint of a widow who considered that the Mexican authorities had failed to properly prosecute the killers of her husband. The oft-repeated passage reads: "[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." *Neer*, at 61-62.

30. For a dynamic-evolutionary interpretation of the concept of "sacred trust," as laid down in 1919, *see, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W. Africa) Nothwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21).

31. *See* Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3 (Apr. 30, 2004), 43 I.L.M. 967 (2004) (Crawford, Civiletti, Gomez, Arbs.), *available at* www.state.gov/documents/organization/34643.pdf; Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002), 42 I.L.M. 85, 85 (Stephen, Crawford, Schwebel, Arbs.); *ADF Group, Inc.*, 18 ICSID REV. at 228.

32. *Waste Mgmt., Inc.*, 43 I.L.M. 967.

33. For the text *see* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

34. Elettronica Sicula S.P.A. (ELSI v. Italy), 1989 I.C.J. 15.

35. 1950 I.C.J. 284 (Nov. 20, 1950).

previous decisions or will build upon relevant precedents by way of analogy or by drawing on the same principle. Obviously, the latter approach was not available to the first tribunals to apply the standard.

IV. Fair and Equitable Treatment: Case Law 2000—2004

A. BIT Jurisprudence

An early ICSID case in which the standard was at least arguably applied, was AMT v. Zaire[36] concerning the Treaty between the United States and Zaire. The treaty linked together "fair and equitable treatment and full protection and security." After incidents of looting, the Tribunal determined that the host state had "manifestly failed to respect the minimum standard required of it by international law."[37] Under classical doctrine, such a case would have been treated in terms of the minimum standard on the level of general international law.[38]

In *Maffezini v. Spain*, dated November 13, 2000,[39] the Tribunal in one sentence linked the standard to requirements of transparency and concluded that the organization of a loan transaction at the expense of the account of the claimant without proper knowledge of the claimant amounted to a violation of the standard.[40] The notion of good faith would have supported the same conclusion.

Genin v. Estonia, dated June 25, 2001,[41] had to apply a BIT which provides for fair and equitable treatment and additionally prescribes that no investment shall be accorded treatment less favorable than that required by international law. Essentially, the *Genin* Tribunal relied on language similar to the *Neer* decision in its understanding of the clause "acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith,"[42] and rejected the claim that certain actions by Estonia amounted to a violation of the standard.

An atmosphere of a jurisprudential crisis surrounded the clause in September 2001, when two tribunals reached different conclusions in the application of two free standing clauses to the same facts.[43]

On the legal side, the *Lauder* Tribunal (Briner, Cutler, Klein) concluded that the standard "is related to the traditional standard of due diligence" and provides a minimum standard

36. Am. Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1 (Feb. 21, 1997), 36 I.L.M. 1531 (1997) (Sucharitkul, Golsong, Mbaye).

37. *Id.* at para. 6.10.

38. *See also* Edwin M. Borchard, Diplomatic Protection of Citizens Abroad (1919).

39. Maffezini v. Spain, ICSID Case No. ARB/97/7, 16 ICSID Rev. 248 (Nov. 13, 2000), (Vicuna, Buergenthal, Wolf, Arbs.).

40. *Id.* at para. 83: "Moreover, the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment in accordance with article 4(1) of the same treaty."

41. Genin v. Estonia, ICSID Case No. ARB/99/2, 17 ICSID Rev. 395, at para. 367 (June 25, 2001) (Fortier, Heth, van den Berg, Arbs.).

42. *Id.*

43. These cases refer to BITs between the United States and Czechoslovakia, and Netherlands and Czechoslovakia. *See* Lauder v. Czech Republic, Sept. 3, 2001, (Final Award), available at http://ita.law.uvic.ca/documents/LauderAward.pdf (last visited Apr. 5, 2005); CME v. Czech Republic, Case T 8735-01 (Svea Ct. App., Sept. 13, 2001) (Swe.), *available at* www.sccinstitute.com/_upload/shared_files/artiklar/toeckiska-republiken.pdf.

forming part of customary law also embracing a prohibition of non-discrimination.[44] The CME Tribunal (Kühn, Schwebel, Hándl) highlighted the significance of the fair and equitable treatment standard: "The obligation of fair and equitable treatment is a specific provision commonly at the heart of investment treaties that may prohibit actions—including State administrative actions—that would otherwise be legal under both domestic and international law."[45]

On the facts, the *Lauder* Tribunal found no inconsistent conduct of the Czech Republic, whereas the *CME* Tribunal concluded that the Czech authority "breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest."[46]

Tecnicas Medioambientales TECMED S.A. v. United Mexican States was decided on May 29, 2003.[47] The relevant BIT between Spain and Mexico provided for "fair and equitable Treatment, according to International Law. . . ."[48]

Initially, the Tribunal (Grigera Naon, Fernandez Rozas, Bernal Verea) explains that this standard is an expression of the bona fide principle recognized in international law and quotes the passage in *Mondev* in which it is said that "[t]o the modern eye, what is unfair and inequitable need not equate with the outrageous or the egregious,"[49] apparently distancing itself from the *Neer* formula.

What follows, by way of setting forth a practical standard of review, is the most extensive explanation of the foundations and the substance of the standard of which the initial key passage reads:

> 154. The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. 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 pre-existing 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.[50]

The Tribunal emphasizes its position that this standard results from an autonomous interpretation of the standard, referring to the ordinary meaning as addressed in article 31

44. Lauder v. Czech Republic, Sept. 3, 2001, (Final Award), available at http://ita.law.uvic.ca/documents/LauderAward.pdf (last visited Apr. 5, 2005).

45. CME v. Czech Republic, Case T 8735-01, at para. 155 (Svea Ct. App., Sept. 13, 2001) (Swe.), *available at* www.sccinstitute.com/_upload/shared_files/artiklar/toeckiska-republiken.pdf.

46. *Id.* at para. 611.

47. Tecnicas Medioambientales TECMED S.A. v. United Mexican States, ICSID Case ARB (AF)/00/2 (May 29, 2003), 43 ILM 133 (2004).

48. *Id.*

49. *Id*, at paras. 153-54 (citing Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002), 42 I.L.M. 85, at para. 116).

50. *TECMED*, 43 ILM 133, at para. 154.

of the Vienna Convention on the Law of Treaties, or from international law and the good faith principle.[51] The method of interpretation relies on the Tribunal's understanding of the ordinary meaning of "fair and equitable" and does not refer to state practice or arbitral and judicial decisions. The Tribunal adds that a different conclusion would fail to give effect to the intentions of the parties which are also reflected in the Preamble of the Treaty to intensify economic relation and the resolve to create favourable conditions for investments.[52] Drawing on its earlier insistence that legal instruments in place have to be used "in conformity with the function usually assigned to such instruments,"[53] the Tribunal emphasizes its position that the laws applicable to the investment would be used to promote the goals underlying such laws.

On the facts, the Tribunal found that the conduct of Mexico in question regarding a permit for a landfill Operations was characterised by a lack of transparency, by a closing of the landfill "in spite of the expectations created" by an ambiguity of various actions, and that the conduct was motivated by political reasons.[54] As a result, the Tribunal found that Mexico's behaviour "conflicts with what a reasonable and unbiased observer would consider fair and equitable . . ."[55]

This survey does not consider *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, dated May 25, 2004.[56] The case is currently subject to an annulment proceeding.

OEPC v. Ecuador, dated July 1, 2004 (Orrego Vicuña, Brower, Sweeney), is remarkable for directly tying a fair and equitable treatment clause of a BIT, worded as a free-standing requirement, to the particular language of the preamble: ". . . fair and equitable treatment is desirable in order to maintain a stable framework for investment and maximum utilization of economic resources . . . ."[57] Reading the standard in conjunction with this part of the preamble, the Tribunal directly concludes: "The stability of the legal and business framework is thus an essential element of fair and equitable treatment."[58]

On the facts, the Tribunal concludes that the law in Ecuador was altered, after the claimant had invested "in an important manner" and that the relevant "tax law was changed without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes."[59]

The Tribunal subsequently returns to the "need for this stability" as emphasized by various other Tribunals, citing to the famous language of *Metalclad* requiring "a transparent and predictable framework" and an "orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly. . . ."[60] *OEPC* adds a citation to the *TECMED* language, concluding that the requirements of fair and equitable treatment had not been met by Ecuador.[61]

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51. *Id.* at para. 155.
52. *Id.* at para. 156.
53. *Id.* at para. 154.
54. *Id.* at para. 164.
55. *Id.* at para. 166.
56. MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7 (May 25, 2004) (Sureda, Lalonde, Oreamuno Blanco, Arbs.), *available at* www.asil.org/ilib/MTDvChile.pdf (last visited Apr. 5, 2005).
57. Occidental Exploration and Production Company (OEPC) v. Ecuador, Case No. UN 3467, at para. 185, (London Ct. Int'l Arb. July 1, 2004), *available at* www.asil.org/ilib/OEPC-Ecuador.pdf.
58. *Id.* at para. 183.
59. *Id.* at para. 184.
60. *Id.* at para. 185.
61. *Id.* at para. 187.

In an interesting manner, the Tribunal thereafter decides to turn to the distinction, or possible distinction, of different versions of the standard. The relevant clause before the Tribunal in the applicable Treaty between Ecuador and the United States reads: "Investment 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 favourable than that required by international law."[62]

From this language the Tribunal concludes: "This means that a minimum fair and equitable treatment must be equated with the treatment required under international law,"[63] and then raises the issue ". . . whether the fair and equitable treatment mandated by the Treaty is a more demanding standard than that prescribed by customary international law."[64] The cryptic answer given by the Tribunal seems to suggest that the two standards will be different in principle even though the Tribunal finds that they are identical in regard to requirements in the specific situation before the Tribunal: "[t]he Tribunal is of the opinion that in the instant case the Treaty standard is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment."[65]

B. NAFTA Jurisprudence

In its ruling of August 30, 2000, the *Metalclad* Tribunal directly tied the principle of transparency to the standard of fair and equitable treatment.[66] The relevant conclusion reads: "Mexico failed to ensure a transparent and predictable framework for *Metalclad's* business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA."[67]

The Supreme Court of British Columbia ruled on a challenge of the award and concluded that the Tribunal went, in this respect, beyond its mandate which was limited by chapter XI of NAFTA. Inasmuch as the principle of transparency is set forth outside of that chapter, in § 102, the Court decided that the ruling was invalid on this point.[68]

In *Pope & Talbot*, decided on May 31, 2002, the Tribunal ruled that Canada's actions fell below the standard of *Neer* because it would "shock and outrage every reasonable citizen in Canada," and that it was not necessary, therefore, to decide whether a more demanding standard was required.[69] The Tribunal found that the investor had been harassed in various ways by Canada, with threats of reduction of export quotas and unjustified suggestions of criminal investigations.

62. *Id.*

63. *Id.* at para. 188.

64. *Id.* at para. 189.

65. *Id.* at 190.

66. Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, at paras. 74-101 (Aug. 20, 2000) (Lauterpacht, Civiletti, Siqueiros, Arbs,).

67. *Id.* at para. 99.

68. United Mexican States v. Metalclad Corp., [2001] B.C.T.C. 664, 2001 B.C.T.C. LEXIS 393 (May 2, 2001) (Can.), at para. 72.

69. Pope & Talbot, Inc. v. Canada, (May 31, 2002) 41 I.L.M. 1347, at paras. 68, 69 (Dervaird, Greenberg, Belman, Arbs.).

In its decision of October 11, 2002, the *Mondev* Tribunal was not faced with the question of the general meaning of a free standing clause on fair and equitable treatment.[70] As accepted and explained by the Tribunal, the NAFTA Treaty had been interpreted by the NAFTA parties, in an authoritative interpretative note, that the standard was to be understood as a minimum standard in accordance with customary law, not as a self-standing concept. However, in the proceedings all three parties had also clarified that the standard will be interpreted in an evolutionary manner.[71] The Tribunal's main task was, under these special circumstances, to give substance to the contemporary meaning of "fair and equitable treatment" as opposed to an understanding as it was accepted decades ago.[72] One key issue in this context was the relevance of modern investment treaties. The NAFTA parties themselves had taken a position which could be understood to indicate that the content of BITs had not, or not yet, become identical with the rules of general international law.[73]

Nevertheless, the Tribunal concluded in view to the widespread BIT practice, that such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927.[74]

Thus, the Tribunal did not, at least explicitly, take the position that customary law had become identical with treaty law, but that the concordant practice would have "influenced" the relevant rules of customary law. The Tribunal did not elaborate on the precise extent of this influence, nor did it address the circumstances under which practice governed by a treaty will be considered as practice relevant for customary law.

The Tribunal in *UPS v. Canada* confirmed that the standard is "included within the minimum standard," but had no reason to elaborate.[75]

ADF Group Inc., dated January 9, 2003,[76] builds upon the *Mondev* decision, literally citing two of the key passages from *Mondev*.[77] Nevertheless, it would not be correct to assume that the *ADF* ruling is identical with the reasoning in *Mondev*. More precisely, the two citations of *Mondev* in *ADF*, when read together, may be interpreted to contain a degree of

70. Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002), 42 I.L.M. 85, 106 (Stephen, Crawford, Schwebel, Arbs.).

71. *Id.* at para. 124.

72. For an evolutionary interpretation of the notion of "sacred trust" as used in 1919 in the light of the UN Charter adopted in 1945, *see* Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W. Africa) Nothwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21).

73. *See Mondev*, 42 I.L.M. 85, at para. 110: "In their post-hearing submissions, all three NAFTA Parties challenged holdings of the Tribunal in *Pope & Talbot* which find that the content of contemporary international law reflects the concordant provisions of many hundreds of bilateral investment treaties. In particular, attention was drawn to what those three States saw as a failure of the *Pope & Talbot* Tribunal to consider a necessary element of the establishment of a rule of customary international law, namely *opinio juris*. These States appear to question whether the parties to the very large numbers of bilateral investment treaties have acted out of a sense of legal obligation when they include provisions in those treaties such as that for "fair and equitable" treatment of foreign investment."

74. *Id.* at para. 117.

75. U.P.S. v. Canada (Nov. 22, 2004) (Keith, Cass, Fortier, Arbs.) (Award on Jurisdiction), *available at* www.asil.org/ilib/ilib0602.htm#j3 (last visited Apr. 5, 2005).

76. ADF Group, Inc. v. United States, ICSID Case No. ARB(AF)/00/1, 18 ICSID REV. 195, 279 (Jan. 9, 2003) (Feliciano, de Mestral, Lamm, Arbs.).

77. *See id.*, paras. 183 and 184.

ambiguity when it comes to identifying those elements which need to be considered in determining the evolution of the law for the purpose of identifying the contemporary standard. Whereas *Mondev* seems to point to the relevance of bilateral treaties—". . . such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law,"[78]—a subsequent paragraph in *Mondev* seemingly approves the U.S. position that the minimum standard embracing fair and equitable treatment will be determined by "as established in state practice and in the jurisprudence of arbitral tribunals."[79]

While it is not entirely clear whether "state practice" as understood in this sentence refers to customary law or to the conclusion of bilateral treaties, as suggested by the language of *Mondev*, the *ADF* ruling takes a clear position in a rather carefully worded interpretation of *Mondev*: "We understand *Mondev* to be saying—and we would respectfully agree with it—that any general requirement to accord 'fair and equitable treatment' and 'full protection and security' must be disciplined by being based upon State practice and judicial or arbitral caselaw or *other sources of customary* or *general international law*."[80] In other words, treaty law was not included among the relevant sources for the identification of the contemporary standard. In the event, neither the *Mondev* nor the *ADF* Tribunal found a violation of the fair and equitable treatment standard.

Waste Management, dated April 30, 2004, dealt with the claim of a company "with weakness of [an] original business plan [which] could not be overcome at a time of financial stringency,"[81] rejecting the claim under article 1105 of NAFTA.

As to the scope and interpretation of the Article, the Tribunal relied on the rulings of the *Mondev* and *ADF* tribunals.[82] The Tribunal also cited the *S.D. Myers* Case, decided before the interpretation by the three NAFTA parties, which found that article 1105 is violated ". . . only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[83] In a remarkable manner, the Tribunal establishes a close link between the requirement of fair and equitable treatment and the prohibition of denial of justice. Without discussion of the identity or difference in the scope and meaning of the requirements of the two standards, the *Waste Management* Tribunal blends the NAFTA rulings on these two concepts and thus included the *Mondev* discussion on denial of justice and the *Loewen* ruling on the same subject, even though the latter decision implied that a distinction between the two standards would be appropriate.[84] Noting "certain differences of emphasis" in the jurisprudence, the Tribunal concludes in *Waste Management*:

78. *Mondev*, 42 I.L.M. 85, at para. 117, *quoted in ADF Group*, 18 ICSID Rev. at 183.

79. *Mondev*, 42 I.L.M. 85, at para. 119, *quoted in ADF Group*, 18 ICSID Rev. at 184.

80. *ADF Group*, 18 ICSID Rev. at 184 (emphasis added).

81. Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3 (Apr. 30, 2004), 43 I.L.M. 967 (2004), at para 113 (Crawford, Civiletti, Gomez, Arbs.), *available at* www.state.gov/documents/organization/34643.pdf.

82. *Id.* at paras. 91-93.

83. *Id.*, quoting S.D. Myers, Inc. v. Canada (Oct. 21, 2002) (Second Partial Award) (Hunter, Chiasson, Schwartz, Arbs.), at para. 263, *available at* http://ita.law.uvic.ca/documents/SDMyersFinalAward.pdf (last visited Apr. 16, 2005).

84. *See Loewen v. United States* (June 26, 2003) 42 I.L.M. 811 (2003) at para 137 (Mason, Mikva, Mustill, Arbs.).

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. 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.[85]

Consistent with the approach in *Mondev* and *ADF*, the Tribunal thus based its decision on previous arbitral rulings.

V. The State of the Law at the Time of the Investment: The Basis and Limits of Legitimate Reliance

One element which is central to the understanding of the modern notion of fair and equitable treatment concerns the specific importance of that state of the law of the host state which was in force at the time at which the foreigner acquired his investment.[86] Recent jurisprudence has highlighted and accentuated the significance of this contextual dimension of the principle. The point is made in the most straightforward and succinct manner in the NAFTA case *GAMI v. Mexico* of November 15, 2004 (Reisman, Lacarte Muró, Paulsson): "To repeat: NAFTA arbitrations have no mandate to evaluate laws and regulations that predate the decision of a foreign investor to invest."[87]

In *S.D. Myers v. Canada*, also a NAFTA case, the Tribunal had to rule on a specific provision of Canadian law regulating exports into the United States.[88] The decision essentially makes the same point as the *GAMI* Tribunal: "[t]he Tribunal makes no determination on this issue because in this case the Disputing Parties acted on the basis of the law as it then appeared to exist."[89]

In a similar way, *Marvin Feldman v. Mexico*,[90] addressing the significance of a Mexican scheme concerning an invoice requirement in the context of duties on certain export transactions (called IEPS law) ruled as follows: "Since the operation of its export business depended substantially on the terms of the IEPS law, the Claimant was or should have been aware at all relevant times that the separate invoice requirement existed, as there has been no *de jure* change in it at any time relevant to this dispute."[91]

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85. *Waste Management*, 43 I.L.M. 967 at para. 98.

86. The law of the host state can also be of crucial importance in the definition of an investment. *See* Mihalyi v. Sri Lanka, ICSID Case No. ARB/00/2 (Mar. 15, 2002), 41 ILM 867 (2002) (Sucharitkul, Rogers, Suratgar, Arbs.).

87. GAMI Investments, Inc. v. United Mexican Status (Nov. 15 2004), at para. 93, *available at* ita.law.uvic.ca/documents/Gami.pdf (last visited Apr. 5, 2005).

88. S.D. Myers, Inc. v. Canada (Oct. 21, 2002) (Second Partial Award) (Hunter, Chiasson, Schwartz, Arbs.), *available at* http://ita.law.uvic.ca/documents/SDMyersFinalAward.pdf (last visited Apr. 16, 2005).

89. *GAMI Investments* at para. 191.

90. Feldman v. United Mexican States, ICSID Case No. ARB(AF)99/1 (Dec. 16, 2002), 42 ILM 625 (2003) (Kerameus, Covarrubias Bravo, Gantz, Arbs.).

91. *Id.* at para 128.

Thus, the Tribunal also clarified that proof of positive knowledge was not required and that the rule applied if the investor had the opportunity to take cognizance of the law. An unpublished law unknown to the investor would not have had the same significance.

The *Mondev* decision also contains language which may be understood to confirm the same principle.[92] Dealing with a US court decision applying a rule of statutory immunity to the Boston Redevelopment Agency (BRA), the Arbitral Tribunal ruled:

> It is not disputed by the Claimant that this decision was in accordance with Massachusetts law, and it did not involve on its face anything arbitrary or discriminatory or unjust, i.e., any new act which might be characterised as in itself a breach of article 1105(1). In other words, if it was not in December 1993 a breach of NAFTA for BRA to enjoy immunity from suit for tortious interference (and, because NAFTA was not then in force, it could not have been such a breach), it is far from clear how the (*ex hypothesi* correct) decision of the United States courts as to the scope of that immunity, after 1 January 1994, could have been in itself unfair or inequitable. On this ground alone, it may well be that Mondev's article 1105(1) claim was bound to fail. . . .[93]

The first NAFTA Case, *Azinian v. Mexico*,[94] may also be deemed relevant in this context even though the claim in question concerned the expropriation clause and not fair and equitable treatment. The relevant issue was the annulation of a concession contract by the competent Mexican authority as confirmed by Mexican courts. The claimant (DESONA) based its claim on this concession contract while Mexico argued that the contract was invalid. The Tribunal accepted the Mexican position with this reasoning:

> 95. The logical starting point is to examine the asserted original invalidity of the Concession Contract. If this assertion was founded, there is no need to make findings with respect to performance; nor can there be a question of curing original invalidity.
>
> 96. From this perspective, the problem may be put quite simply. The Ayuntamiento believed it had grounds for holding the Concession Contract to be invalid under Mexican law governing public service concessions. At DESONA's initiative, these grounds were tested by three levels of Mexican courts, and in each case were found to be extant. How can it be said that Mexico breached NAFTA when the Ayuntamiento of Naucalpan purported to declare the invalidity of a Concession Contract which by its terms was subject to Mexican law, and to the jurisdiction of the Mexican courts, and the courts of Mexico then agreed with the Ayuntamiento's determination? Further, the Claimants have neither contended nor proved that the Mexican legal standards for the annulment of concessions violate Mexico's Chapter Eleven obligations; nor that the Mexican law governing such annulments is expropriatory.
>
> 97. With the question thus framed, it becomes evident that for the Claimants to prevail it is not enough that the Arbitral Tribunal disagree with the determination of the Ayuntamiento. A governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level.*[95]

Thus, the Tribunal in *Azinian* not just confirmed the same viewpoint as the *GAMI* and *Feldman* decisions, it also extended the ruling beyond the law as written to its application

92. Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002), 42 I.L.M. 85, at para. 156 (Stephen, Crawford, Schwebel, Arbs.).

93. *Id.* (footnote omitted).

94. Azinian v. United Mexican States, ICSID Case No. ARB (AF)/97/2 (Nov. 1, 1999), 39 ILM 537 (2000) (Paulsson, Civiletti, von Wobeser, Arbs.).

95. *Id.* at paras. 95-97.

and interpretation by the domestic courts of the host country, concluding that the foreign investor had to accept the law as it was applied by the competent national courts. The only limitations recognized by the Tribunal concerned a violation of NAFTA by the law, and (more properly: including) expropriatory acts.[96] The Tribunal apparently had no reason to examine whether the understanding and application of the law came as a surprise and had no basis in previous rulings.

It bears emphasis that this line of jurisprudence with its focus on the law of the host state at the time of the investment is by no means novel. The Permanent Court of International Justice had to rule in the *Chinn* case whether Mr. Oscar Chinn, a British subject, was entitled to a claim against the Belgian Government, at that time the colonial power of the Belgian Congo, in view of a market distortion caused by Belgium when it favoured and supported *Unatra*, the only market rival of Mr. Chinn.[97] The Court rejected the claim and explained that Chinn should have been aware of the legal peculiarities of the market which existed when he made his investment:

> (. . .) Mr. Chinn, a British subject, when, in 1929, he entered the river transport business, could not have been ignorant of the existence of the competition which he would encounter on the part of Unatra, which had been established since 1925, of the magnitude of the capital invested in that Company, of the connection it had with the Colonial and Belgian Governments, and of the predominant role reserved to the latter with regard to the fixing and application of transport rates.[98]

Thus, the Court focused not just on the law as written, but also on the law as a basis for its subsequent application detrimental to the investor. The Court voted six to five on this point, and it was questioned, *inter alia*, whether the ruling was consistent with an applicable treaty requiring "commercial equality" for foreign subjects such as Mr. Chinn. Whatever may have been the proper construction of the treaty containing this requirement, the basic conceptual approach of the *Chinn* ruling reflected the position that a foreign investor must accept the law as it stands at the time of the investment and cannot subsequently base a claim on the application of that law.

The various rulings of the Courts and Tribunals discussed above have not addressed the doctrinal foundation of the reasoning which they applied. Essentially, this aspect will not be seen to raise a serious question. The principle of territorial sovereignty and of economic self-determination provide for the doctrinal basis of the jurisprudence here reviewed. Each state has always had the right to determine its own laws, within the boundaries of the international minimum standard and of *ius cogens*, and this legal position has not been abandoned in the process of economic and legal globalization. Correspondingly, no other state and no foreign investor can be considered, in the absence of a treaty to the contrary, to have a right toward a host state to determine and organize its law in any particular manner, and the logical extension of this principle is that no investor has a right to base a claim against the host country upon the subsequent application of the law to the business of the investor.

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96. The Tribunal could (or should) have simply referred to NAFTA and all laws embodied in the international minimum standard governing the status of aliens.

97. Oscar Chinn Case (U.K. v. Belg.), 1934 P.C.I.J. (ser. A./B) No. 63 (Dec. 12), *available at* www.icj-cij.org/cijwww/cdecisions/ccpij/serie_AB/AB_63/01_Oscar_Chinn_Arret.pdf.

98. *Id.* at 84.

The foregoing observations have focused on the pre-investment state of the law as a limitation for the range of elements which serve to determine the standard of protection to be accorded to the investor under the standard of fair and equitable treatment. However, that state of the law is of equal significance for establishing the framework of those considerations which in a positive sense will decide the protection granted to the investor. That the pre-investment state of the law forms the foundation of this protection, and its limits, also clarifies that the standard of fair and equitable treatment is in this respect relative in its nature, depending upon the law as it happens to stand at one particular time. A part of the difficulty to define and prescribe the standard of fair and equitable treatment in absolute terms finds its explanation in this context.

From the viewpoint of the investor, this chronological anchoring of the operation of the standard in effect serves as reminder to carefully examine the law as it stands before the investment and to consider the implications of content and its peculiarities. From the vantage point of the host state, this setting requires that the government must at all times be aware that the law as it stands and as it is reformed will in the future allow the foreign investor to point to this date and to this legal order as the legal basis for his decision.

The double function of the pre-investment state of the law as both the foundation of the investment decision and the limitation of his subsequent protection in case of a dispute reveals that in this respect the standard of fair and equitable treatment is closely tied to considerations underlying the notion of legitimate expectations which has occasionally been referred to by international tribunals in cases brought by foreign investors. The pre-investment legal order forms the framework for the positive reach of the expectation which will be protected and also the scope of considerations upon which the host state is entitled to rely when it defends against subsequent claims of the foreign investor. Here, it becomes clear that the standard of fair and equitable treatment centers to a considerable degree, on expectations of the foreign investor and that in the individual case the legitimacy of these expectations will largely depend upon the objective state of the law as it stands at the time when the investor acquires the investment.

The foregoing analysis is responsive to the mutual interests of both the host state and the foreign investor upon which the entire scheme of economics and law of foreign investment is predicated. Whereas the law protects expectations of the foreign investor, it does so only to the extent that these expectations are grounded in the legal order of the host state as determined by the host state in accordance with the principles of territorial sovereignty and economic self-determination.

A second dimension covered by the requirements of fair and equitable treatment also concerns the investor's ability of planning and doing business, in regard to the conduct of the host state subsequent to the investment. Consistency in the course of actions of the host state concerns the investor in all areas of regulations, from the process of requiring and granting of permits to regulations of health and environment and the imposition of taxes, royalties and duties. The issue may arise simply upon the reversal of conduct by one organ. Alternatively, simultaneous inconsistent conduct on the part of two organs with respect to the same subject matter such as a permit requirement may also be relevant. Again, the focus here is on the legitimate expectations of the investor, but not in regard to the pre-investment state of the law, but at a later stage. One of the main areas of application of this consideration will be discretionary rules and areas of governmental decision-making for which the investor has no right to a specific action on the part of the government. The basic concern again is not to tie the host government to any specific standard, but to allow

the foreign investor to rely on a standard which the government has freely determined. In specific circumstances, the scope and meaning of these considerations may become especially complex when an evolutionary understanding of the law or the policy is explicitly or implicitly built into the law.

Underlying all of these applications of fair and equitable treatment are the basic themes of stability of the law and, seen from the investor's perspective, predictability of the requirements to be met and the rights to be granted. In the words of the *TECMED* tribunal, the thrust of the concern is the foreign investor's ability "to know beforehand."[99] Obviously, this concern is not so important for those types of transactions which bring the two parties together for only a short period of a few months. The issue acquires a totally different dimension for the long-term investor who has sunk his money into a project and has calculated his expected rate of return for a period of thirty years or more, especially when the initial investment costs are high, the post-investment costs are low and the return on the investment depends upon permits or, in a regulated sector, rate-setting decisions of the host state. Such long-term foreign investments, as they are not infrequent in the energy sector, in the water sector or in waste management, will be made by the prudent investor only upon due diligence and the judgment that the political risks stemming from a potential future change of action on the part of the host state will not likely stand in the way of preventing the reasonable implementation of the business plan. The standard of fair and equitable treatment will acquire its strongest significance in such long-term projects.

VI. Reliance On Contractual Arrangements and On Assurances

One of the most difficult issues concerning the reach of the standard of fair and equitable treatment pertains to the matter of legitimate reliance on the part of the investor in regard to contractual relations with the host state. D. Carreau and P. Juillard base their understanding of the standard on the need for a satisfactory balance of the interests of the investor, the host state and the home state.[100] So far, this problem is far from resolved. On the one hand, it is clear that contractual relations may form the framework on which the foreign investor has relied after it was negotiated and tailor-made to the needs of the specific investment, possibly quite distinct from the general regulatory framework of the host country. This nature of a contract as a kind of *lex specialis* accepted by the host state so as to attract and accommodate the foreign investor may be considered to justify special protection of the affected investor, more so than the expectation of the investor who has decided to operate under the host state's general legislation. From the opposite perspective, it may be argued that contractual arrangements deserve less protection precisely because they deviate from general legislation which may be seen to reflect the public good more broadly than an individual contract. Recent ICSID jurisprudence regarding indirect takings may be interpreted to weigh towards this second line of thinking. The 2004 *Waste Management* decision does not consider all serious breaches of a contract to amount to an expropriation while it is generally assumed that a serious breach of a traditional property right will require

99. *Tecnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case ARB (AF)/00/2 (May 29, 2003), 43 ILM 133 (2004), at para. 154.

100. DOMINIQUE CARREAU & PATRICK JUILLARD, DROIT INTERNATIONAL ECONOMIQUE 437 (2003).

compensation. The *Waste Management* ruling has relied on the distinction between governmental and commercial acts by state organs in this context, and it remains to be seen whether this approach will find general acceptance and ultimately contribute to a line of jurisprudence which reduces the practical value of contractual arrangements from the point of view of the investor and correspondingly broadens the scope of non-compensable actions of the government in relation to contracts.

A related issue concerns the comparison between the effect of a stabilization clause, of an umbrella clause and of the requirements of fair and equitable treatment in the context of an investment contract. Strict insistence on the concept of reliance for a contractual arrangement would come close to having the same effect as a stabilization clause or an umbrella clause. The issue does not become more simple when it is recognized that neither the legal significance of a stabilization nor the meaning of an umbrella clause has been clarified by recent decisions, and the entire issue must be deemed to remain open at this point.

Also, the legal significance of assurances given to foreign investors in a non-formalized context such as public speeches by representatives of the host country remains to be clarified by international tribunals. On the state-to-state-level, international courts have clearly decided that under certain conditions unilateral statements may create international obligations.[101]

VII. Conclusion

State parties to investment treaties have entrusted arbitral tribunals with a formidable task when they included the standard in the BITs in the expectation that tribunals will identify an investment-specific, judicially manageable content of the clause. The task was even more demanding as the standard had to be developed *ab novo* in the absence of any rule or precedent in any other field of international law. The current ICSID system of ad hoc tribunals and the corresponding lack of institutionalized continuity and consistency of jurisprudence have added to the challenge of developing a body of jurisprudence tailored to the specific structures of foreign investment and acceptable to investors, the host state and the home state.

Meeting the investor's central legitimate concern of legal consistency, stability and predictability remains a major, but not the only, ingredient of an investment-friendly climate in which the host state in turn can reasonably expect to attract foreign investment. Thus, no inconsistency between the interests of the host state and those of the investor in regard to the creation of a stable legal framework of the host state will be diagnosed. Built upon this joint perspective of host state and investor, underlying the agreement on an investment treaty, the standard of fair and equitable treatment will nevertheless not be understood to amount to a stabilization clause but will leave a measure of governmental space for regulation. Presumably, the degree of freedom generally considered as appropriate in domestic legal orders will not be affected. It is true that in effect the standard will narrow down the discretionary space available to the host state. But it is also true, in principle, that this specific sort of limitation is indeed necessary to attract foreign investment.

101. *See, e.g.*, Nuclear Tests (Austl. v. Fra.), 1974 I.C.J. 253, 267 (Dec. 20); Nuclear Tests (N.Z. v. Fra.), 1974 I.C.J. 457, 472 (Dec. 20); Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser A/B) No. 53, 70. In the investment context, *see, e.g.*, Revere Copper v. OPIC (Aug. 24, 1978), 17 I.L.M. 1321. (The ruling does not make clear what type of assurances are meant. Reference is made to the "Heads of Agreement" on page 262).

Within this general setting, investment tribunals have, in the past five years, started to develop a framework of understanding which is responsive to the basic rationale of the clause and is suitable for judicial management. Two overlapping central lines of application have emerged. The first one concerns consistency of governmental action. This will be of practical importance, for instance, in such areas in which the domestic law of the host state lacks substantive or jurisdictional clarity, or grants discretionary power to the local authorities. Changes of government may lead to special problems in this context as well as in the second area of concern, being the stability of long-term arrangements and commitments, which may be re-evaluated by governments following the one which accepted the obligation toward the investor.

The most important contribution to an operational understanding of the standard for this latter issue concerns the strict focus on the state of the law at the time of investment, laying the basis and limiting the legitimate expectations protected by the standard. This central component of the case-law as developed in the past years embodies and reflects the two pillars of foreign investment law, being the respect for the host state's rights of economic sovereignty and the protection of the investor's legitimate expectations. The focus on the law at the time of investment provides, in principle, for an appropriate synthesis of these two principles.

The issue of defining the necessary governmental space to change a law is not resolved by this approach, but a framework of analysis is thereby established. Special factors relevant in a special case have to be identified and accommodated, and in this respect it is true that the first phase of jurisprudence may not have led to much clarity as to the nature of these factors and the weight to be accorded to them. Ultimately, however, it should not be expected that criteria and formula can be developed which would allow an application of a standard in the manner of a hard and fast rule. The nature of the standard simply will not allow an understanding which would satisfy a demand for total predictability in the sense of the removal of all individualized aspects of weighing relevant concerns by the competent tribunal. Within these parameters, the first generation of judgments giving content to the clause may well be considered to provide an appropriate measure of guidance for future cases.

As indicated, a major issue that will have to be developed by further jurisprudence concerns the relationship of the standard to other clauses of an investment treaty or an investment contract, in particular to the rules on indirect expropriation and the umbrella clause of a treaty. Will the standard serve as a catch-all safety clause for the foreign investor which operates in the same areas of applications as other clauses in investment treaties addressing all insufficiencies, real or perceived, of actions of the host state below the threshold of other clauses, or will the standard operate primarily in areas of application not generally covered by such other standards? In other words, will the standard have a supplementary or a corrective function in relation to other principles? Will the standard be applied with a bias to the interest of the host state or of the investor? And will the standard be applied with a significant degree of deference to the host state or will an autonomous standard of application be rigorously applied by the tribunal? The questions indicate that serious issues remain in the understanding and application of the standard for a second generation of judgments. If they will be as consistent and principle-oriented as the first one, the standard can be said to have served the purpose for which it was intended by the state parties.