Offprints of
THE JOURNAL OF WORLD INVESTMENT & TRADE

Fair and Equitable Treatment in Arbitral Practice

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Geneva June 2005 Vol. 6 No. 3

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P.O. Box 5134, 1211 Geneva 11, Switzerland
Tel. (41–22) 310 34 22 Telefax (41–22) 311 45 92
E-mail: wernerp@iprolink.ch

Website: www.wernerpubl.com
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and tables of contents of current and back issues

The Journal of World Investment & Trade is published every two months.
Annual Subscription: Sfr. 670 or US$ 490 including airmail postage
Single copies: Sfr. 120 or US$ 90

For U.S. Subscribers:
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Published by Werner Publishing Company Ltd.

ISSN 1660–7112 Mode of citation: 6 J.W.I.T. 3

Fair and Equitable Treatment in Arbitral Practice

Christoph SCHREUER*

I. INTRODUCTION

Fair and equitable treatment is currently the most important standard in investment disputes. Most treaties dealing with the protection of investments contain this standard. It seems to be invoked in the majority of cases brought to arbitration. Over the last few years, a number of awards have dealt with this standard and have yielded a fair amount of practice shedding light on it. Although more clarification is likely to emerge in the future, it seems appropriate to take stock of the existing authority at this time.

II. THE HISTORY OF THE FAIR AND EQUITABLE TREATMENT STANDARD

The concept of fair and equitable treatment is not new but has appeared in international documents for some time. Some of these documents have remained drafts; others are non-binding documents; yet others have entered into force as multilateral or bilateral treaties.[1]

The fair and equitable treatment standard seems to have first appeared in the Havanna Charter for an International Trade Organization of 1948.[2] Article 11(2) thereof provided that the Organization would be able to make recommendations for and promote bilateral or multilateral agreements on measures designed: "(i) to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another ..."[3]

The Abs-Shawcross Draft Convention on Investment Abroad of 1959[4] contained the following Article 1:

> "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection

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[1] For a more detailed description of the origin and history of the concept of fair and equitable treatment, see especially the United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment*, Series on Issues in International Investment Agreements, 1999, pp. 3–4, 7–9, 25–28 and 31–32; S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, B.Y.I.L., Vol. 70, 1999, pp. 100–111 and 107–119; C. Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law*, Working Papers on International Investment Number 2004/3, Organisation for Economic Co-operation and Development (OECD), Directorate for Financial and Enterprise Affairs, Paris, 2004, pp. 3–7.

[2] The Havanna Charter never entered into force.

[3] UNCTAD, *International Investment Instruments: A Compendium*, UNCTAD, Geneva, 1996, Vol. I, p. 4.

[4] The Draft Convention represented a private initiative by Hermann Abs and Lord Shawcross.

and security within the territories of the other Parties and the management, use, and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures."[5]

The Draft Convention on the Protection of Foreign Property developed by the Organisation for Economic Co-operation and Development (OECD) in 1967 contained a provision in its Article 1, entitled "Treatment of Foreign Property", that closely followed the Abs-Shawcross draft:

"(a) Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures."[6]

The draft for a United Nations Code of Conduct on Transnational Corporations in its 1983 version contained the following language:

"48. Transnational corporations should receive [fair and] equitable [and non-discriminatory] treatment [under] [in accordance with] the laws, regulations and administrative practices of the countries in which they operate [as well as intergovernmental obligations to which the Governments of these countries have freely subscribed] [consistent with their international obligations] [consistent with international law]."[7]

The Guidelines on the Treatment of Foreign Direct Investment, adopted by the Development Committee of the Board of Governors of the International Monetary Fund and the World Bank in 1992, in their Section III dealing with "Treatment", provide for fair and equitable treatment linked to the other standards provided by the Guidelines: "2. Each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines."[8]

The OECD Draft Negotiating Text for a Multilateral Agreement on Investment of 1998 provided for fair and equitable treatment together with the standard of constant protection and security. At the same time, international law was preserved as a residual standard:

"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."[9]

The concept of fair and equitable treatment has also found entry into a number of multilateral treaties in force. For instance, the Convention Establishing the Multilateral Investment Agency of 1985 (the MIGA Convention) requires the availability of fair and

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[5] UNCTAD, *International Investment Instruments: A Compendium*, UNCTAD, Geneva, 2001, Vol. V, p. 395.
[6] OECD Draft Convention on the Protection of Foreign Property, 1967, 7 I.L.M. 117, 1968, at 119.
[7] UNCTAD, *supra*, footnote 3, p. 172. The brackets are original and reflect the provisional stage of the drafting.
[8] Guidelines on the Treatment of Foreign Direct Investment, 7 ICSID Rev.–F.I.L.J. 297, 1992, at 300.
[9] UNCTAD, *International Investment Instruments: A Compendium*, UNCTAD, Geneva, 2001, Vol. IV, p. 148.

equitable treatment as a precondition for extending insurance cover. Article 12 dealing with "Eligible Investments" provides in part:

> "(d) In guaranteeing an investment, the Agency shall satisfy itself as to:
>
> ...
>
> (iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment."[10]

The North American Free Trade Agreement (NAFTA) of 1992 contains the fair and equitable treatment principle in its Article 1105, para. 1: "1. 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."[11] This provision has been applied repeatedly by NAFTA tribunals and will be discussed in some detail in Sections III, V and VI of this article.

The Energy Charter Treaty of 1994 contains elaborate language around the requirement of fair and equitable treatment, with specific reference to stable and transparent conditions. Its Article 10, para. 1 provides:

> "(1) Each 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 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."[12]

The requirement of fair and equitable treatment has also found entry into numerous bilateral treaties. Treaties of Friendship, Commerce and Navigation concluded in the 1950s referred to either equitable treatment or to fair and equitable treatment.[13] With the advent of bilateral investment treaties (BITs), the requirement of fair and equitable treatment became a regular feature. The vast majority of BITs currently in force contain this standard.[14] These BIT provisions, although nearly all of them seem to use the formula "fair and equitable treatment", are not uniform. In particular, there are variations as to the linkage of this standard to customary international law.[15]

III. FAIR AND EQUITABLE TREATMENT AND CUSTOMARY INTERNATIONAL LAW

There has been considerable debate on whether the fair and equitable treatment standard merely reflects the international minimum standard, as contained in customary international law, or offers an autonomous standard that is additional to general

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[10] MIGA Convention, in UNCTAD, *supra*, footnote 3, p. 219.
[11] NAFTA, 32 I.L.M. 639, 1993.
[12] ECT, 34 I.L.M. 381, 1995, at 389.
[13] Vasciannie, *supra*, footnote 1, at pp. 109–111; Yannaca-Small, *supra*, footnote 1, p. 4.
[14] UNCTAD, *supra*, footnote 1, p. 22; R. Dolzer and M. Stevens, *Bilateral Investment Treaties*, Brill, Leiden, 1995, p. 58; Vasciannie, ibid., at pp. 113–114; Yannaca-Small, ibid., at p. 5.
[15] Dolzer and Stevens, ibid., pp. 58–60.

international law.[16] This debate has reached particular prominence in the context of the interpretation of Article 1105(1) NAFTA. Principles of treaty interpretation, academic writings, State practice and judicial decisions have all contributed to this debate.

As a matter of textual interpretation, it is inherently implausible that a treaty would use an expression such as "fair and equitable treatment" to denote a well-known concept such as the "minimum standard of treatment in customary international law". If the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression.

Prominent among the supporters of an independent concept of fair and equitable treatment is Mann. Writing about British BITs in 1981, he said:

> "The terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously."[17]

Dolzer and Stevens, in their leading treatise on BITs, reach the same result:

> "It is submitted here that the fact that the parties to BITs have considered it necessary to stipulate this standard as an express obligation rather than relied on a reference to international law and thereby invoked a relatively vague concept such as the minimum standard, is probably evidence of a self-contained standard. Further, some treaties refer to international law in addition to the fair and equitable treatment, thus appearing to reaffirm that international law standards are consistent with, but complementary to, the provisions of the BIT." (footnote omitted).[18]

The study on fair and equitable treatment carried out by the United Nations Conference on Trade and Development (UNCTAD)[19] devotes considerable attention to the question of the autonomous or declaratory nature of the fair and equitable treatment standard. It also finds that "[i]f States and investors believe that the fair and equitable standard is entirely interchangeable with the international minimum standard, they could indicate this clearly in their investment instruments".[20] After looking at the evidence in some detail,[21] the study concludes:

> "These considerations point ultimately towards fair and equitable treatment not being synonymous with the international minimum standard. Both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and

[16] For a detailed discussion of this issue, see Yannaca-Small, *supra*, footnote 1, pp. 8–25.

[17] F. A. Mann, *British Treaties for the Promotion and Protection of Investments*, B.Y.I.L., Vol. 52, 1981, p. 241, at p. 244.

[18] Dolzer and Stevens, *supra*, footnote 14, p. 60. See also P.T. Muchlinski, *Multinational Enterprises and the Law*, Blackwell, Oxford, U.K., 1999, p. 626, citing J.P. Laviec, *Protection et promotion des investissements: étude de droit international économique*, Presses universitaires de France, Paris, 1985, p. 94.

[19] UNCTAD, *supra*, footnote 1.

[20] Ibid., at p. 13.

[21] Ibid., at pp. 17, 23, 37–40, 53 and 61.

unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors. Where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and inequitable."[22]

Similarly, Vasciannie supports the view that this standard is autonomous.[23] After a detailed examination of the evidence he concludes:

"... bearing in mind that the international minimum standard has itself been an issue of controversy between developed and developing States for a considerable period, it is unlikely that a majority of States would have accepted the idea that this standard is fully reflected in the fair and equitable standard without clear discussion."[24]

There is also authority pointing in the opposite direction. Outside the NAFTA context, the case for regarding the fair and equitable treatment standard as equivalent to the international minimum standard of customary international law seems to rest primarily on the following evidence.

As pointed out above, Article 1(a) of the OECD Draft Convention on the Protection of Foreign Property of 1967 refers to fair and equitable treatment. The Notes and Comments to this provision state that, in the Drafting Committee's view, this indicated the standard set by international law:

"4. (a) The phrase 'fair and equitable treatment', customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that ... protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the 'minimum standard' which forms part of customary international law."[25]

A comment by the Swiss Foreign Office of 1979 in the context of a discussion of the fair and equitable treatment standard is sometimes put forward as supporting the view that the standard is equivalent to the international minimum standard:

"*On se réfère ainsi au principe classique du droit des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du 'standard minimum' international, c'est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques.*"[26]

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[22] Ibid., at p. 40.

[23] Vasciannie, *supra*, footnote 1, pp. 104–105 and 139–144.

[24] Ibid., at p. 144.

[25] OECD, *supra*, footnote 6, at 120. The passage is quoted in the Dissenting Opinion of arbitrator Asante to *AAPL v. Sri Lanka*, Award, 21 June 1990, 30 I.L.M. 628, 1991, at 639.

[26] 36 Annuaire suisse de droit international 178, 1980. "Thus, it refers to the classical principle of international public law according to which States must give foreigners found within their territories, and their properties, the benefit of the international 'minimum standard', that is to say to accord them a minimum of personal, procedural and economic rights." (Editor's translation).

By far the most intensive discussion of the relationship of the fair and equitable treatment standard to customary international law has taken place in the context of Article 1105(1) NAFTA.[27] That provision, including its heading, reads as follows:

"Article 1105: Minimum Standard of Treatment

1. 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."[28]

Two features of this text are conspicuous. One is the reference to the "Minimum Standard of Treatment" in the heading—an evident reference to customary international law. The second is the inclusion of the fair and equitable treatment standard in the reference to international law: "international law, including fair and equitable treatment". Both features suggest that under this provision, fair and equitable treatment is part of international law, specifically of its rules on the minimum standard of treatment.

In spite of these indications, early arbitral decisions demonstrate that NAFTA tribunals did not regard the fair and equitable treatment standard in Article 1105(1) as restricted to customary international law. The Partial Award in *S.D. Myers*[29] stated that a breach of a rule of international law may not be decisive in determining whether a denial of fair and equitable treatment had occurred. The Tribunal said:

"264. In some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied *'fair and equitable treatment'*, but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105." (emphasis original).[30]

The Tribunal in *Pope & Talbot* was even more explicit.[31] It discussed the issue of the relationship of Article 1105 NAFTA to customary international law at some length. It found that the fairness elements in Article 1105 did not merely reflect customary international law but were additional to the requirements of international law. This resulted from the fact that the language of Article 1105 grew out of bilateral treaties which demonstrated that additive character. Therefore "the language and evident intention of the BITs makes the discrete (i.e. additive) standards interpretation the proper one. A contrary reading would do violence to the BIT language."[32] It followed that "compliance with the fairness elements must be ascertained free of any threshold

[27] See especially C. N. Brower, C. H. Brower and J. K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 Arb. Int'l 415, 2003, at 428; P. Dumberry, *The Quest to Define "Fair and Equitable Treatment" for Investors under International Law—The Case of the NAFTA Chapter 11* Pope & Talbot *Awards*, 3 J.W.I. 4, August 2002, p. 657; P.G. Foy and R.J.C. Deane, *Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement*, 16 ICSID Rev.–F.I.L.J. 299, 2001; J. C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID Rev.–F.I.L.J. 21, 2002.

[28] NAFTA, *supra*, footnote 11.

[29] *S. D. Myers v. Government of Canada* (*S.D. Myers*), Partial Award, 12 November 2000, 40 I.L.M. 1408, 2001.

[30] Ibid., at para. 264.

[31] *Pope & Talbot v. Canada* (*Pope & Talbot*), Award, 10 April 2001, 7 ICSID Reports 102, paras. 105–118.

[32] Ibid., at para. 113.

that might be applicable to the evaluation of measures under the minimum standard of international law."[33]

In reaction to this finding, on 31 July 2001 the NAFTA Free Trade Commission (FTC), a body composed of representatives of the three States Parties with the power to adopt binding interpretations,[34] issued the following Note of Interpretation:

"Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."[35]

In a further Decision,[36] the *Pope & Talbot* Tribunal voiced considerable misgivings concerning the FTC's power to issue the above Interpretation[37] and concerning the Interpretation's correctness.[38] It reluctantly accepted the FTC's Interpretation, however.[39]

Subsequent NAFTA tribunals have accepted the FTC Interpretation without further resistance.[40] Therefore, it may now be regarded as established that, in the context of Article 1105(1) NAFTA, the concept of fair and equitable treatment is equivalent to the minimum standard of treatment under customary international law.

It does not follow that the result reached in the NAFTA context should necessarily be applied also to other treaties, notably to BITs. This is so because of three special

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[33] Ibid., at para. 111.

[34] Article 1131(2) NAFTA.

[35] The United States Model BIT, as well as recently concluded U.S. Free Trade Agreements, incorporates the view expressed by the FTC. The 2004 United States Model BIT provides in part:

"Article 5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."

[36] *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, 41 I.L.M. 1347, 2002.

[37] Ibid., at paras. 17–24.

[38] Ibid., at paras. 25–47.

[39] Ibid., at paras. 48–69.

[40] See *Mondev International Ltd. v. United States of America* (*Mondev*), Award, 11 October 2002, 6 ICSID Reports 192, paras. 100 *et seq.*; *United Parcel Service of America, Inc. v. Canada* (*UPS*), Award, 22 November 2002, 7 ICSID Reports 288, para. 97; *ADF Group, Inc. v. United States of America* (*ADF Group*), Award, 9 January 2003, 6 ICSID Reports 470, paras. 175–178; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (*Loewen*), Award, 26 June 2003, 7 ICSID Reports 442, paras. 124–128; *Waste Management, Inc. v. United Mexican States* (*Waste Management*), Award, 30 April 2004, paras. 90–91. See also *United Mexican States v. Metalclad Corp.*, Judgment, Supreme Court of British Columbia, 2 May 2001, 5 ICSID Reports 236, paras. 61–65.

features of Article 1105(1) NAFTA:

- Article 1105 NAFTA refers to the "Minimum Standard of Treatment" in its heading;
- Article 1105(1) NAFTA refers to "international law, including fair and equitable treatment", suggesting that the fair and equitable treatment standard is part of customary international law; and
- Article 1105(1) NAFTA was the object of a binding interpretation by an authorized treaty body.

Tribunals operating outside the NAFTA context have not adopted a dogmatic position on whether the fair and equitable treatment standard contained in BITs is an autonomous standard or merely reflects customary international law. Rather, they have interpreted the relevant provisions in BITs on the basis of their respective wording.[41] The relevant cases are discussed in their proper context in Sections V and VI of this article.

Overall, the better view would seem to be that, in the absence of a clear indication to the contrary, the fair and equitable treatment standard contained in BITs is an autonomous concept. Depending on the specific wording of a particular treaty, this concept may well overlap with or even be identical to the minimum standard required by international law. The meaning of a clause providing for fair and equitable treatment will ultimately depend on its specific wording.[42] The fact that the host State has breached a rule of international law will be strong evidence of a violation of the fair and equitable treatment standard,[43] but that is not the only conceivable form of its breach.

IV. THE INTERPRETATION OF THE FAIR AND EQUITABLE TREATMENT CONCEPT

The standard of fair and equitable treatment is relatively imprecise. Its meaning will often depend on the specific circumstances of the case at issue.[44] The Tribunal in *Mondev* pointed out that "[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case".[45] Similarly, the Tribunal in *Waste Management* said that "the standard is to some extent a flexible one which must be adapted to the circumstances of each case".[46]

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[41] See, especially, *Técnicas Medioambientales Tecmed S. A. v. The United Mexican States* (*Tecmed*), Award, 29 May 2003, 43 I.L.M. 133, 2004, paras. 155 and 156; *MTD v. Republic of Chile* (*MTD*), Award, 25 May 2004, paras. 110–112; *Occidental Exploration and Production Co. v. Ecuador* (*Occidental*), Award, 1 July 2004, paras. 188–190.

[42] See also Vasciannie, *supra*, footnote 1, at pp. 122 and 127, who points out that the use of the term "fair and equitable treatment" does not necessarily convey the same legal result in each case. In the same sense, see also UNCTAD, *supra*, footnote 1, p. 22; Yannaca-Small, *supra*, footnote 1, pp. 1 and 40.

[43] See *S.D. Myers*, *supra*, footnote 29, para. 264: "... the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105."

[44] G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 Recueil des Cours 251, 1997, at 346.

[45] *Mondev*, *supra*, footnote 40, para. 118.

[46] *Waste Management*, *supra*, footnote 40, para. 99. See also *Ronald S. Lauder v. The Czech Republic* (*Lauder*), Award, 3 September 2001, para. 292; *GAMI Investments, Inc. v. United Mexican States* (*GAMI*), Award, 15 November 2004, para. 96.

Muchlinski has summarized the situation in the following terms:

> "The concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content."[47]

At the same time, this lack of precision may be a virtue rather than a shortcoming. In actual practice, it is impossible to anticipate in the abstract the range of possible types of infringements upon the investor's legal position. The principle of fair and equitable treatment allows for independent and objective third-party determination of this type of behaviour on the basis of a flexible standard.[48] Therefore, it is not devoid of independent legal content. Like other broad principles of law, it is susceptible of specification through judicial practice. As Weil wrote in the year 2000: "The standard of 'fair and equitable treatment' is certainly no less operative than was the standard of 'due process of law,' and it will be for future practice, jurisprudence and commentary to impart specific content to it."[49]

Therefore, although "fair and equitable" may be reminiscent of the extralegal concepts of fairness and equity, it should not be confused with decision *ex aequo et bono*. It is a legal concept that is susceptible to interpretation and application by a tribunal without an authorization by the parties to go beyond the law and to apply equitable principles.[50] The Tribunal in *ADF Group* pointed out that the requirement to accord fair and equitable treatment does not allow a tribunal to adopt its own idiosyncratic standard but "must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law".[51]

A number of arbitral awards rendered in the last couple of years have already made valuable contributions towards clarifying the concept of fair and equitable treatment through judicial practice. These decisions are discussed in the next two Sections of this article.

As will be shown below, it is possible to identify typical fact situations in which tribunals have employed the principle of fair and equitable treatment. UNCTAD, in its publication on the topic, has formulated this method of giving a more concrete meaning to this abstract concept in the following terms:

> "It is possible to identify certain forms of behaviour that appear to be contrary to fairness and equity in most legal systems and to extrapolate from this the type of State action that may be inconsistent with fair and equitable treatment, using the plain meaning approach. Thus, for instance, if a State acts fraudulently or in bad faith, or capriciously and wilfully discriminates against a foreign investor, or deprives an investor of acquired rights in a

[47] Muchlinski, *supra*, footnote 18, p. 625.
[48] Vasciannie, *supra*, footnote 1, pp. 100, 104 and 145.
[49] P. Weil, *The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois*, 15 ICSID Rev.–F.I.L.J. 401, 2000, at 415.
[50] See C. Schreuer, *Decisions Ex Aequo et Bono under the ICSID Convention*, 11 ICSID Rev.–F.I.L.J. 37, 1996.
[51] *ADF Group*, *supra*, footnote 40, para. 184. See also *Mondev*, *supra*, footnote 40, para. 119.

manner that leads to the unjust enrichment of the State, then there is at least a *prima facie* case for arguing that the fair and equitable standard has been violated."[52]

An examination of a treaty provision containing the fair and equitable treatment standard will have to start from the normal canons of treaty interpretation as contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. This includes the ordinary meaning of the treaty's terms, their context and the object and purpose of the treaty.[53]

The Tribunal in *Tecmed*[54] found that it had to interpret the concept of fair and equitable treatment autonomously, taking into account its text according to its ordinary meaning, international law and the "good faith" principle. The intention behind the concept was to strengthen the security and trust of foreign investors, thereby maximizing the use of economic resources. This goal was expressed in the Preamble of the relevant BIT. The Tribunal said:

"The Arbitral Tribunal understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described above is that resulting from an autonomous interpretation, taking into account the text of Article 4(1) of the Agreement according to its ordinary meaning (Article 31(1) of the Vienna Convention), or from international law and the good faith principle

...

by including this provision in the Agreement, the parties intended to strengthen and increase the security and trust of foreign investors that invest in the member States, thus maximizing the use of the economic resources of each Contracting Party by facilitating the economic contributions of their economic operators. This is the goal of such undertaking in light of the Agreement's preambular paragraphs which express the will and intention of the member States to '... intensify economic cooperation for the benefit of both countries ...' and the resolve of the member States, within such framework, '... to create favorable conditions for investments made by each of the Contracting Parties in the territory of the other ...'."[55]

The Tribunal in *MTD*[56] adopted a similar approach. It relied on the provision's ordinary meaning and on the relevant treaty's object and purpose as expressed in its Preamble. It said:

"112. This being a Tribunal established under the BIT, it is obliged to apply the provisions of the BIT and interpret them in accordance with the norms of interpretation established by the Vienna Convention on the Law of the Treaties, which is binding on the State parties to the BIT. Article 31(1) of the Vienna Convention requires that a treaty be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

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[52] UNCTAD, *supra*, footnote 1, p. 12.

[53] Article 31 of the Vienna Convention states: "General rule of interpretation: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose ..."

[54] *Tecmed*, *supra*, footnote 41.

[55] Ibid., at paras. 155 and 156.

[56] *MTD*, *supra*, footnote 41.

> 113. In their ordinary meaning, the terms 'fair' and 'equitable' used in Article 3(1) of the BIT mean 'just', 'even-handed', 'unbiased', 'legitimate'. These terms are also used in Article 2(2) of the BIT entitled 'Promotion and Protection of Investments'. As regards the object and purpose of the BIT, the Tribunal refers to its Preamble where the parties state their desire 'to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party', and the recognition of 'the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view to the economic prosperity of both Contracting Parties'."[57]

The context of the fair and equitable treatment standard is reflected also in other standards of the treaty that contains it. It is useful to compare the fair and equitable treatment standard to the national treatment and most-favoured-nation (MFN) standards. National treatment and MFN treatment are relative or contingent standards. They depend upon standards granted to other entities, which may vary. By contrast, fair and equitable treatment is an absolute standard that provides a fixed reference point.[58] UNCTAD has expressed this point in the following terms:

> "A foreign investor may conceivably believe that, even where protection by the national and MFN standards is offered, the level of protection is insufficient because the host State may provide inadequate protection to its nationals or to investors from the most favoured nation. In such cases, fair and equitable treatment helps to ensure that there is at least a minimum level of protection, derived from fairness and equity, for the investor concerned."[59]

Tribunals have repeatedly emphasized the independence of the fair and equitable treatment standard from the national treatment and MFN standards.[60] The Tribunal in *UPS*[61] said:

> "Those obligations are relative. They depend simply and solely on the specifics of the treatment the Party accords to its own investors or investors of third States. Article 1105, by contrast, states a generally applicable minimum standard which, depending on the circumstances, may require more than the relative obligations of articles 1102 and 1103."[62]

Therefore, the fair and equitable treatment standard may be violated even if the foreign investor receives the same treatment as investors of the host State's nationality. For the same reason, an investor may have been treated unfairly and inequitably even if it is unable to benefit from an MFN clause because it cannot show that investors of other nationalities have received better treatment.

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[57] Ibid., at paras. 112 and 113. See also *Lauder*, *supra*, footnote 46, para. 292; *Occidental*, *supra*, footnote 41, para. 183.

[58] Vasciannie, *supra*, footnote 1, pp. 105–106, 133 and 147.

[59] UNCTAD, *supra*, footnote 1, p. 16.

[60] *Genin, Eastern Credit Ltd., Inc. and AS Baltoil v. Republic of Estonia* (*Genin*), Award, 25 June 2001, 6 ICSID Reports 241, at para. 367; *S.D. Myers*, *supra*, footnote 29, at para. 259; *CME v. The Czech Republic* (*CME*), Partial Award, 13 September 2001, para. 611.

[61] *UPS*, *supra*, footnote 40.

[62] Ibid., at para. 80.

V. The Evolution of the Fair and Equitable Treatment Standard in Judicial Practice

The last few years have yielded considerable judicial practice on the issue of fair and equitable treatment. Despite its generality and lack of precision, international tribunals have given some specific meaning to the concept. In a number of cases they have found that this standard has been violated.

This Section looks at some broad principles that tribunals have defined in the application of the fair and equitable treatment standard. More concrete applications of the fair and equitable treatment standard are discussed in Section VI. This Section also demonstrates that practice shows a clear progression over time towards more exacting standards for host States.

The starting point for a discussion of the standard of treatment for foreigners is often seen to lie in the *Neer* case.[63] That case did not involve the concept of fair and equitable treatment, which did not exist in these terms at the time, nor did the case concern an investment dispute. Nevertheless, it has become a point of departure for later discussions on this issue.

In the *Neer* case, a U.S. citizen had been murdered in Mexico. The charge was that the Mexican authorities had shown a lack of diligence in investigating and prosecuting the crime. The United States–Mexico General Claims Commission said:

> "... the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law, or from the fact that the laws of the country do not empower the authorities to measures up to international standards, is immaterial."[64]

The Commission found that the facts did not show such a lack of diligence as would render Mexico liable, and dismissed the claim. As will be seen, subsequent tribunals have specifically distanced themselves from the very high threshold for a violation of international law formulated in *Neer*.

Another frequently cited case is *Elsi* (*United States v. Italy*),[65] decided by a Chamber of the International Court of Justice (ICJ). The case concerned the temporary requisitioning by the Mayor of Palermo of an industrial plant belonging to an Italian company that was owned by U.S. shareholders. The Court was not concerned with the issue of fair and equitable treatment as such but had to apply a treaty clause prohibiting arbitrary or discriminatory measures. Nevertheless, the *Elsi* case is frequently cited in

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[63] *Neer v. Mexico* (*Neer*), Opinion, United States–Mexico General Claims Commission, 15 October 1926, 21 A.J.I.L. 555, 1927. The case is discussed by Foy and Deane, *supra*, footnote 27, p. 314, and by Thomas, *supra*, footnote 27, pp. 29–32.

[64] *Neer*, ibid. at p. 556.

[65] *Elettronica Sicula S.p.A. (Elsi)* (*United States of America v. Italy*), I.C.J. Reports 1989, p. 15.

the context of discussions on the fair and equitable treatment standard. The ICJ said: "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[66] The Court found that the requisition order did not violate that standard.

In *S.D. Myers*,[67] the Tribunal applied the fair and equitable treatment standard under Article 1105(1) NAFTA. The case concerned an export ban by Canada of polychlorinated biphenyl waste to the United States for remediation. The Claimant argued successfully that the export ban had been introduced not for legitimate environmental reasons but in a discriminatory and unfair manner. The Tribunal described the criteria for a finding of a violation of the fair and equitable treatment standard in the following terms:

> "263. The Tribunal considers that a breach of Article 1105 occurs 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. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case."[68]

On the basis of the standard thus defined, the Tribunal found that Canada had violated the fair and equitable treatment standard.

Genin[69] concerned the withdrawal of a banking licence. The Tribunal stated that acts violating the fair and equitable treatment standard "would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith" (footnote omitted).[70] The Tribunal did not find that such a violation of the fair and equitable treatment standard had occurred, since there were ample grounds for the action taken by the Estonian authorities.

In *Pope & Talbot*,[71] the Claimant challenged the allocation of export quotas under the Canada–United States Softwood Lumber Agreement.[72] The Tribunal upheld the claim that the fair and equitable treatment standard under Article 1105 NAFTA had been violated. It said:

> "... the Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA

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[66] Ibid., at para. 128. For a detailed discussion of the *ELSI* case in relation to the fair and equitable treatment standard, see Vasciannie, *supra*, footnote 1, pp. 134–137.

[67] *S.D. Myers*, *supra*, footnote 29. For a summary of the case, see Foy and Deane, *supra*, footnote 27, pp. 321–323.

[68] *S.D. Myers*, ibid., at para. 263.

[69] *Genin*, *supra*, footnote 60.

[70] Ibid., at para. 367.

[71] *Pope & Talbot*, *supra*, footnote 31.

[72] See also the discussions in Dumberry, *supra*, footnote 27, pp. 665, 674 and 682 *et seq.*; Foy and Deane, *supra*, footnote 27, pp. 323–325; Thomas, *supra*, footnote 27, pp. 71 *et seq.*

countries, without any threshold limitation that the conduct complained of be 'egregious,' 'outrageous' or 'shocking,' or otherwise extraordinary."[73]

In its subsequent Award in Respect of Damages,[74] the *Pope & Talbot* Tribunal compared the old *Neer* case with the ICJ's more contemporary Decision in *ELSI*. It said:

"63. The International Court of Justice has moved away from the *Neer* formulation:

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. * * * It is a wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety.

64. That formulation leaves out any requirement that *every* reasonable and impartial person be dissatisfied and perhaps permits a bit less injury to the psyche of the observer, who need no longer be outraged, but only surprised by what the government has done. And, of course, replacing the neutral 'government action' with the concept of 'due process' perforce makes the formulation more dynamic and responsive to evolving and more rigorous standards for evaluating what governments do to people and companies." (emphasis original; footnote omitted).[75]

This passage is particularly instructive, since it highlights the evolving trend towards a higher standard of protection against State interference.

The *Mondev* case[76] concerned alleged failures by the judiciaries of the State of Massachusetts and of the United States in the context of an urban rehabilitation project in Boston. In interpreting the concept of fair and equitable treatment in Article 1105 NAFTA, the Tribunal rejected a suggestion that the standard as formulated in the *Neer* case should be applied. Apart from the fact that *Neer* did not concern an investment, there had been considerable developments in international law since that Decision: "To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious."[77] It went on to say: "...the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s."[78]

The *Mondev* Tribunal, in the context of interpreting the NAFTA's fair and equitable treatment provision, elaborated upon the standard formulated by the ICJ in *ELSI* in the following terms:

"127. In the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays 'a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety' ... The Tribunal would stress that the word 'surprises' does not occur in isolation. The 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 ... In the end the question is whether, at an international

[73] *Pope & Talbot*, *supra*, footnote 31, at para. 118. The Tribunal added in a footnote that the "minimum standards" reach of Article 1105 would protect NAFTA investors and investments against such conduct, even in the unlikely event that it was customary within a NAFTA Party.

[74] *Pope & Talbot*, Award in Respect of Damages, *supra*, footnote 36.

[75] Ibid., at paras. 63 and 64.

[76] *Mondev*, *supra*, footnote 40.

[77] Ibid., at para. 116.

[78] Ibid., at para. 123. See also para. 125.

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. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities." (footnotes omitted).[79]

ADF Group[80] concerned domestic-contents requirements in respect of government procurement for a construction project. The Tribunal agreed "that the customary international law referred to in Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment does evolve".[81] It continued:

"Put in slightly different terms, what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development."[82]

The *ADF Group* Tribunal quoted extensively from the Decision in *Mondev*, emphasizing those passages that distinguished *Neer*, and pointed to the fact that international law has changed since the 1920s.[83] The *ADF Group* Tribunal added:

"There appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of treatment of foreign investors and their investments by a host or recipient State."[84]

The *Loewen* case[85] concerned the propriety of court proceedings in Mississippi State Court against a Canadian undertaker. The Tribunal examined the applicability of Article 1105(1) NAFTA to the case, relying in particular on the decisions in *Pope & Talbot* and *Mondev*.[86] The *Loewen* Tribunal quoted the passage from *Mondev* that puts emphasis on the criterion whether "the impugned decision was clearly improper and discreditable".[87] It also pointed out that international law attaches special importance to discrimination and ill-will towards foreigners: "A decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law."[88]

On that basis, the *Loewen* Tribunal found that "the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."[89]

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[79] Ibid., at para. 127.
[80] *ADF Group*, *supra*, footnote 40.
[81] Ibid., at para. 179.
[82] Id.
[83] Ibid., at para. 180.
[84] Ibid., at para. 181.
[85] *Loewen*, *supra*, footnote 40.
[86] Ibid., at paras. 131–133.
[87] Ibid., at para. 133.
[88] Ibid., at para. 135.
[89] Ibid., at para. 137. In the end, the Tribunal found that the investor had failed to exhaust local remedies and dismissed the claim on that ground.

Waste Management[90] arose from a failed concession for the disposal of waste that involved a number of grievances, including the municipality's failure to pay its bills, exclusivity of services, difficulties with a line of credit agreement and proceedings before Mexican courts. The Tribunal cited the rejection of the *Neer* standard in *Mondev* and *ADF Group* and quoted from *S.D. Myers*, *Mondev*, and *Loewen*.[91] It then summarized its position on the fair and equitable treatment standard in Article 1105(1) NAFTA in the following terms:

> "... 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."[92]

Upon the facts of the particular case, the Tribunal found that this standard had not been violated.[93]

The *MTD* case[94] concerned a project for the construction of a large planned community which failed because it was inconsistent with zoning regulations. The Tribunal applied a provision in the BIT between Chile and Malaysia requiring that "Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment ..." In doing so, the Tribunal agreed with a legal opinion by Judge Schwebel that fair and equitable treatment encompassed such fundamental standards as good faith, due process, non-discrimination and proportionality. After discussing the appropriate method of interpretation and emphasizing, in particular, the object and purpose of the BIT, the Tribunal said:

> "... fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a proactive statement—'to promote', 'to create', 'to stimulate'—rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors."[95]

On the basis of this standard, the Tribunal found that the fair and equitable treatment standard had been violated by Chile.

The *GAMI* case[96] concerned the expropriation of sugar mills belonging to a Mexican company in which the Claimant was a minority shareholder. One of the claims rested on Article 1105(1) NAFTA. The complaint was that Mexico had not properly implemented its own decrees. The Tribunal relied on the decisions in *Waste Management* and *ADF Group*, noting in particular that standards had changed since the days of the *Neer*

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[90] *Waste Management*, *supra*, footnote 40.
[91] Ibid., at paras. 93–97.
[92] Ibid., at para. 98.
[93] Ibid., at para. 140.
[94] *MTD*, *supra*, footnote 41.
[95] Ibid., at para. 113.
[96] *GAMI*, *supra*, footnote 46.

Decision.[97] It dismissed the claim based on the alleged violation of the fair and equitable treatment standard and drew the following four conclusions from *Waste Management*:

> "(1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole—not isolated events—determines whether there has been a breach of international law."[98]

The efforts by Tribunals, as outlined above, to define a general standard for fair and equitable treatment may be summarized as follows:

- The high threshold formulated in *Neer*, referring to an outrage, to bad faith and to wilful neglect of duty, has been rejected consistently in recent decisions (*Pope & Talbot*, *Mondev*, *ADF Group*, *Waste Management*, *GAMI*).
- The ICJ's standard in *ELSI* of "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety" has been accepted (*Pope & Talbot*, *Mondev*).
- Some tribunals have used the standard of "improper and discreditable" (*Mondev*, *Loewen*).
- Discrimination against foreigners has been regarded as an important indicator of failure to grant fair and equitable treatment (*Loewen*, *Waste Management*, *MTD*).
- A definition used by some tribunals referred to international or comparative standards (*S.D. Myers*, *Genin*, *Pope & Talbot*).
- A failure to effectively implement aspects of domestic law is not necessarily a breach of the fair and equitable treatment standard (*GAMI*).
- Other criteria employed by tribunals included arbitrariness, idiosyncrasy, injustice, lack of good faith, lack of due process and proportionality (*Waste Management*, *MTD*).

VI. Specific Applications of the Fair and Equitable Treatment Standard

In addition to making broad statements on the meaning of fair and equitable treatment, tribunals have contributed to the clarification of this standard by applying it to particular circumstances. An examination of these more concrete applications permits an analysis of the concept of fair and equitable treatment in the light of typical fact situations. This analysis leads to more concrete principles that are covered by the fair and equitable treatment standard. These principles include:

- transparency and the protection of the investor's legitimate expectations;

[97] Ibid., at para. 95.
[98] Ibid., at para. 97.

- freedom from coercion and harassment;
- procedural propriety and due process; and
- good faith.

A. *Transparency and the Protection of the Investor's Legitimate Expectations*

Transparency and the protection of the investor's legitimate expectations are closely related. Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework. UNCTAD has described the role of transparency as part of fair and equitable treatment in the following terms:

> "The concept of transparency overlaps with fair and equitable treatment in at least two significant ways. First, transparency may be required, as a matter of course, by the concept of fair and equitable treatment. If laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host State, then fairness requires that the investor is informed about such decisions before they are imposed. This interpretation suggests that where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly included in the treaty ... Secondly, where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action; the degree of transparency in the regulatory environment will therefore affect the ability of the investor to assess whether or not fair and equitable treatment has been made available in any given case."[99]

The investor's legitimate expectations will be based on this clearly perceptible legal framework and on any undertakings and representations made explicitly or implicitly by the host State. A reversal of assurances by the host State which have led to legitimate expectations will violate the principle of fair and equitable treatment. Wälde has pointed out that the principle of the protection of legitimate, investment-backed expectations "is often combined with the principle of transparency: that government administration has to make clear what it wants from the investor and cannot hide behind ambiguity and contradiction itself".[100]

At the same time, it is clear that this principle is not absolute and does not amount to a requirement for the host State to freeze its legal system for the investor's benefit. A general stabilization requirement would go beyond what the investor can legitimately expect. It is clear that a reasonable evolution of the host State's law is part of the environment with which investors must contend. For instance, an adjustment of environmental regulations to internationally accepted standards or general improvements in labour law for the benefit of the host State's workforce would not lead to a violation of the fair and equitable treatment standard if applied in good faith and

[99] UNCTAD, *supra*, footnote 1, p. 51. See also Vasciannie, *supra*, footnote 1, pp. 146–147.
[100] T. W. Wälde, *Energy Charter Treaty-based Investment Arbitration*, 5 J.W.I.T. 3, June 2004, p. 387.

without discrimination. Practice demonstrates that problems do not so much arise from changes in host State legislation as from inconsistent positions taken by executive organs.

Transparency and the protection of legitimate expectations are firmly rooted in arbitral practice. In the *SPP* case,[101] the Respondent contended that certain acts of Egyptian officials upon which the Claimants relied were null and void because they were in conflict with the inalienable nature of the public domain and because they were not taken pursuant to the procedures prescribed by Egyptian law. The Tribunal rejected this argument and emphasized that the investor was entitled to rely on the official representations of the Government:

> "82. It is possible that under Egyptian law certain acts of Egyptian officials including even Presidential Decree No. 475, may be considered legally nonexistent or null and void or susceptible to invalidation. However, these acts were cloaked with the mantle of Government authority and communicated as such to foreign investors who relied on them in making their investments.
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> 83. Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law."[102]

In *Metalclad*,[103] the issue of transparency played a central role. The Federal Government of Mexico and the State Government of San Luis Potosí had issued construction and operating permits for the investor's landfill project. The investor was assured that it had all the permits it needed. But the Municipality of Guadalcázar refused to grant a construction permit. The Claimant complained about a lack of transparency surrounding the process. In interpreting Article 1105(1) NAFTA, the Tribunal said:

> "76. Prominent in the statement of principles and rules that introduces the Agreement is the reference to 'transparency' (*NAFTA Article 102(1)*). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws."[104]

The Tribunal held that the investor was entitled to rely on the representations of the federal officials.[105] It concluded that the acts of the State and the Municipality were

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[101] *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (*SPP*), Award, 20 May 1992, 3 ICSID Reports 189.

[102] Ibid., at paras. 82 and 83.

[103] *Metalclad Corp. v. United Mexican States* (*Metalclad*), Award, 30 August 2000, 5 ICSID Reports 212.

[104] Ibid., at para. 76.

[105] Ibid., at para. 89.

in violation of the fair and equitable treatment standard under Article 1105(1) NAFTA. The Tribunal said:

> "99. 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."[106]

In *Maffezini*,[107] one of the complaints concerned a "loan" that had been transferred by a government institution from the investor's personal account without his consent. The Tribunal found that the lack of transparency associated with the loan transaction was incompatible with the fair and equitable treatment mandated by the BIT between Argentina and Spain. It said:

> "... 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. Accordingly, the Tribunal finds that, with regard to this contention, the Claimant has substantiated his claim and is entitled to compensation ..."[108]

In the *CME* case,[109] the Claimant complained about interference in its contractual rights by a regulatory authority. The authority had reversed its previous position on the legal situation of a licence holder in an important point. This had created conditions enabling the investor's local partner to terminate the contract on which the investment depended. The Tribunal found that: "The Media Council breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest."[110]

In *Tecmed*,[111] the dispute concerned the replacement of an unlimited licence by a licence of limited duration for the operation of a landfill. The Tribunal applied a provision in the BIT between Mexico and Spain guaranteeing fair and equitable treatment. The Tribunal found that this provision required transparency and protection of the investor's basic expectations. It said:

> "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

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[106] Ibid., at para. 99. The Award was set aside in part by the Supreme Court of British Columbia; see *United Mexican States v. Metalclad Corp.*, *supra*, footnote 40, paras. 57–76. The Court found that the Tribunal had improperly based its Award on transparency, even though that principle is not contained in Chapter Eleven but in Chapter Eighteen of the NAFTA. The Court's Decision is questionable for two reasons: (1) Under Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in its context, which includes its entire text; (2) Article 1131 NAFTA, dealing with governing law, directs that a NAFTA Chapter Eleven tribunal is to decide the dispute "in accordance with this Agreement [i.e. the NAFTA—not just its Chapter Eleven] and applicable rules of international law".

[107] *Emilio Agustín Maffezini v. The Kingdom of Spain*, Award, 13 November 2000, 5 ICSID Reports 419.

[108] Ibid., at para. 83.

[109] *CME*, *supra*, footnote 60.

[110] Ibid., at para. 611.

[111] *Tecmed*, *supra*, footnote 41.

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 thereunder, 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."[112]

In the Tribunal's opinion, the requirement of fair and equitable treatment meant that:

"... the Claimant was entitled to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly."[113]

The Tribunal concluded that the investor's fair expectations were frustrated by the contradiction and uncertainty in Mexico's behaviour which was:

"... characterized by its ambiguity and uncertainty which are prejudicial to the investor in terms of its advance assessment of the legal situation surrounding its investment and the planning of its business activity and its adjustment to preserve its rights."[114]

Therefore, the:

"... described behavior frustrated Cytrar's fair expectations upon which Cytrar's actions were based and upon the basis of which the Claimant's investment was made, or negatively affected the generation of clear guidelines that would allow the Claimant or Cytrar to direct its actions or behavior to prevent the non-renewal of the Permit ..."[115]

In *MTD*,[116] the Respondent had signed an investment contract for the construction of a large planned community which failed because it turned out to be inconsistent with zoning regulations. The BIT between Chile and Malaysia required that "Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment ..." The Tribunal found that this provision had been violated by what it described as "the inconsistency of action between two arms of the same Government *vis-à-vis* the same investor".[117] While it was the investor's duty to inform itself of the country's law and policy:

"Chile also has an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is. Under international law (the law that this Tribunal has to apply to a dispute under the BIT), the State of Chile needs to be considered by the Tribunal as a unit.

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[112] Ibid., at para. 154. See also paras. 157, 162 and 164.
[113] Ibid., at para. 167.
[114] Ibid., at para. 172.
[115] Ibid., at para. 173.
[116] *MTD*, *supra*, footnote 41.
[117] Ibid., at para. 163.

166. The Tribunal is satisfied, based on the evidence presented to it, that approval of an investment by the FIC 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."[118]

In *Occidental*,[119] the claim was directed at the inconsistent practice of the Respondent's authorities in reimbursing value-added tax (VAT) paid on purchases in connexion with the Claimant's exploration and exploitation activities and the ultimate exportation of the oil produced. The Claimant relied on the provision in the Ecuador–United States BIT guaranteeing fair and equitable treatment. The Tribunal noted that the framework under which the investor had been operating had been changed in an important manner and that the clarifications sought by the investor had evoked a wholly unsatisfactory and thoroughly vague answer: "The tax law was changed without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes."[120]

After quoting from *Metalclad* and *Tecmed*, the Tribunal reached the conclusion that the requirements, as described in these cases, were not met in the case before it.[121] The Tribunal said:

"190. The Tribunal is of the opinion that in the instant case the Treaty standard is not different from that required under international law concerning the stability and predictability of the legal and business framework of the investment. To this extent the Treaty standard can be equated with that under international law as evidenced by the opinions of the various tribunals cited above. It is also quite evident that the Respondent's treatment of the investment falls below such standards.

191. The relevant question for international law in this discussion is not whether there is an obligation to refund VAT, which is the point on which the parties have argued most intensely, but rather whether the legal and business framework meets the requirements of stability and predictability under international law. It was earlier concluded that there is not a VAT refund obligation under international law ... but there is certainly an obligation not to alter the legal and business environment in which the investment has been made. In this case it is the latter question that triggers a treatment that is not fair and equitable."[122]

In *GAMI*,[123] the charge of unfair and inequitable treatment was based not on a complaint about a change of the law but on the Government's alleged failure to effectively implement its law. The Tribunal held that a government's failure to abide by its own law in a manner adversely affecting a foreign investor may lead to a violation of Article 1105(1) NAFTA.[124] In particular, a State would have to accept liability if its officials fail to implement regulations or implement them in a discriminatory or arbitrary fashion.[125] The key question was the extent to which an investor may rely on the implementation by the host State of laws in place before the investment was made.[126]

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[118] Ibid., at paras. 165 and 166.
[119] *Occidental*, *supra*, footnote 41.
[120] Ibid., at para. 184.
[121] Ibid., at paras. 185 and 186.
[122] Ibid., at paras. 190 and 191.
[123] *GAMI*, *supra*, footnote 46.
[124] Ibid., at para. 91.
[125] Ibid., at para. 94.
[126] Ibid., at para. 100.

The *GAMI* Tribunal found that there had been no violation of Article 1105(1). There was no evidence of an outright and unjustified repudiation of the relevant regulations.[127] Rather, the failure to implement the decrees was not attributable to the Government, since the programme that it foresaw was structured on the basis of broad co-operation among the private sector, the unions and the Government.[128]

A related question is whether reliance on contractual undertakings is protected by the obligation to give fair and equitable treatment. In other words, can it be said that non-performance of a contract between the investor and the host State or one of its territorial subdivisions or entities is contrary to the investor's legitimate expectations and hence a violation of the fair and equitable treatment standard? If the answer is affirmative, would it be possible to utilize the standard of fair and equitable treatment as a kind of "umbrella clause" which elevates contractual breaches to treaty breaches?[129]

The authority on this point is not unequivocal. In *Waste Management*,[130] the Tribunal described transparency and reliance as elements of the fair and equitable treatment standard contained in Article 1105(1) NAFTA. It found that this standard would be infringed by:

> "... 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."[131]

One of the claims in *Waste Management* that was based on Article 1105(1) NAFTA concerned the failure of the City of Acapulco to make payments under a concession agreement.[132] The Tribunal found that the evidence before it did not support the conclusion that the City had acted in a wholly arbitrary way that was grossly unfair but that it was in a situation of genuine difficulty.[133] The Tribunal said:

> "... even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, 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."[134]

Other tribunals have indicated that a failure to perform a contract may, under certain circumstances, amount to a violation of the fair and equitable treatment standard.

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[127] Ibid., at para. 104.
[128] Ibid., at paras. 108 and 110.
[129] See A.C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 Arb. Int'l 411, 2004; C. Schreuer, *Travelling the BIT Route—Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J.W.I.T. 2, April 2004, p. 231, at pp. 249–255; T.W. Wälde, *The "Umbrella" Clause in Investment Arbitration—A Comment on Original Intentions and Recent Cases*, 6 J.W.I.T 2, April 2005, pp. 183–236.
[130] *Waste Management*, *supra*, footnote 40.
[131] Ibid., at para. 98.
[132] Ibid., at paras. 108–117.
[133] Ibid., at para. 115.
[134] Id.

The Tribunal in *Mondev*[135] found it clear that the protection of Article 1105(1) NAFTA extended to contract claims[136] and held that:

> "... a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance."[137]

The Tribunal in *SGS v. Philippines*[138] also admitted the possibility that a violation of obligations under a contract may give rise to a claim for violation of the fair and equitable treatment standard. In its Decision on Jurisdiction, it found that although the scope of Article IV of the applicable BIT, dealing with fair and equitable treatment, was a matter for the merits, "an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV".[139]

This limited authority on the applicability of the fair and equitable treatment standard to contract claims would indicate that the answer will depend on the particular circumstances of the case. A simple breach of contract is part of normal business risk, and an investor may have to anticipate such an occurrence without recourse to a treaty remedy. Also, a breach of contract resulting from serious difficulties on the part of the government to comply with its financial obligations cannot be equated with unfair and inequitable treatment. On the other hand, a wilful refusal by a government authority to abide by its contractual obligations, abuse of government authority to evade agreements with foreign investors and action in bad faith in the course of contractual performance may well lead to a finding that the standard of fair and equitable treatment has been breached.

B. *FREEDOM FROM COERCION AND HARASSMENT*

Another set of facts to which tribunals have applied the concept of fair and equitable treatment concerns coercion and harassment by organs of the host State. The practice on this point is not nearly as abundant as that discussed in the previous Section but still merits a short analysis.

In *Pope & Talbot*,[140] the Softwood Lumber Division (SLD) of the Canadian Export and Import Controls Bureau, a government regulatory authority, had launched a "verification review" of the investor that was found to be confrontational and aggressive. The Tribunal held that this investigation amounted to a violation of the fair and equitable treatment standard contained in Article 1105(1) NAFTA:

> "The relations between the SLD and the Investment during 1999 were more like combat than cooperative regulation, and the Tribunal finds that the SLD bears the overwhelming

[135] *Mondev*, *supra*, footnote 40.
[136] Ibid., at para. 98.
[137] Ibid., at para. 134.
[138] *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, 42 I.L.M. 1285.
[139] Ibid., at para. 162.
[140] *Pope & Talbot*, *supra*, footnote 31, paras. 156–181.

responsibility for this state of affairs. It is not for the Tribunal to discern the motivations behind the attitude of the SLD; however, the end result for the Investment was being subjected to threats, denied its reasonable requests for pertinent information, required to incur unnecessary expense and disruption in meeting SLD's requests for information, forced to expend legal fees and probably suffer loss of reputation in government circles ... In its totality, the SLD's treatment of the Investment during 1999 in relation to the verification review process is nothing less than a denial of the fair treatment required by NAFTA Article 1105, and the Tribunal finds Canada liable to the Investor for the resultant damages."[141]

In its subsequent Damages Award, the *Pope & Talbot* Tribunal described these actions by the regulatory authority as "threats and misrepresentation" and as "burdensome and confrontational" and confirmed its finding of a violation of the fair and equitable treatment standard.[142]

In *Tecmed*,[143] an unlimited licence for the operation of a landfill had been replaced by a licence of limited duration. The Tribunal applied a provision in the BIT between Mexico and Spain guaranteeing fair and equitable treatment according to international law. The Tribunal found that the denial of the permit's renewal was designed to force the investor to relocate to another site, bearing the costs and the risks of a new business. The Tribunal said:

"Under such circumstances, such pressure involves forms of coercion that may be considered inconsistent with the fair and equitable treatment to be given to international investments under Article 4(1) of the Agreement and objectionable from the perspective of international law." (footnote omitted).[144]

It follows from the above cases that hostile treatment, harassment and coercion is in violation of the fair and equitable treatment standard.

C. *Procedural Propriety and Due Process*

Procedural fairness is an elementary requirement of the rule of law and a vital element of fair and equitable treatment. It is the antithesis to the international delinquency of denial of justice.[145] This duty may be violated not only by the courts but also through executive action.

The United States Model BIT of 2004 specifically clarifies that the fair and equitable treatment standard covers protection from denial of justice and guarantees due process.

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[141] Ibid., at para. 181.

[142] *Pope & Talbot*, Award in Respect of Damages, *supra*, footnote 36, at paras. 67–69.

[143] *Tecmed*, *supra*, footnote 41.

[144] Ibid., at para. 163.

[145] For a general description of denial of justice, see *Azinian, Davitian and Baca v. United Mexican States*, Award, 1 November 1999, 5 ICSID Reports 269, paras. 102 and 103:

"102. A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way ...

103. There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law."

Article 5(2)(a) provides 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 ..."

Tribunals have held consistently that the absence of a fair procedure or serious procedural shortcomings were important elements in a finding of a violation of the fair and equitable treatment standard. Most often, this has involved a violation of the right to be heard. For instance, in *Metalclad*,[146] the Municipality had refused to grant a construction permit. The Tribunal found that there had been a violation of the fair and equitable treatment guarantee in Article 1105(1) NAFTA. An element in this finding was lack of procedural propriety: "91. Moreover, the permit was denied at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear."[147]

In *Middle East Cement*,[148] one of the complaints concerned the seizure and auction of the Claimant's ship and the lack of proper notification of the auction to the owner. The attachment order and notice for the auction had been applied on board the ship (which was unmanned at the time), notified to the chief of the local police and published in a newspaper. The Tribunal applied provisions promising fair and equitable treatment and full protection and security in the BIT between Greece and Egypt. It found that a matter as important as the seizure and auctioning of a ship of the Claimant should have been notified by a direct communication, which would have been possible. Therefore, it found that the procedure applied did not fulfil the requirements of the fair and equitable treatment and full protection and security standards.[149]

In *Tecmed*,[150] the dispute arose from the revocation of a licence for the operation of a landfill and involved a provision in the BIT between Mexico and Spain guaranteeing fair and equitable treatment according to international law. The Tribunal found that this standard had been violated because, *inter alia*, the environmental regulatory authority had failed to notify the Claimant of its intentions, thereby depriving it of the opportunity to express its position.[151]

The *Loewen* case[152] concerned the propriety of domestic court proceedings. The Tribunal applied Article 1105 NAFTA and found that for its violation "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a

[146] *Metalclad*, *supra*, footnote 103.
[147] Ibid., at para. 91.
[148] *Middle East Cement Shipping and Handling Co. S. A. v. Arab Republic of Egypt*, Award, 12 April 2002, 7 ICSID Reports 178.
[149] Ibid., at para. 143.
[150] *Tecmed*, *supra*, footnote 41.
[151] Ibid., at para. 162.
[152] *Loewen*, *supra*, footnote 40.

sense of judicial propriety is enough".[153] The *Loewen* Tribunal found that the trial court permitted the jury to be influenced by persistent appeals to local favouritism against the foreign Claimant.[154] It followed that "the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment".[155]

However, the Tribunal found that the claim had to fail since the Claimant had not pursued all available remedies.[156]

Waste Management[157] arose from a failed concession for the disposal of waste. On the basis of previous authority, the Tribunal adopted a general description of fair and equitable treatment that included due process:

> "... 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 ... 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."[158]

In the particular case, the Tribunal found that the Mexican courts had not violated this standard.[159]

These cases demonstrate that questions of procedural propriety and due process are important elements of the fair and equitable treatment standard.

D. *Good Faith*

"Good faith" is a broad principle that is inherent in the legal architecture of international law. It is clear that a State is bound by this principle also in its dealings with foreign investors. In the words of Vasciannie:

> "States would fail to meet the minimum standard, and, by this reasoning, the fair and equitable standard, if, among other things, their acts amounted to bad faith, wilful neglect of duty, clear instances of unreasonableness or lack of due diligence."[160]

Of course, one might raise the objection that the principle of good faith is hardly more concrete than the concept of fair and equitable treatment. Therefore, it is doubtful whether the use of good faith contributes to the differentiation of fair and equitable. On the other hand, the principle of good faith is well tested in international law and provides a useful background of authority also for investment disputes.[161] For instance,

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[153] Ibid., at para. 132.
[154] Ibid., at para. 136.
[155] Ibid., at para. 137.
[156] Ibid., at paras. 142–157, 165–171 and 207–217.
[157] *Waste Management*, *supra*, footnote 40.
[158] Ibid., at para. 98.
[159] Ibid., at para. 130.
[160] Vasciannie, *supra*, footnote 1, p. 144.
[161] See, for example, Articles 26, 31(1), 46(2) and 69(2)(b) of the Vienna Convention on the Law of Treaties.

it is accepted that legal instruments must not be used abusively but must be applied in accordance with their intended purpose.

Arbitral tribunals have confirmed that good faith is inherent in fair and equitable treatment.[162] The Tribunal in *Tecmed*,[163] interpreting a BIT provision on fair and equitable treatment, said:

> "The Arbitral Tribunal finds that the commitment of fair and equitable treatment ... is an expression and part of the *bona fide* principle recognized in international law ... 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 ..." (footnotes omitted).[164]

In a similar vein, the Tribunal in *Waste Management*[165] found that the obligation to act in good faith was a basic obligation under the fair and equitable treatment standard as contained in Article 1105(1) NAFTA. In particular, a deliberate conspiracy by government authorities to defeat the investment would violate this principle:

> "138. The Tribunal has no doubt that a deliberate conspiracy—that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement—would constitute a breach of Article 1105(1). A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."[166]

Therefore, it may be regarded as established that action against the investor that is demonstrably in bad faith would be a violation of the fair and equitable treatment standard.

A related but different question is whether every violation of the standard of fair and equitable treatment requires bad faith. Put differently, is it a valid defence for the host State to argue that, although its actions may have caused damage to the investor, these actions were taken *bona fide* and hence could not have violated the fair and equitable treatment standard?

Arbitral practice indicates that the fair and equitable treatment standard may be violated even if no *mala fides* is involved.[167] For instance, the Tribunal in *Mondev*[168] said: "To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[169]

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[162] See also *Genin*, *supra*, footnote 60, at para. 367: "Acts that would violate this minimum standard [of fair and equitable treatment] would include ... subjective bad faith."

[163] *Tecmed*, *supra*, footnote 41.

[164] Ibid., at paras. 153 and 154.

[165] *Waste Management*, *supra*, footnote 40.

[166] Ibid., at para. 138.

[167] A contrary indication may be seen in a dictum in *Genin*, *supra*, footnote 60, at para. 371: "... any procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action." However, this passage does not relate to fair and equitable treatment but to the standard of arbitrary and discriminatory measures in Article II(3)(b) of the Estonia–United States BIT.

[168] *Mondev*, *supra*, footnote 40.

[169] Ibid., at para. 116.

The Tribunal in *Tecmed*,[170] after pointing out that fair and equitable treatment is an expression of the *bona fide* principle recognized in international law, quoted the above passage from *Mondev* to underline that "bad faith from the State is not required for its violation".[171]

The Tribunal in *Loewen*[172] also emphasized that bad faith or malicious intention is not an essential element of a breach of the fair and equitable treatment standard:

> "132. Neither 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."[173]

The Award in *Occidental*[174] expresses the same idea. In the context of transparency and consistency as part of the fair and equitable treatment standard, the Tribunal said that "this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not".[175]

It follows from the above that action by the host State that is governed by bad faith is at variance with fair and equitable treatment. Bad faith action by the host State includes the use of legal instruments for purposes other than those for which they were created. It also includes a conspiracy by State organs to inflict damage upon or to defeat the investment.

Although action in bad faith is clearly a violation of the fair and equitable treatment standard, *mala fides* is not a condition for such a violation. Action by the host State may be at variance with fair and equitable treatment even if the host State maintains with some credibility that its intentions were not in bad faith. In other words, a claimant need not prove bad faith to pursue a claim for violation of the fair and equitable treatment standard.

VII. Summary and Conclusion

The concept of fair and equitable treatment has appeared in documents for over half a century. Yet its meaning has remained elusive until tribunals started interpreting it systematically during the last five years.

The relationship of the fair and equitable treatment standard to the traditional minimum standard under customary international law has been a point of controversy. In the context of the NAFTA, it is now established that the term as used in Article 1105(1) therein is no more than a reference to established principles of international law. In other contexts, notably that of BITs, the answer depends on the wording of the particular clause. In the absence of indications to the contrary, the better view is to give it an autonomous meaning.

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170 *Tecmed*, *supra*, footnote 41.
171 Ibid., at para. 153.
172 *Loewen*, *supra*, footnote 40.
173 Ibid., at para. 132.
174 *Occidental*, *supra*, footnote 41.
175 Ibid., at para. 186.

Fair and equitable treatment, although relatively imprecise, is a legal concept and not a reference to decision *ex aequo et bono*. Treaty provisions guaranteeing this standard have to be construed with the help of the usual principles of interpretation, notably their ordinary meaning, their context and the treaty's object and purpose. Context includes the treaty's other provisions, notably other standards of treatment. The object and purpose is usually set out in the treaty's preamble.

Recent decisions have rejected old authorities that set a very high threshold for a violation of international law. In a number of cases, tribunals have attempted to define or explain fair and equitable treatment in general terms. Among these attempts is a description of its violation as a wilful disregard of due process of law and an act which shocks or at least surprises a sense of judicial propriety. Acts that can be regarded as improper and discreditable have also been included in these broad definitions. Other general descriptors include arbitrariness, idiosyncrasy, injustice, lack of good faith, lack of due process and proportionality. Tribunals have used international or comparative standards in this context. Discrimination against foreigners is an important element in determining whether the standard has been breached. A failure to implement domestic law is not necessarily a breach of the fair and equitable treatment standard.

The practice of tribunals shows typical fact situations to which the standard of fair and equitable treatment has been applied. One of these is transparency and the protection of the investor's legitimate expectations. This application of the standard protects the investor against a reversal of decisions or inconsistent action by different government organs and against arbitrary changes of the law. It is still unclear to what extent this variant of the fair and equitable treatment principle will protect the investor against breaches of contract by government authorities.

Another fact situation to which fair and equitable treatment applies is the investment's protection from hostile treatment, harassment and coercion on the part of government authorities. Procedural propriety and due process of law is also protected by this standard. This includes, in particular, respect of the right to be informed of and to be heard in judicial and administrative proceedings.

Finally, tribunals have found that fair and equitable treatment encompasses the general obligation to act in good faith. This would include protection against the use of legal instruments for uses other than their intended purpose and any conspiracy by government authorities to destroy the investment. At the same time, it is clear that action in bad faith is not a prerequisite for a finding that the fair and equitable treatment standard has been breached.

This outline of typical applications of the fair and equitable treatment principle is not exhaustive, and it can be expected that further categories will emerge from the practice of tribunals. Generally, the development of this concept is still in its infancy, and more specification and detail is likely to follow in years to come.