FAIR AND EQUITABLE TREATMENT: SHOULD THE FAIR AND EQUITABLE TREATMENT STANDARD CRYSTALLISE INTO CLEAR, BUT RIGID, RULES? OR SHOULD IT INCLUDE FLEXIBLE, BUT VAGUE NOTIONS ON JUSTICE?

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Abstract

The growing concern of States in order to attract foreign investment into their territories has led to the formulation of a legal structure aimed at encouraging investment through the granting of a secure and stable environment for the investors in the host State. The core of this structure is the Fair and Equitable Treatment (FET) standard, which as a non-contingent standard, constitutes an independent and reliable system for the protection of the investors. However, the application of the true fairness concept underlying the standard seems at times to be in jeopardy, due to a serious lack of precision regarding its true meaning. Arbitrators and scholars have wandered from one interpretation to another, trying in occasions to fit the standard in existing legal concepts such as the international minimum standard of customary international law or simply creating a whole new meaning by means of self-contained legal figure.

Introduction

This paper examines the most decisive attempts to define the FET standard within modern international law and whether there may be a presumptive need for consideration of the specific resources and specific investment regulatory experience of the particular host state involved as part of the FET analysis. To put in a better way, should the fair and equitable treatment standard crystallize into clear, but rigid rules? Or should it include flexible, but vague notions of justice?

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Interpretation of the Fair and Equitable Treatment Standard

There are a number of issues that come into play in understanding the interpretation and application of the fair and equitable standard today. A range of these issues is canvassed in this section. The main approaches that have been formulated regarding the meaning of the standard are:

i) A minimum standard of treatment under customary international law;
ii) A minimum standard of treatment under international law, including all sources; or
iii) A free-standing, autonomous requirement that should be interpreted according to the plain-meaning of "FET".

The first approach requires that the assessment of FET be made in accordance with the minimum standard of treatment owed to alien-owned property and investments under customary international law.[1] This restricts the scope considerably as the only obligations will be those accepted as reaching the status of norms under customary international law.

The second approach has a wider scope than the first. Its scope is not restricted to obligations arising under customary international law but also includes those accruing from other established sources of international law. For instance, tribunals have said it includes duties imposed on host States in accordance with State practice, judicial or arbitral case law and other sources of general law.[2]

The third approach is found where the treaty includes an obligation to provide FET without referring to international law. This means that an arbitral tribunal must come to its own view of what is fair and equitable in the circumstances. A number of tribunals and commentators have endorsed the view of Dr. F.A. Mann:[3]

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[1] OECD, Fair and Equitable Treatment Standard in International Law, September 2004,p8.

[2] *Mondev v. United States,ICSID Case No.ARB(AF)/99/2(Oct,2002)*, para 119; cited in *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) (NAFTA), Award 9 January 2003, para 184. Both *ADF* and *Mondev* cited in *Waste Management, Inc. v. Mexico* (Number 2) (ICSID Case No. ARB (AF)/00/3) (NAFTA), Final Award 30 April 2004, para 96.

[3] F.A. Mann, British Treaties for the Promotion and Protection of Investments, 52 BRIT. YB Int'l L. 241, 244 (1981). His view was shared by the tribunals in *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No.

> "The term 'FET' envisages conduct which goes far beyond the minimum standard and affords 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 any other words is likely to be material. The terms are to be understood and implied independently and autonomously."

No case has been found which applies the "FET" standard of Bilateral Investment Treaties (BITs) as an autonomous treaty standard. In *Tecmed v. Mexico,*[4] the Tribunal mentions that approach as one of the alternative approaches but it goes on to judge the claim against the international law principle of good faith.

Even within these three approaches, there is no precise definition of what constitutes "FET". One of the more comprehensive efforts to delineate the standard was made by the tribunal in *Waste Management v Mexico*:[5]

> "Taken together, *the S.D. Myers*,[6] *Mondev*, *ADF*[7] and *Loewen*[8] cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by

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ARB/01/8) Award 12 May 2005, para 284; *Azurix Corp. v. Argentina Republic*, Award, 14 July 2006 para 361; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. ("Vivendi") v. Argentina*, (ICSID Case No. ARB/03/19), Award August 2007, para 7.4.8. It was also echoed by UNCTAD, Fair and Equitable Treatment 40 (UNCTAD Series on Issues in Int'l Investment Agreements) (1999) "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" and Stephen Vascianne, The Fair and Equitable Treatment Standard in International Investment Law and Practice, 70 BRIT. Y.B. Int'l L 99, 144 (1999). ("Following Mann, where the fair and equitable treatment standard is invoked, the central question remains simply whether the actions in question are in all of the circumstances fair and equitable or unfair and inequitable.")

4 *Técnicas Medioambientales Techmed S.A.* v. *the United Mexican States*, ICSID, case No. ARB(AF)/00/2 (Award) (29 May 2003).

5 *Waste Management, Inc.* v. *The United Mexican States*, ICSID Case No. ARB(AF)/00/3., para 98.

6 *S.D. Myers, Inc.* v. *Canada, (13* November 2000), Partial Award. International Legal Materials 408.

7 *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) (NAFTA), Award 9 January 2003.

8 Loewen v. United Sates of America, ICSID Case NO. ARB (AF)/98/3.

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

The Role of the Preamble and Objective of the Treaty

The rules for interpreting treaties, including investment treaties, are set out in article 31 of the 1969 Vienna Convention on the Law of Treaties.[9] Article 31(1) of the Vienna Convention provides:

> "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".

Various tribunals have agreed that the ordinary meaning of "fair" and "equitable" is "just", "even- handed", "unbiased", "and legitimate"[10]. However, as one tribunal has noted, these definitions do not take one very far because they replace "fair" and "equitable" with terms of almost equal vagueness.[11]

Tribunals have, however, found more assistance in looking at the object and purpose of the treaty in question. The object and purpose may be discerned from its title and preamble[12] as well as other relevant provisions of the treaty. This has led many tribunals to hold that the object and purpose of the treaty in question was to promote foreign investment and to create a stable framework for investment and effective use of economic

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9 Article 31 represents customary international law for the interpretation of treaties, *Eureko B.V. v. Poland*, Ad Hoc Investment Treaty Case (Netherlands/Poland BIT), Partial Award on Liability, para 247; *Siemens AG v.Argentine Republic* (ICSID Case No ARB/02/8) Decision on Jurisdiction 3 August 2004, para 80.

10 *MTD v. Chile*, para 112; *Siemens v. Argentina, Award, 6 February 2007* para 290, *Saluka Investments v. Czech Republic*, UNICTRAL, Partial Award 17 March 2006, para 297; *Azurix v. Argentina,* para 360.

11 *Saluka v. Czech Republic*, UNICTRAL, Partial Award 17 March 2006, para 297.

12 Ibid para 299.

resources.[13] One tribunal took a more nuanced view. It called for a balanced approach to the interpretation of the treaty's provisions, saying that an interpretation that exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments. It said that this would undermine the overall aim of extending and intensifying the parties' mutual economic relations.[14]

However, even under the more nuanced approach, the tribunal still viewed the ultimate aim as investment promotion without regard as to whether the said investment contributed to the sustainable development of the host State. If the preambles and objective provisions of BITs remain silent as to the need to balance the interests of the various stakeholders and to ensure the sustainable development of the host State, tribunals may find it hard to deviate from this view.

The Interpretation of Fair and Equitable Treatment in Past Arbitral Awards

Certain principles seem to be emerging from the growing body of arbitral awards dealing with FET.[15] Below are some of the cases to explain FET:

1. Cases arising under Bilateral Treaties*:*

Several different developments can be identified in this regard. First is the view that FET standard must not be inferior to a "minimum standard of vigilance and of care required by international law," as was held in *AMT v. Zaire*[16]. Second is the view that FET standard is an "international minimum standard that is separate from domestic law," as the tribunal opined in *Genin v. Republic of Estonia.* [17] In *Genin,* the claimant sought to recover losses related to its investment in an Estonian financial institution. The International Centre for Settlement of Investment Dispute (ICSID) tribunal, after having considered whether certain actions of the Bank of Estonia amounted to a violation of its obligation to accord "fair and equitable treatment" and "non-

[13] For example, *MTD v. Chile*, para 113; *Siemens v. Argentina,* Award, para 289; *Azurix v. Argentina,* para 360.
[14] Saluka supra note 11, para 300.
[15] C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles,* Oxford University Press (2007) para 7.99 p234.
[16] (ICSID, 1997)
[17] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia,* ICSID Case no ARB/99/2 (Award) (June 25, 2001).

discriminatory and non arbitrary treatment" under the US-Estonia 1994 BIT, dismissed the claim. In its consideration, it described the standard as follows:

> "Under international law, this requirement is generally understood to 'provide a basic and general standard, which is detached from the host State's domestic law'. While the exact content of the standard is not clear, the Tribunal understands it to require an 'international minimum standard that is separate from domestic law, but that is, indeed, a minimum standard". (Emphasis in the original)

A further view is that FET relates to "standards acceptable under international law," in the words of the tribunal in *CME v. Czech Republic*.[18] FET standard has also sometimes been held to include "full protection and security" and "vigilance". [19] Furthermore, FET standard has been considered to include due process/non-denial of justice/non-arbitrariness[20]. Finally, in *Maffezini v. Spain*,[21] the Tribunal addressed the unauthorized transfer of the claimant's funds by a Spanish official. It held that:

> "Because the acts of SODIGA (public company) relating to the loan cannot be considered commercial in nature and involve its public functions, responsibility for them should be attributed to Spain. In particular, these acts amounted to a breach by Spain of its obligation to protect the investment as provided for in Article 3(1) of the Argentine-Spain Bilateral Investment Treaty. Moreover, the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment in accordance with Article 4(1) of the same treaty. Accordingly, the Tribunal finds that, with regard to this contention, the Claimant has substantiated his claim and is entitled to compensation."

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18 *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) Award 12 May 2005, para 284.

19 *AAPL v. Srilanka* (ICSID, 1990), *AMT v. Zaire* (ICSID, 1997) and *Wena v. Egypt* (ICSID, 2000).

20 *Alex Genin* supra note 17.

21 *Maffezini* v. *Kingdom of Spain*, ICSID case No. ARB/97/7, Award (13 November 2000).

2. NAFTA cases:

In this regard, NAFTA awards have been particularly revealing, in large part because of the somewhat serendipitous road which they have travelled. Thus, FET standard was held to be part of international law including all sources, and not limited to a Minimum Standard in customary international law, in *Metalclad v. Canada*, where a breach of the corresponding Art. 1105(1) NAFTA was held to be possible by way of a breach of some *other* NAFTA provision. In *SD Myers v. Canada*,[22] the NAFTA tribunal held to the same effect, finding that a breach of national treatment may equal a breach of FET standard, which in turn equals a breach of a conventional international law rule, and then in turn a breach of the minimum standard of treatment.

However, as the lines between investors and host countries blur, and interests shift from investment to investment, the time is ripe for scholars and practitioners to re-examine the fairness debate as one of global policy. The question is not whether investment protections should protect investors over host countries or vice versa. Some relevant questions may instead be: Should the fair and equitable treatment standard crystallize into clear, but rigid, rules? Or should it include flexible, but vague, notions of justice? Below is the analysis for these questions.

Should the fair and equitable treatment standard vary according to the level of development, governance capacity, and resources of host countries?

There is a question of differential application to different levels of host state development. That is to say, there may be a presumptive need for consideration of the specific resources and specific investment regulatory experience of the particular host state involved as part of the FET analysis. Such a nuanced analysis appears to have been carried out in *Genin v. Estonia* (ICSID, 2001), *Generation Ukraine v. Ukraine* (ICSID, 2003) (referring to the "vicissitudes of the economy"), *Maffezini v. Spain*[23] (ICSID, 2000) (referring to "bad business judgments"), *MTD v. Chile* (ICSID, 2004) and *CMS v. Argentina* (ICSID, 2005), referencing the particular crisis situation. Some of these cases have been described above.

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22 *S.D. Myers, supra 6 para* 408.
23 *Maffezini* supra note 21.

However, one may argue that the interpretation of FET standard should be differentiated according to the level of development, governance capacity, and resources of host countries. However, in order to analyze this, two questions need to be answered here: Should the fair and equitable treatment standard crystallize into clear, but rigid, rules? Arguing this way means FET will be interpreted under the minimum standard of customary international law. Or should it include flexible, but vague, notions of justice? If it is to be flexible, then a self-contained standard is required.

3. Any Self Contained Standard?

Of particular interest are the views of investors with regard to the standard, as well as that of host States. Investors, generally, argue the more expansive view, that is, conceiving the standard as a self-contained concept, which will extend far beyond the minimum standard approach that limits it to outrageous behavior by the host State, as was established in the Neer case[24]. On the other hand, the host State's argument will tend to limit its liability precisely to the Neer case understanding. Therefore, for there to be variation in analyzing FET standard to different levels of host state, one may argue that adopting a self contained concept fully, giving its plain-meaning, will help the standard to fit in different levels of the host states. The host state cannot possibly promise or grant what they do not have, so self-contained concept kind of making it possible to consider the specific levels of each host state. It is flexible in nature.

If one looks rather towards the idea of an 'international law minimum standard', one might be more tempted to think of an universal standard; if one rather adopts the 'plain meaning', Vienna Convention approach, then 'fairness' and 'equitableness' should be rather formulated in view of the specific region and the pertinent countries. Such an approach allows a distinction of the quality of the standard according to the particular country involved e.g. poor developing countries should have to measure up to a standard which reflects their ability to perform and the resources available to them, rather than imposing a uniform standard which may be too high for very weak countries and too low for the developed countries in Eastern Europe which

[24] Neer Claim, United Nations, Reports of International Arbitral Awards, 1926, IV, p. 60. In OECD. The International Minimum Standard in Customary International Law. Annex to Fair and Equitable Treatment Standard in International Investment Law, OECD, 2004.

constitute the Energy Charter Treaty (ECT) core target group. Such a differentiated approach would draw support from the recognition in other international legal instruments (WTO, but also environmental instruments) that developing countries require a differentiated set of legal obligations reflecting their particular level of development.

Since viewing the ECT as a distinct investment treaty in the primarily European regional, historical and cultural context, one may suggest to interpret FET rather in the context of contemporary European standards of governance. The European Convention on Human Rights and the standards of good-governance expressed by the European Court of Justice, the European agreements and other agreements of the EU with Eastern countries would be most authoritative as the most pertinent and special principles.

Besides, the concept is subjective, any application of the standard has to be fact-based and take into account the specific country context; countries which are developing countries or closer to developing countries in terms of governance quality, but also governance resources and capacity cannot be expected to apply the same quality of EU-like governance as, for example, countries that have joined or are about to join the EU, with many linkages already in place. But one should not be overly lenient with transition countries which are, still, quite underdeveloped in terms of governance quality. Also, the view has been held that it was not clear that all developing countries agree that an international minimum standard is part of customary international law. This is because interpretation of FET under minimum standard will be too rigid, which many host state might not meet the standard under customary law.

The plain-meaning approach entails a series of advantages, such as "the considerable advantages of uniformity". After all, why should "fair and equitable treatment" mean something different depending on which BIT applies? This is not a minor issue. It seems that this approach would surely improve the uniformity of the interpretation of the standard issued by arbitral tribunals. If we consider the standard in its plain meaning, arbitral rulings would become more uniform and may only vary in a little degree according to the facts of each case. It seems much easier to rely on the general meaning granted to a word than to determine what special standards of customary international law are equivalent to the fair and equitable treatment standard. The decision,

considering the case's facts, must simply be based on whether the conduct at issue is fair and equitable or unfair and inequitable.

The consideration of this theory is nevertheless not without difficulties. A plain-meaning approach may become subjective and lack precision. However, "in some circumstances, both the States and the foreign investors may view lack of precision as a virtue, for it promotes flexibility in the investment process".[25] Therefore, it seems that many existing arbitral rulings have headed towards this self-contained standard theory anyway. It might require some extra arbitral rulings to totally define the meaning's standard on the basis of the theory's elements.

Accordingly, either an overt or indirect refusal to consider a host state's particular level of development and experience in regulation of aliens as part of the FET analysis may be unwelcome. Indeed it was essentially refused in *GAMI v. Morocco* (NAFTA, 2004),[26] *MTD v. Chile* [27](ICSID, 2004), *Tecmed v. Mexico* [28](ICSID, 2003) and *Metalclad v. Canada*[29] (NAFTA, 2000). However, from the perspective of the investor, the FET component provides a fixed reference point, a definite standard that will not vary according to external considerations, because its content turns on what is fair and reasonable in the circumstances. In *MTD v. Chile*, a foreign investment contract signed on behalf of Chile had been frustrated by an inconsistent zoning regulation. The tribunal held that the host State's behaviour had violated the FET standard. Additionally, the claimant invoked a provision in the Chile- Malaysia BIT protecting it against "unreasonable or discriminatory measures". The tribunal said:

> To a certain extent, this claim has been considered by the Tribunal as part of the fair and equitable treatment. The approval of an investment against the Government urban policy can be equally considered "unreasonable".[30]

Another reason why it may be unwelcome is that, FET in its plain meaning; do not refer to any established body of law or to existing legal precedents. Instead, the self-contained approach presumes

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[25] Walker, Herman Jr. (1957-1958). "Modern Treaties Of Friendship, Commerce And Navigation", *Minnesota Law Review*, vol. 42 (April), pp. 805-824.

[26] *Gami Investment Inc.* v. *Mexico* (NAFTA), Award, 15 November 2004.

[27] *MTD Equity Sdn. Bhd and MTD Chile S.A.* v. *Republic of Chile*, ICSID case No. ARB/01/ 7 (Award), 21 May 2004.

[28] *Tecmed*, supra note 4.

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

[30] *MTD Equity* supra note 27 At para. 196.

that, in each case, the question will be whether a foreign investor has been treated fairly and equitably, without reference to any technical understanding of the meaning of "fair and equitable treatment".[31] But this is problematic because, with there being no particular agreement as to the content of the term, the self-contained approach could give rise to conflicting interpretations in practice.

4. Minimum standard under customary international law?

Article 1105 of the Minimum Standard of Treatment provides:

> 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.

The plain language and structure of Article 1105 (1) require those concepts to be applied as and to the extent that they are recognized in customary international law. Interpreting the FET under the customary international law minimum standard will mean that FET standard will crystallize into clear, but rigid, rules. Basically, the promotion of an international minimum standard eliminates the flexibility in the content of FET standard. The customary international law linkage with the FET standard will be too narrow and there is always a difficulty in identifying how customary international law is formed and evolved.

With respect to the content of the minimum standard, the Tribunal in *Thunderbird* established:

> The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law. Notwithstanding the evolution of customary law since decisions such as *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal view acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that weigh against the given factual context, amount to a gross denial

[31] Fatouros, A.A. (1962). *Government Guarantees to Foreign Investors* (New York: Columbia University Press),p.215.

> of justice or manifest arbitrariness falling below acceptable international standards."[32]

In fact, by subsuming the concept of FET inside what the three NAFTA Parties claim is the customary international law standard for the treatment of "aliens", they may have unwittingly expanded the law rather than narrowing it.[33] It should be noted that Article 1105 (1), on its face, speak only on the treatment to be offered to investments of investors from other NAFTA Parties. As such, one could argue that the NAFTA Parties did not initially oblige themselves to accord the minimum standard of treatment to investors acting on their own behalf in their territories, including those, who as envisaged in the definition of "investors" found in Article 1139 only seek to make an investment. However, we have an affirmative statement from the three Parties that they have always considered the treatment required under Article 1150 to include how State conduct relates to "alien", who must be investors, because any investments with legal personality capable of being treated in some manner would, per force, be legal entities of the host State. This means that the supposition that Article 1105 (1) only applies with respect to the treatment of "investment is incorrect.[34]

Moreover, "bearing in mind that the international minimum[35] 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, though both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in

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32 *International Thunderbird Gaming Corporation v. The United Mexican States, Award*,(26 January 2006) at pp. 63-64.

33 Sir Robert Hennings: second Opinion, 18 September 2001, available at http://www.naftalaw.org/jenning%20Methanex%20Openion.pdf. on the contrary, for Christopher Greenwood, retained as expert by the United States in the case of *Loewen Group, Inc. and Raymond L. Loewen v. United Sates of America*, ICSID Case NO. ARB (AF)/98/3, the Commission's Interpretation can be construed as a 'subsequent Agreement' between the Parties on the proper interpretation to be given to Article1105: Second Opinion, 16 August 2001, at p1r1.77, available at:<http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB65/claimargument3a.pdf>

34 Available at http://www.naftalaw .org/jenning%20Methanex%20Openion.pdf..

35 *Saluka* supra note 11 *para* 291-2.

an investment instrument does not automatically incorporate the international minimum standard for foreign investors". [36]

Any criteria for differentiation?

Some of the criteria for differentiation include:

1. Legitimate Expectation

The notion of legitimate expectations, also called basic expectations or reasonable and justifiable expectations,[37] is a key element of the fair and equitable treatment standard.[38] One may suggest 'legitimate expectation' of the investors as one of the criteria for differentiation. This is an important element in the sense that, the level of protection expected from the investors in the developed country (e.g. US) will be far higher than what investors in the developing country (e.g. Zambia) had in mind or expected when investing. Here, basic expectations that were taken into account by the foreign investor to make the investment are very important in taking consideration of specific level of host state into account. The Permanent Court of International Justice held many years ago that an investor must take the conditions of the host State as it finds them.[39] This view has since been endorsed in a number of arbitral decisions that have held that an investor cannot make a subsequent complaint if its investment fails merely because of laws or practices that were in place at the time of investment, and which were, or ought to have been, known to it before making the investment.[40]

This principle encompasses the basic expectations of the investor to be treated by the State in a transparent, consistent, i.e. non arbitrary manner, which would not "conflict with what a reasonable and unbiased observer would consider fair and equitable". The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and

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[36] Vasciannie, Stephen, The Fair and Equitable Treatment Standard in International Investment Law and Practice, The British Yearbook of International Law, 1999, Oxford, Volume 70 1999 (2000), p. 144.

[37] *Enron and Ponderosa Assets v. Argentina* (ICSID Case No. ARB/01/3) (United States/Argentina BIT) Award 22 May 2007, para 262.

[38] *Saluka , supra note* 11, para 302.

[39] *The Oscar Chinn Case* (1934) PCIJ Rep Series A/B No 63.

[40] *MTD v Chile*, supra note 25 para 205 and *GAMI Investments v. Mexico*, para 91. See also McLachlan, Shore, Weiniger, para 7.105-7.107 p237.

launch its commercial and business activities. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstance.

In *Occidental Exploration case*[41], the Tribunal referred to the preamble of the US-Ecuador BIT, which notes the agreement of the parties that such treatment "is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources", and concluded that "the stability of the legal and business framework is thus an essential element of fair and equitable treatment".[42] The Tribunal noted that "the tax law was changed without providing clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes[43]", and cited the *Metalclad* and *TECMED* awards in which the Tribunals concluded that there was a violation of fair and equitable treatment because the governments have acted in an inconsistent, non-transparent and unpredictable manner. Therefore, there can be no doubt therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.

2. Transparency

One may also suggest transparency as the second criterion for differentiation. The transparency of laws and other government measures has many facets, from simply disclosing and publicizing all government measures in accordance with a country's legal system, to specifically notifying and making available certain types of measures to an international body or to officials of another country. In the *Metalclad v. Mexico* case, the tribunal stated:

> "The Tribunal understands the principle of transparency to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments should be capable of being readily known to all affected investors".

In other words, it has become apparent that transparency can play a role in protecting investors' property.

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41 *Occidental Exploration and Production Company (OEPC)* v. *The Republic of Ecuador* (Case No. UN 3467) Final Award, 1 July 2004.
42 Ibid at para. 183.
43 Ibid at para. 184.

3. 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 in its dealings with foreign investors. In the words of Vasciannie:

> "State 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, willful neglect of duty, clear instances of unreasonableness or lack of due diligence."[44]

In setting criteria for differentiation, in particular, a deliberate conspiracy by government authorities to defect the investment would violate this principle. Therefore, it may be regarded as established that, action against the investor which is demonstrably in bad faith would be a violation of the fair and equitable treatment standard. Though, State may treat foreign investment unfairly and inequitably without necessarily action in bad faith.

4. Due process

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 FET standard. Most often, this has involved a violation of the right to be heard. For instance, in *Metalclad,*[45] the Municipality had refused to grant a construction permit. The Tribunal found that there had been a violation of the FET. An element in this finding was lack of procedural propriety.

Conclusion

An interpretation of the fair and equitable treatment standard, in accordance with recognized methods of treaty interpretation and State practice, leads to the conclusion that "States would fail to meet the minimum standard, and by this reasoning, the fair and equitable standard, if their acts amounted to bad faith, willful neglect, clear instances of unreasonableness or lack of due diligence."[46] Therefore, change and not stability will sometimes be

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44 S. Vascianni, Fair and Equitable Treatment Standard in International Investment Law and Practice, B.Y.I.L., Vol70, 1999,p144.

45 *Metalclad Corp* supra note 26

46 *Metalclad corp* supra note 26, p. 40.

a necessary component of the fair and equitable treatment standard, especially in times of systemic crises and with respect to long-term investments, since as the Tribunal in the case *Government of Kuwait v. Aminoil* held:

> This is how they can be said to have based themselves in advance on the assumption that a division of profits equitable today will need to be modified in order to be regarded as equitable tomorrow.[47]

Flexibility is good because it means that the FET can cover different situations. It can adjust to several aspects. The Free Trade Commission's intention, through the issuance of its Notes, was to restrict the flexibility of arbitral tribunals. However, the international minimum standard's own vagueness as a term did not allow even that, since Tribunals have in practice exceeded its intentional terms.

The whole divergence between most tribunals' decisions seems to confirm that the term is still subject to their own interpretations according to the facts of each case. To many, it seems that tribunals should maintain the opportunity to construe their text. Relying on the principle behind the investment agreement, which is to grant protection to the foreign investor, the restriction of the standard's meaning to customary international law and, therefore, the restriction of the tribunals' own functions, do not help in this respect. "Interpretation must begin with the rules that appear in the Vienna Convention, but it cannot end with the Notes of Interpretation".[48]

In conclusion, although some investment agreements do equate the fair and equitable treatment to the international minimum standard in customary international law, it cannot be concluded that this is the general meaning that the standard has adopted in international law. Even NAFTA tribunals that were restricted in their interpretation exceeded customary international law, which leads us to conclude that the meaning is still mainly in the hands of each tribunal, eventually applying a plain-meaning approach to it.

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47 *The Government of the State of Kuwait v. American Independent Oil Company (Aminoil)"*, 66 ILR (1948), para. 20.

48 Brower, Charles H., Fair and Equitable Treatment Under Nafta's Investment Chapter. American Society of International Law. Proceedings of the Ninety-Six Annual Meeting, March 16, 2002.