

Chapter 1: The Emergence of the Concepts of the Minimum Standard of Treatment and the Fair and Equitable Treatment

This book is about the FET standard under NAFTA Article 1105. The law on this area has been subject to heavy debate and substantial case law. The first element under discussion will be the origin and development of the concept of the 'minimum standard of treatment', which provides protection for investors under international law (section §1.01). The next section will focus primarily on the emergence of the FET standard after the Second World War, and most importantly, the reasons for its development in treaty practice (section §1.02). The last section will then undertake an examination of the controversial question of the interaction between the minimum standard of treatment and the FET standard (section §1.03).

§1.01. The Minimum Standard of Treatment

The historical aspects of the emergence of the minimum standard of treatment have already been the subjects of substantial scholarship on international law.⁽¹⁾ Moreover, a [page "13"](#) number of recent articles⁽²⁾ and books⁽³⁾ have also made a significant contribution to the better understanding of the concept of the minimum standard of treatment. The purpose of this section however, will be to offer a *tour d'horizon* of the concept rather than a detailed analysis of its complex ramifications.

[A]. The Origin of the Concept

The origin of the minimum standard of treatment stems from the international law doctrine of State responsibility for injuries to aliens. It is rooted in a due diligence obligation for States to respect the rights of foreigners within their country. Before the twentieth century, the prevailing view was that individuals conducting business in another State should be subject to the law of that State.⁽⁴⁾ One reason for the emphasis on local law was that, in many circumstances, Western States simply felt that there was no need for any international rules protecting their nationals abroad. Such was the case in the context of investments made in imperial State colonies (in Africa and parts of Asia for instance).⁽⁵⁾ There was also no need for any 'international law' protection in the different context of the 'extraterritoriality' system that was imposed by powerful European States upon independent (yet weaker) States in Asia (the most well-known example being that of the legations in Chinese cities).⁽⁶⁾ Thus, under these 'unequal treaties'⁽⁷⁾ of capitulation, foreigners were not subject to local laws and representatives of their States adjudicated their disputes under their own laws.⁽⁸⁾

Another reason for the prevalence of the host State's laws was the strong opposition from many States, especially in Latin America, to any other solution. At the time, the Argentinian scholar Carlos Calvo developed a theory whereby foreigners should receive a treatment that was not more favorable than that accorded to nationals [page "14"](#) of the host State.⁽⁹⁾ The Calvo doctrine also required foreigners to give up their right to receive diplomatic protection from their home State and prohibited access to international arbitration for dispute resolution. This view was based on the fundamental international law principle of the sovereign equality of States.⁽¹⁰⁾ Latin American States adopted this position to counter so-called 'gunboat diplomacy' and other interferences in their internal affairs by Western States.⁽¹¹⁾ Such interferences by Western States had often been made under the pretext of protecting the interests of their nationals abroad.⁽¹²⁾ In this context, many States rejected the idea that there existed any obligation under international law to accord a minimum protection to foreigners.⁽¹³⁾

Despite a strong opposition by many States, the early twentieth century nevertheless saw the gradual emergence of a minimum standard of treatment.⁽¹⁴⁾ The development of this new standard of treatment grew out of a concern of capital-exporting States that governments of the territories receiving the investments lacked the most basic measures of protection for aliens and their property.⁽¹⁵⁾


Jurisdiction

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At the time, the minimum standard focused almost exclusively on the non-discriminatory aspects of the treatment of aliens and the prevention of denial of justice.⁽¹⁶⁾ These concerns were legitimate and warranted due to the numerous acts of expropriation without compensation that took place in Russia in the context of the Revolution of 1917 and in Mexico in the turmoil of the 1930s.⁽¹⁷⁾ Western States argued that all governments were bound under international law to treat foreigners with at least a minimum standard of protection.⁽¹⁸⁾ Such minimum standard of treatment was required precisely because the existing standard of protection in many countries was considered too low.⁽¹⁹⁾ As further explained by US Secretary of State, Mr. Elihu Root in an article published in 1910, States sought to establish a threshold below which certain treatments would be deemed unacceptable and contrary to international law.


Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: *provided the protection which the country gives to its own citizens conforms to the established standard of civilization.* There is [however] a standard of justice  page "15" very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The ... system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment of its citizens.⁽²⁰⁾

Several decades later, the NAFTA *S.D. Myers* tribunal would explain why such an 'absolute' (non-contingent)⁽²¹⁾ standard of treatment is still necessary in modern investment treaty practice:

The inclusion of a 'minimum standard' provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The 'minimum standard' is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner.⁽²²⁾

[B]. The Neer Case and Its Relevance Today

Notwithstanding early disagreements between States, international jurisprudence slowly developed the concept of a minimum standard of protection.⁽²³⁾ While a number of cases have had a significant impact on the emergence of that standard,⁽²⁴⁾ special attention should be given in the NAFTA context to the particularly important *Neer* case of 1926. The case was decided by the US-Mexico Claims Commission, which was established in the 1920s to adjudicate claims arising out of a widespread unrest in Mexico, which caused harm to U.S. nationals.⁽²⁵⁾ The case involved a claim for compensation for the death of an American citizen, Mr. Paul Neer, and alleged that 'the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits'.⁽²⁶⁾ While the Commission dismissed the claim, it nevertheless provided for an explanation of the minimum standard:

The propriety of governmental acts should be put to the test of international standards, and ... 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,  page "16" or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.⁽²⁷⁾

As noted by one writer, 'the Commission attempted to define the international standard by means of analogy, deriving criteria of procedural outrage from the better-established rules of denial of justice and then applying these more generally'.⁽²⁸⁾ The *Neer* case has had considerable influence on the emergence of the concept of a minimum standard of treatment.⁽²⁹⁾ In fact, international law

casebooks typically refer to *Neer* as evidence of the existence of such a standard.⁽³⁰⁾ This conclusion has recently been contested by several writers who have indicated that limited weight should be given to a three-page award which only makes a general statement not substantiated by State practice.⁽³¹⁾ In the recent *Railroad Development Corporation* case, the tribunal also stated that the Commission 'did not formulate the minimum standard of treatment after an analysis of State practice' and further noted that it was 'ironic that the decision considered reflecting the expression of the minimum standard of treatment in customary international law is based on the opinions of commentators and, on its own admission, went further than their views without an analysis of State practice followed because of a sense of obligation'.⁽³²⁾ Others have rightly highlighted the fact that the case does not involve any issues related to the protection of investments per se,⁽³³⁾ therefore arguing that the award would only be relevant for 'cases of failure to arrest and punish private actors of crimes against aliens'.⁽³⁴⁾ The *Mondev* tribunal has persuasively explained this position as follows:

The Tribunal would observe, however, that the *Neer* case, and other similar cases which were cited, concerned not the treatment of foreign investment as such but the physical security of the alien. Moreover the specific issue in *Neer* was that of Mexico's responsibility for failure to carry out an effective police investigation into the killing of a United States citizen by a number of armed men who were not even alleged to be acting under the control or at the instigation of Mexico. In general, the State is not responsible for the acts of private parties, and only in special [page "17"](#) circumstances will it become internationally responsible for a failure in the conduct of the subsequent investigation. Thus there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the *Neer* principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens present on the territory of the State, are confined to the *Neer* standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.⁽³⁵⁾

In spite of these sound criticisms, it remains that recent investment tribunals still refer to the *Neer* 'standard' as reflecting the 'traditional' definition of the minimum standard of treatment in international law.⁽³⁶⁾ Moreover, the *Neer* standard has been repeatedly invoked by parties in modern investor-State arbitration disputes. As observed by one writer, 'after languishing three-quarters of a century in relative obscurity, *Neer* was, it seems, resuscitated in Canada's pleadings in the *S.D. Myers* and *Pope & Talbot* cases'.⁽³⁷⁾ In its 2002 award, the *Pope* tribunal portrayed Canada's position as being one where 'the principles of customary international law were frozen in amber at the time of the *Neer* decision'.⁽³⁸⁾ In fact, in other subsequent arbitration proceedings of the same year, Canada refuted ever having taken such a position.⁽³⁹⁾

As further discussed below,⁽⁴⁰⁾ there is a large consensus in the literature that the *Neer* case offers very little value in determining the actual content of the minimum standard of treatment in the context of contemporary international investment law.⁽⁴¹⁾ This is essentially because the standard has evolved substantially since the 1920s. Thus, as explained by the *ADF* tribunal, 'there appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically [page "18"](#) extendible to the contemporary context of treatment of foreign investors and their investments by a host or recipient State'.⁽⁴²⁾ This statement has also been endorsed by several other NAFTA tribunals.⁽⁴³⁾ However, in the specific context of NAFTA where Article 1105 refers expressly to the minimum standard of treatment (in its title), a number of recent tribunals have adopted a different position. Two recent NAFTA awards have thus held that the 'required severity of the conduct as held in *Neer* is maintained' (*Cargill*⁽⁴⁴⁾) or that the 'fundamentals of the *Neer* standard thus still apply today' (*Glamis*⁽⁴⁵⁾).⁽⁴⁶⁾ This conflicting NAFTA case law on this question will be examined below.⁽⁴⁷⁾

[C]. Challenges to the Existence of a Minimum Standard of Treatment and the Proliferation of BITs

The evolution of the minimum standard until the 1940s has been summarized by Paparinskis as follows:

The creation of the international minimum standard

(...) passed through a number of stages. The first stage is reflected in the nineteenth-century state practice, (almost) exclusively focusing on the non-discriminatory aspects of the treatment of aliens and denial of justice. Elihu Root's speech of 1910 illustrates the second stage of development, simultaneously explicit about the non-exhaustive nature of the non-discriminatory aspect of the international standard, and uncertain and contradictory about the source and content of this exception that could go further and apply to outrageous cases. The third stage is exemplified by the 1926 award of the US-Mexico General Claims Commission in the LFH Neer and Pauline Neer (Neer) case. The Commission attempted to define the international standard by means of analogy, deriving criteria of procedural outrage from the better-established rules of denial of justice and then applying these more generally. Neer was a relative improvement, attempting to give some juridical certainty to the previously indefinable exception (...). However and simultaneously, the focus on procedural outrage made it more complicated to develop rules that fell outside this paradigm (...). Despite the implicit consensus of the nineteenth century and the first decades of the twentieth century on the existence of such a rule and the explicit confirmation by the PCIJ in the 1920s, State practice [page "19"](#) in the 1930s Hague Conference during the 1930s raised questions about the continuing correctness of this view.⁽⁴⁸⁾

In the context of large-scale expropriations that took place after the Second World War in Eastern Europe, the concepts of denial of justice and the minimum standard were considered unsatisfactory in addressing such wrongs; arbitration practice focuses instead on the issue of compensation.⁽⁴⁹⁾ In the 1960s and 1970s, a group of States revived the opposition towards the concept of the minimum standard of treatment. This era was fundamentally marked by the arrival of a growing number of newly independent States in Asia and Africa that openly contested the *legitimacy* of existing customary international law. These States demanded a revision of these 'outdated' rules that did not respond to the fundamental changes that had prevailed in the international community since the end of the colonization period.⁽⁵⁰⁾ According to one prominent scholar, these States '[did] not easily forget that the same body of international law that they [were] now asked to abide by, sanctioned their previous subjugation and exploitation and stood as a bar to their emancipation'.⁽⁵¹⁾ Developing States thus rejected having to provide any minimum standard of protection to foreign investors under customary international law.⁽⁵²⁾ The conflicting ideologies of the time are summarized as follows by Judge Schwebel:

Capital-exporting States generally maintained that host States were bound under international law to treat foreign investment at least in accordance with the 'minimum standard of international law'; and where the host State expropriated foreign property, it could lawfully do so only for a public purpose, without discrimination against foreign interests, and upon payment of prompt, adequate and effective compensation. Capital importing States maintained that host States were not in matters of the treatment and taking of foreign property bound under international law at all; that the minimum standard did not exist; and that States were bound to accord the foreign investor only national treatment, only what their [page "20"](#) domestic law provided or was revised to provide. The foreign investor whose property was taken was entitled to no more than the taking State's law afforded.⁽⁵³⁾

A compromise between these different approaches was eventually reached in 1962 with the adoption by the United Nations General Assembly of the *Resolution on Permanent Sovereignty over Natural Resources* affirming the right for host States to nationalize foreign-owned property, but nevertheless requiring 'appropriate compensation' in accordance with international law.⁽⁵⁴⁾ The so-called 'Hull formula' which provided for 'prompt, adequate and effective' compensation in the event of expropriation was, however, rejected by developing States in 1974 with the General Assembly's adoption of the *Charter of Economic Rights and Duties of States*.⁽⁵⁵⁾ Under this 'New International Economic Order' the requirement to provide 'appropriate compensation' for expropriation still existed, but any related disputes (or 'controversy') had to be 'settled under the

domestic law of the nationalizing State and by its tribunals' and not by an international tribunal under international law. The debate on this issue of compensation for expropriation illustrates a lack of any broad international consensus on the existing protection for foreign investors. In the famous *Barcelona Traction* case of 1970, the International Court of Justice ('ICJ') explained that such a lack of consensus prevented the development and crystallization of rules of customary international law in the field of international investment law:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.⁽⁵⁶⁾

It is in this historical context that bilateral investment treaties emerged. As explained by two scholars, it is precisely because 'customary law was deemed to be too amorphous and not be able to provide sufficient guidance and protection' to foreign investors that capital-exporting and developing States started to frenetically conclude *ad hoc* BITs.⁽⁵⁷⁾ The 1990s were marked by a new era of globalization. As explained by Schreuer and [page "21"](#) Dolzer, as a result of the new climate of international economic relations of the 1990s, 'the fight of previous decades against customary rules protecting foreign investment had abruptly become anachronistic and obsolete'.⁽⁵⁸⁾ Consequently, by the 1990s, 'the tide had turned' and developing States were no longer opposed to the application of a minimum standard of protection under custom, and instead granted 'more protection to foreign investment than traditional customary law did, now on the basis of treaties negotiated to attract additional foreign investment'.⁽⁵⁹⁾ One fundamental element of such enhanced protection that was now being offered by States under BITs is the FET standard (a point further discussed below⁽⁶⁰⁾).

Finally, reference should be made to the position of several writers arguing in favor of the 'return' of custom *precisely because* of the proliferation of BITs. One controversial issue currently being debated in academia and amongst arbitrators is whether BITs represent the 'new' custom in this field.⁽⁶¹⁾ For instance, Schwebel believes that 'customary international law governing the treatment of foreign investment has been *reshaped* to embody the principles of law found in more than two thousand concordant bilateral investment treaties'.⁽⁶²⁾ The *CME* tribunal reached the same conclusion in its ruling.⁽⁶³⁾ The *Mondev* tribunal also held that the 'content' of 'current international law' was '*shaped* by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce'.⁽⁶⁴⁾ According to the writers advocating for the return of custom, the content of custom would now simply be the *same* as that of thousands of BITs.⁽⁶⁵⁾ As pointed out by one writer, it is quite a paradox that the process of 'treatification' that emerged *because* of the lack of customary rules in international investment law, could somehow have led to the creation of custom.⁽⁶⁶⁾ In any event, the present author has explained elsewhere the [page "22"](#) reasons for which the preferable view is that custom in the field of international investment law *does not* correspond to the *total sum* of 2,500 BITs.⁽⁶⁷⁾

[D]. The Minimum Standard of Treatment Is a Norm of Customary International Law

Despite some disagreement between States on the existence of the minimum standard of treatment in the last few decades, the concept is nowadays predominantly recognized as a rule of customary international law. This means in practical terms that this obligation applies to *all States*, including those that have not entered into any BITs. It also means that the standard of protection can be invoked by *any foreign investor* regardless of whether its State of origin has entered into a BIT with the country where it makes its investment.⁽⁶⁸⁾

A number of States have explicitly stated that the minimum standard of treatment was part of customary international law. This is, for instance, the position taken by the Member States of the Organization for Economic Co-operation and Development (OECD) in the context of the 1967 OECD Draft Convention,⁽⁶⁹⁾ and as stated in a more recent 2005 report as well.⁽⁷⁰⁾ This (now) undisputed fact has also been recognized by several NAFTA awards, including

This position has also been adopted by a majority of writers.⁽⁷⁴⁾ In fact, only a few scholars have rejected the customary status of the minimum standard of treatment. Porterfield, for instance, believes that the assumption that customary international law includes a minimum standard of treatment has 'never been supported by any comprehensive empirical study of the actual practice of nations with regard to foreign investment'.⁽⁷⁵⁾ He is also critical of the role played by tribunals' decisions as 'guiding the evolution of the minimum standard'.⁽⁷⁶⁾ Another prominent writer taking this position is Somarajah who denies the existence of any rule of customary law since 'it would be difficult to show that there was free consent on the part of all the developing states to the creation of any customary international law' in international investment law.⁽⁷⁷⁾ For Somarajah, any such rules of custom would have been imposed on developing States which have always rejected them:

The formation of customary principles has been associated with power. The role of power in this area is evident. Powerful States sought to construct rules of investment protection largely aimed at developing States by espousing them in their practice and passing them off as customary principles. They were always resisted ... Nevertheless, the norms that were supported by the developed states were maintained on the basis that they were accepted as custom though that was never the case. The significance of the General Assembly resolutions associated with the New International Economic Order is that they demonstrated that there were a large number, indeed a majority, of states of the world, which did not subscribe to the norms maintained by the developed world. After that, it was no longer credible to maintain that there was in fact an international law on foreign investment, though the claim continues to be made simply because of the need to conserve the gains made for investment protection by developed States.⁽⁷⁸⁾

Somarajah also believes that even 'if there was such customary international law, many developing States would regard themselves as persistent objectors who were not bound by the customary law'.⁽⁷⁹⁾ The present author has argued elsewhere that tribunals [page "24"](#) should not apply the controversial concept of persistent objector in the context of international investment law.⁽⁸⁰⁾ In subsequent writing, Somarajah admits that a minimum standard may have emerged, but *only* amongst NAFTA Parties in the context of a regional custom.⁽⁸¹⁾

In any event, this theoretical controversy is of limited importance in the specific context of NAFTA. Thus, the title of Article 1105 refers to the minimum standard of treatment. As pointed out by the *ADF* tribunal, in the context of NAFTA 'the long-standing debate as to whether there exists such a thing as a minimum standard of treatment of non-nationals and their property prescribed in customary international law, is closed'.⁽⁸²⁾ The *Mondev* tribunal also mentioned:

[I]t is clear that Article 1105 was intended to put at rest for NAFTA purposes a long-standing and divisive debate about whether any such thing as a minimum standard of treatment of investment in international law actually exists. Article 1105 resolves this issue in the affirmative for NAFTA Parties.⁽⁸³⁾

[E]. The Content of the Minimum Standard of Treatment

If there is no doubt as to the existence of a minimum standard of treatment that must be respected by States and the fact that this is a customary norm of international law, what remains controversial is to determine the actual *content* of that standard.

The minimum standard of treatment is an *umbrella concept*, which in *itself*, incorporates different elements. As pointed out by Roth in 1949, 'the international standard is nothing else but a set of rules, correlated to each other and deriving from one particular norm of general international law, namely that the treatment of an alien is regulated by the law of nations'.⁽⁸⁴⁾ Similarly, for Newcombe, the minimum standard of treatment 'consists of a series of interconnecting and overlapping elements or standards that apply to both the treatment of foreigners and their property'.⁽⁸⁵⁾ The United

States has consistently interpreted the minimum standard of treatment as an umbrella concept in NAFTA proceedings. The submission by the United States in *ADF* stands as a noteworthy exemplification of this position: [page "25"](#)

The 'international minimum standard' embraced by Article 1105(1) is an umbrella concept incorporating a set of rules that over the centuries have crystallized into customary international law in specific contexts. The treaty term 'fair and equitable treatment' refers to the customary international law minimum standard of treatment. The rules grouped under the heading of the international minimum standard include those for denial of justice, expropriation and other acts subject to an absolute, minimum standard of treatment under customary international law. The treaty term 'full protection and security' refers to the minimum level of police protection against criminal conduct that is required as a matter of customary international law.

The rules encompassed within the customary international law minimum standard of treatment are specific ones that address particular contexts. There is no single standard applicable to all contexts. The customary international law minimum standard is in this sense analogous to the common-law approach of distinguishing among a number of distinct torts potentially applicable to particular conduct, as contrasted with the civil-law approach of prescribing a single delict applicable to all conduct. As with common-law torts, the burden under Article 1105(1) is on the claimant to identify the applicable rule and to articulate and prove that the respondent engaged in conduct that violated that rule.⁽⁸⁶⁾

In *Glamis*, the tribunal agreed with the United States' description of the minimum standard of treatment as an umbrella concept.⁽⁸⁷⁾ It also explained that Mexico had adopted the same position.⁽⁸⁸⁾ The *Cargill* and *Mobil* tribunals also endorsed this umbrella concept description.⁽⁸⁹⁾

A number of writers have emphasized the vagueness of the concept of the minimum standard of treatment and its lack of precise content.⁽⁹⁰⁾ In a recent 2012 report, UNCTAD also stated that the minimum standard is 'highly indeterminate, lacks a clearly defined content and requires interpretation'.⁽⁹¹⁾ The report suggests that '[t]he MST is a concept that does not offer ready-made solutions for deciding modern [page "26"](#) investment disputes; at best, it gives a rough idea of a high threshold that the challenged governmental conduct has to meet for a breach to be established'.⁽⁹²⁾

Roth's identification of eight rules on the treatment of aliens in 1949 (not dealing specifically with foreign investment) constitutes an earlier attempt to define the *actual content* of the minimum standard of treatment.⁽⁹³⁾ A recent OECD report states that 'case law points to a number of areas across which the notion of an international minimum standard applies' including 'the administration of justice in cases involving foreign nationals, usually linked to the notion of denial of justice', 'the treatment of aliens under detention', full protection and security, and finally, the 'general right of expulsion by the host State' which 'should be the least injurious to the person affected'.⁽⁹⁴⁾ The 2012 UNCTAD report merely indicates that '[t]he MST is often understood as a broad concept intended to encompass the doctrine of denial of justice along with other aspects of the law of State responsibility for injuries to aliens'.⁽⁹⁵⁾ The report refers in turn, to an earlier 2004 OECD report⁽⁹⁶⁾ concluding that 'the international minimum standard applies in the following areas: (a) the administration of justice, [page "27"](#) usually linked to the notion of the denial of justice; (b) the treatment of aliens under detention; and (c) full protection and security'.⁽⁹⁷⁾ The UNCTAD report concluded that 'there are no other aspects of the MST that have become apparent to date in customary international law'.⁽⁹⁸⁾ Other writers have defined the content of the minimum standard more broadly.⁽⁹⁹⁾

In sum, there is a large consensus to the effect that the minimum standard of treatment encompasses (at the very least):

- An obligation for host States to prevent denial of justice in the administration of justice.
- An obligation not to expropriate a foreign investor's investment unless the taking is for a public purpose, as provided by law, conducted in a non-discriminatory manner and with compensation in return.

- An obligation to prevent arbitrary conduct.
- An obligation to provide investors with ‘full protection and security’.

One of the most controversial questions in the field of investor-State arbitration (further examined below⁽¹⁰⁰⁾) is whether or not the FET standard is one of the elements *encompassed* within the larger umbrella concept of the minimum standard of treatment or whether the FET is an autonomous standard.

§1.02. The Fair and Equitable Treatment Standard

Just like the minimum standard of treatment, the FET is an ‘absolute’ (non-contingent) standard of treatment.⁽¹⁰¹⁾ It is quite different from the national treatment (a ‘relative’ standard), which is defined by reference to the treatment accorded to *other specific* [page "28" investments](#) (i.e., the treatment accorded by the host State to its own investors).⁽¹⁰²⁾ On the contrary, the FET standard ‘applies to investments in a given situation without a reference to how other investments or entities are treated by the host State’.⁽¹⁰³⁾

The history of the emergence of the FET clause has previously been examined in detail by several authors.⁽¹⁰⁴⁾ For the purposes of this book, it suffices to simply highlight some of the most salient features of these important historical developments (section §1.02[A]). One important question that will be addressed below is why States began to include such a standard in their BITs in the 1960s and 1970s, a period where the very existence of the minimum standard of treatment under international law was a highly contentious issue (section §1.02[B]). Finally, we will examine the widespread use of the FET standard in modern BITs (section §1.02[C]).

[A]. Early Appearances of the Standard in Multilateral Instruments

The first reference to ‘equitable treatment’ can be found at Article 23(e) of the League of Nations Covenant, which commits its Member States ‘to secure and maintain ... equitable treatment for the commerce of all Members of the League’.⁽¹⁰⁵⁾ The League convened an International Conference on the Treatment of Foreigners to develop an applicable standard of treatment under Article 23(e) and later adopted a Draft Convention on the matter, which did not, however, refer to any FET obligation.⁽¹⁰⁶⁾

The 1948 *Havana Charter for an International Trade Organization* (hereinafter ‘Havana Charter’) is generally considered as the first legal instrument that makes reference to the FET standard.⁽¹⁰⁷⁾ Although the Havana Charter focused on trade issues, it also contained a number of provisions related to investments including a reference that a future organization would be authorized to ‘make recommendations for and promote bilateral or multilateral agreements on measure designed ... to assure just and equitable treatment for the enterprise ...’.⁽¹⁰⁸⁾ It is noteworthy that the Havana Charter [page "29"](#) did not, in itself, provide a guarantee, but rather that ‘it merely authorized the International Trade Organization to recommend that this standard be included in future agreements’.⁽¹⁰⁹⁾ The Havana Charter never came into force. At the same time, the Organization of American States adopted the *Economic Agreement of Bogotá* (hereinafter ‘Bogotá Agreement’) in 1948, which mentioned at Article 22 that ‘foreign capital shall receive equitable treatment’.⁽¹¹⁰⁾ The document was, however, never ratified.⁽¹¹¹⁾ It has been argued that the drafters of both the Bogotá Agreement and the Havana Charter ‘understood the requirement to provide equitable treatment as additive to a state’s duties toward aliens under customary international law’.⁽¹¹²⁾

Ten years later in 1959, a group of European businesspersons and lawyers under the leadership of Mr. Hermann Abs and Lord Shawcross drafted the Abs-Shawcross *Draft Convention on Investments Abroad*. The document specifically offered protection in terms of ‘fair and equitable treatment’ to foreigner’s property.⁽¹¹³⁾ The clause offered wide protection and covered ‘the most constant protection and security’ and forbade discrimination against a foreigner’s property.

In 1967, the OECD developed a convention to protect private property: the *Draft Convention on the Protection of Foreign Property* (hereinafter ‘Draft Convention’).⁽¹¹⁴⁾ It provides that ‘each party shall at all times ensure FET to the property of the nationals of the other parties’.⁽¹¹⁵⁾ One of the reasons why the Draft Convention included such a reference to FET may be because several OECD members

had, at the time, already started to adopt the FET clause in their respective BITs (a point discussed below⁽¹¹⁶⁾).⁽¹¹⁷⁾ Although the Draft Convention was never opened for signature, its importance should not be underestimated since it 'represented the collective view and dominant trend of OECD countries on investment issues'.⁽¹¹⁸⁾ The Draft Convention also provided OECD Member States with guidelines that were subsequently used by them as a model to draft their own BITs.⁽¹¹⁹⁾ In fact, it has been rightly observed that the many textual similarities between the different treaty models used by developed OECD Member States as a basis for treaty negotiation with developing countries, has led to a greater [page "30"](#) uniformity in BIT language.⁽¹²⁰⁾ Thus, the origin of the FET clause that is now commonly found in modern BITs can (at least in part) be traced to this 1967 OECD Draft Convention.⁽¹²¹⁾

Finally, it is worth mentioning that a number of non-binding instruments have also included protective measures for FET,⁽¹²²⁾ including the *Draft United Nations Code of Conduct on Transnational Corporations*,⁽¹²³⁾ and the 1992 World Bank *Guidelines on the Treatment of Foreign Direct Investment*.⁽¹²⁴⁾

[B]. Reasons for the Emergence of the Standard in BITs in the 1960s and 1970s

The failure to negotiate multilateral accords eventually led States to enter into bilateral agreements instead.⁽¹²⁵⁾ The common feature of the FET standard in the above-mentioned multilateral instruments certainly influenced States to incorporate such a standard at the bilateral level.⁽¹²⁶⁾ The late 1960s saw a substantial growth in the number of BITs between developed and developing countries. The first groups of BITs that mentioned the FET were those concluded by European States (including Germany and Switzerland) in the early 1960s.⁽¹²⁷⁾ By the 1970s, FET was specifically mentioned in most BITs between capital-exporting and capital-importing countries.⁽¹²⁸⁾ According to some estimates, the standard was mentioned in over 300 BITs between the 1960s and 1990s.⁽¹²⁹⁾

One of the most controversial questions discussed in scholarship in recent years is why States began to include the term 'fair and equitable treatment' in their BITs throughout the 1960s and 1970s.

According to one view, Western States incorporated the concept of FET in their BITs to simply reflect the minimum standard of treatment that existed under international law.⁽¹³⁰⁾ This approach has been endorsed by a number of writers.⁽¹³¹⁾ They [page "31"](#) typically refer to the above-mentioned 1967 OECD Draft Convention as representing the position of developed States at the time on matters of protection of foreign investments.⁽¹³²⁾ This is because the OECD's Commentary to the 1967 Draft Convention indicated that the concept of FET flowed from the 'well established general principle of international law that a State is bound to respect and protect the property of nationals of other States'.⁽¹³³⁾ The Drafting Committee also added that the phrase FET refers to 'the standard set by international law for the treatment due by each State with regard to the property of foreign nationals' and that 'the standard required conforms in effect to the minimum standard which forms part of customary international law'.⁽¹³⁴⁾ The same position was also taken by OECD Member States in 1984.⁽¹³⁵⁾ This position is also confirmed by the practice of some Western States.⁽¹³⁶⁾ This narrative has, however, been subject to dissent by many scholars.⁽¹³⁷⁾ While it is possible that the OECD commentary reflected what their Member States (all developed States) *themselves* viewed as what [page "32"](#) was customary international law at the time, they were certainly not representative of what developing States believed was their legal obligations in the 1960s.⁽¹³⁸⁾

As explained by two scholars, the use of a 'different and more politically neutral term [FET] might be explained by the historical political sensitivities regarding the minimum standard of treatment', which was 'historically viewed with suspicion because of the legacy of gun-boat diplomacy and imperialism'.⁽¹³⁹⁾ For these writers, '[f]air and equitable treatment may simply have been viewed as a convenient, neutral and acceptable reference to the minimum standard of treatment'.⁽¹⁴⁰⁾ It has also been argued that developing States have long-refused to incorporate the FET clause in their BITs *precisely* because Western States have viewed it as the equivalent of the minimum standard of treatment existing under international law.⁽¹⁴¹⁾

A more convincing approach has been adopted by a number of writers, wherein the growing use of the term 'fair and equitable

treatment' by Western States in BITs was intended to counter the assertion made by developing States about the inexistence of any minimum standard of treatment under international law.⁽¹⁴²⁾ Thus, Western States started including such a reference in their BITs in the 1960s precisely *because* of the ambiguities surrounding the concept of the minimum standard of treatment.

The actual drafting language used by States in their BITs supports this approach. As pointed out by two authors, 'if the parties to a treaty want to refer to customary international law, one would assume that they will refer to it as such rather than using [page "33"](#) a different expression'.⁽¹⁴³⁾ Incidentally, most BITs do *not* make such an explicit link to the minimum standard of treatment under custom.⁽¹⁴⁴⁾ The present author's own survey of some 365 BITs has shown that only 19% of the treaties examined do make such an explicit reference to 'international law' and that a mere 1% refer to 'customary international law'.⁽¹⁴⁵⁾ For the vast majority of BITs containing an FET clause that does not make reference at all to international law, the standard should *not* be considered as an implicit reference to the minimum standard of treatment.⁽¹⁴⁶⁾ Thus, '[a]s a matter of textual interpretation, it seems implausible that a treaty would refer to a well-known concept like the "minimum standard of treatment in customary international law" by using the expression "fair and equitable treatment"'.⁽¹⁴⁷⁾ This is especially the case considering the (above-mentioned) contentious debates between developed and developing States as to the very existence of a minimum standard of treatment.⁽¹⁴⁸⁾ As pointed out by Vasciannie:

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.⁽¹⁴⁹⁾

In sum, there are good reasons to interpret the increased use of the term 'fair and equitable treatment' by States in their BITs as a reference to something *other* than the minimum standard of treatment under customary international law. This seems to be the most compelling approach considering the origin and the historical development of the FET standard. Yet, as logical and sound as it may be, this interpretation is *not* convincing in cases where a BIT *does* in fact *explicitly* link the FET standard to 'international law'. Moreover, this interpretation is *simply not* sustainable in situations where parties to a treaty have expressly stated that their intention was in fact for the [page "34"](#) FET standard to make reference to the minimum standard of treatment under custom. These vexing questions are further discussed below.⁽¹⁵⁰⁾

[C]. The Widespread Use of the Standard in Modern BITs

A detailed analysis conducted in the early 1990s of 335 BITs shows that only 28 BITs did not include a reference to FET.⁽¹⁵¹⁾ From the 1990s onwards, the standard has been included in the vast majority of BITs. Thus, the model BITs adopted by most capital-exporting countries such as Canada, the United States, Germany, the United Kingdom and France, all incorporate an FET clause.⁽¹⁵²⁾ It was estimated at the time that by the year 2000, 'bilateral investment treaties which omit reference to fair and equitable treatment constitute the exception rather than the rule'.⁽¹⁵³⁾ This is confirmed by Tudor's recent book published in 2008 examining 365 BITs with only 19 of them not containing a reference to fair and equitable treatment.⁽¹⁵⁴⁾ The present author has conducted its own analysis in 2012 of some 365 treaties (not the same treaties as those examined by Tudor) and concluded that only 28 of them did not contain a reference to FET.⁽¹⁵⁵⁾

The FET standard is now also found in several multilateral investment treaties,⁽¹⁵⁶⁾ in a number of recent FTAs (containing investment chapters),⁽¹⁵⁷⁾ as well as in a number of other multilateral economic instruments.⁽¹⁵⁸⁾ Another remarkable feature of recent State practice is the fact that the FET clause has been embraced not only by developed States, but also by developing States.⁽¹⁵⁹⁾ The standard has thus been included in regional multilateral instruments relative to the protection of foreign investments in Europe,⁽¹⁶⁰⁾ Latin America,⁽¹⁶¹⁾ Asia,⁽¹⁶²⁾ and Africa.⁽¹⁶³⁾ The standard has also been included in BITs entered into *between* developing countries;⁽¹⁶⁴⁾ and in Model BITs of developing States (including Chile and China).⁽¹⁶⁵⁾

While the vast majority of BITs include an FET clause, there nevertheless remains a considerable degree of variation in the actual content of the clause.⁽¹⁶⁶⁾ These variations can be summarized as follows:⁽¹⁶⁷⁾

- Reference to the FET solely in a treaty preamble which therefore does not impose any binding obligations on the host State.
- Autonomous and unqualified reference to the FET.
- Reference to the FET in combination with other standards of protection (such as national treatment and the Most-Favored-Nations clause).
- Reference to the FET with an additional specification that this treatment prohibits arbitrary and discretionary measures.
- Reference to the FET combined with a reference to international law.
- Reference to the FET combined with a reference to customary international law.

The present author's own analysis of some 365 BITs has shown that a large number of FET clauses (197) contain some additional specifications that this treatment prohibits arbitrary and/or discriminatory measures.⁽¹⁶⁸⁾ It also indicates that while a number of BITs (65) contain an 'unqualified' stand-alone FET clause, an equally significant number of other treaties make explicit reference to international law (70) or to customary international law (5).⁽¹⁶⁹⁾ This book focuses on Article 1105 of the NAFTA, which makes explicit reference to 'international law'.

§1.03. The Interaction between the Minimum Standard of Treatment and the Fair and Equitable Treatment Standard

The question of the interaction between the minimum standard of treatment and the FET standard has been amply debated in the field of investor-State arbitration. This section first briefly examines this controversial issue (section §1.03[A]). We will then examine the practice of tribunals (section §1.03[B]). Finally, a third section will discuss the specific situation under NAFTA Article 1105 (section §1.03[C]).

[A]. Is the Fair and Equitable Treatment an Autonomous Standard or Is It Linked to the Minimum Standard of Treatment Under International Law?

On this issue, the following two distinct approaches have been adopted by writers:⁽¹⁷⁰⁾

- First, FET can be viewed as an *independent* treaty standard that has a distinct and separate meaning from the minimum standard of treatment. In this context, the standard would provide treatment protections *above and beyond* the minimum standard of treatment. From this perspective, the level of treatment required by the host State would be *more extensive* than that existing under custom and foreign investors would be given *more rights*. This approach is generally referred to as the 'additive' or the 'plain meaning' theory (because the terms 'fair and equitable' are given their ordinary meaning under such an interpretation).⁽¹⁷¹⁾ As further discussed below,⁽¹⁷²⁾ it has even been argued by some supporters of this approach that the FET has now, in fact, emerged as a rule of customary international law *of its own*.⁽¹⁷³⁾ For one author, the minimum standard of treatment and the FET standard should be considered as two distinct customary standards with only the latter operating in the field of international investment law.⁽¹⁷⁴⁾
- Second, FET can be viewed as a reflection of the minimum standard of treatment under customary international law. From this perspective (sometimes referred to as the 'equalizing' approach), the standard would *not* provide treatment protections above and beyond the minimum standard of treatment.⁽¹⁷⁵⁾ Under this interpretation, the FET standard is *one* of the elements encompassed under the umbrella concept of the minimum standard of treatment.⁽¹⁷⁶⁾


As mentioned above,⁽¹⁷⁷⁾ Western States started to include references to the FET standard in their BITs throughout the 1960s and 1970s not only *because* of the ambiguities surrounding the

concept of the minimum standard of treatment, but also due to the fact that at the time, developing States were rejecting the concept. Thus, in the context of BITs between developed and developing States, the introduction of the FET standard must have had a distinct meaning in relation to the minimum standard of treatment. These historical developments support the theory that the FET is an *independent* treaty standard with an autonomous meaning from the minimum standard of treatment. This is the position adopted by the majority of writers.⁽¹⁷⁸⁾ It should be noted, however, that a number of scholars have rejected this interpretation.⁽¹⁷⁹⁾

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Apart from the historical origin of the FET standard from the 1960s and 1970s,⁽¹⁸⁰⁾ scholars have put forward a number of other arguments supporting the autonomous approach. One such argument frequently invoked is that the minimum standard is not appropriate to address the complexities of modern trade and investment.⁽¹⁸¹⁾ Another argument often cited is that equalizing the FET standard to the minimum standard would limit the rights offered to investors to 'extreme cases' only.⁽¹⁸²⁾ The autonomous approach, on the contrary, 'offers the foreign Investor a type of guarantee which is much more generous and designed to be operational'.⁽¹⁸³⁾ In practical terms, it is often argued that to equate the FET standard to the minimum standard would result in providing investors with a lower level of protection that would otherwise be provided under the FET conceived as an autonomous standard.⁽¹⁸⁴⁾ It has also been argued that it could not have been the intention of States to lower the standard of protection when in fact they signed treaties to grant the best protection to investors.⁽¹⁸⁵⁾ For all these reasons, some writers believe that 'neither investors nor host States would benefit from equating the FET standard with the IMS'.⁽¹⁸⁶⁾

Another often cited argument is that the application of the plain-meaning approach would have the considerable advantage of improving 'the uniformity of the interpretation of the standard issued by Arbitral Tribunals'.⁽¹⁸⁷⁾ However, the reality is that the adoption of the plain-meaning approach does not provide much guidance to tribunals as to how to actually interpret what is 'fair' and 'equitable'. These are somewhat subjective and vague terms that lack precision.⁽¹⁸⁸⁾ In fact, the plain-meaning approach may have the opposite effect by increasing uncertainty with 'the potential proliferation of multiple interpretations and applications of the standard, raising the potential for inconsistent and conflicting decisions and reasoning'.⁽¹⁸⁹⁾

A further difficulty raised by the adoption of the plain-meaning approach is that it does not 'refer to an established body of law or to existing legal precedents' but instead 'presumes that, in each case, the question will be whether the foreign investor has been treated fairly and equitably, without reference to any technical understanding  [page "39"](#) of the meaning of fair and equitable treatment'.⁽¹⁹⁰⁾ The fact that arbitral tribunals are invited to apply their own view of what is 'fair,' or 'equitable' has been considered by one author as 'extremely dangerous to good governance'.⁽¹⁹¹⁾ To be fair, linking FET with the MST does not eliminate the difficulties associated with interpretation. For UNCTAD, 'it presupposes the existence of a general consensus as to what constitutes the minimum standard of treatment of aliens under customary international law' when in fact 'the minimum standard itself is highly indeterminate, lacks a clearly defined content and requires interpretation'.⁽¹⁹²⁾

Finally, some writers have argued that the whole controversy is misguided and that the dichotomy is based on false assumptions.⁽¹⁹³⁾ And while there is some truth to that, this debate cannot be solved in purely abstract terms. In fact, the practice of tribunals shows that the solution will essentially depend on the specific drafting of each FET clause. This question will be discussed in the next section.

[B]. The Practice of Tribunals: The Solution Depends on the Drafting of the Fair and Equitable Treatment Clause

As mentioned above, while the vast majority of BITs do include an FET clause, there exist several different formulations of these clauses.⁽¹⁹⁴⁾ The most important drafting distinction lies between the following two groups of provisions:⁽¹⁹⁵⁾

- Clauses explicitly linking the FET standard to the standard existing under international law.

- Clauses containing an unqualified formulation of the FET obligation (i.e., a stand-alone obligation to provide FET without any reference to international law).

The approach developed by tribunals shows that these different formulations are pivotal elements in the determination of the actual scope of the FET obligation. Thus, arbitral tribunals have adopted either the plain-meaning or the equalizing approach [page "40"](#) depending on the actual drafting of the FET clause.⁽¹⁹⁶⁾ This is the conclusion reached by a 2004 OECD paper:

Because of the differences in its formulation, the proper interpretation of the 'fair and equitable treatment' standard depends on the specific wording of the particular treaty, its context, the object and purpose of the treaty, as well as on negotiating history or other indications of the parties' intent. For example, some treaties include explicit language linking or, in some cases limiting, fair and equitable treatment to the minimum standard of international customary law. Other treaties which either link the standard to international law without specifying custom, or lack any reference to international law, could, depending on the context of the parties' intent, for example, be read as giving the standard a scope of application that is broader than the minimum standard as defined by international customary law.⁽¹⁹⁷⁾

A 2012 UNCTAD report further suggests that the drafting variations in FET clauses have in fact been interpreted as meaning *different content* as well as *different thresholds*:

[The] identification of the correct source of the FET standard – whether it is grounded in customary international law or is a self-standing obligation – can have important consequences in terms of the standard's content and, more precisely, of the types of State measures that can be challenged as well as the required threshold for finding a violation, that is, the required degree of seriousness of the breach.⁽¹⁹⁸⁾


Many arbitral tribunals have therefore interpreted an unqualified FET standard as 'delinked from customary international law' and have therefore 'focused on the plain-meaning of the terms "fair" and "equitable," which "may result in a low liability threshold and brings with it a risk for State regulatory action to be found in breach of it'.⁽¹⁹⁹⁾ This phenomenon has been recognized by many scholars.⁽²⁰⁰⁾ The vast majority of tribunals have interpreted an unqualified FET standard as having an autonomous [page "41"](#) character, which hence provides a level of treatment higher than under the minimum standard.⁽²⁰¹⁾ In fact, only a limited number of tribunals have interpreted an unqualified FET standard as an implicit reference to international law.⁽²⁰²⁾

A good illustration is the tribunal's reasoning in *Saluka*, which held that the FET standard had an autonomous character in the specific context of the BIT at hand precisely because it was not linked to international law.⁽²⁰³⁾ The tribunal added that in the context of such an autonomous FET clause, 'in order to violate the standard, it may be sufficient that States' conduct displays a relatively lower degree of inappropriateness'⁽²⁰⁴⁾ while in contrast, under the minimum standard, 'in order to violate that standard, States' conduct may have to display a relatively higher degree of inappropriateness'.⁽²⁰⁵⁾

This situation contrasts with the approach adopted by tribunals faced with an FET clause containing an explicit reference to 'international law'.⁽²⁰⁶⁾ Tribunals have overall been divided on the proper interpretation and use of these words. While some tribunals have held that the term 'international law' found in an FET clause was a reference to the minimum standard under custom,⁽²⁰⁷⁾ others have interpreted such an express reference in much the same way as an unqualified FET standard.⁽²⁰⁸⁾

The same assessment can be made with regards to FET clauses containing a slightly different reference to international law: 'investment shall at all times be [page "42"](#) accorded fair and equitable treatment ... and shall in no case be accorded treatment less than that required by international law'. Under this clause, the FET standard is *not* directly linked or attached to the level of treatment existing under international law; international law only sets a floor below which State actions are considered illegal.⁽²⁰⁹⁾ A number of tribunals have interpreted such a clause in much the same way as an autonomous FET clause, thus requiring a treatment 'additional to, or beyond that of, customary law'.⁽²¹⁰⁾ Other

tribunals have, on the contrary, held that such a clause provides for a standard of protection no different than that of the MST under custom.⁽²¹¹⁾

The fact that variances in FET clause drafting translates to variances in content and levels of liability is further evidenced by the reactions of several States in recent years. Many of them have started to explicitly specify in their most recent BITs that FET is not only linked to international law, but that it is a reference to the MST under custom.⁽²¹²⁾ As further discussed below,⁽²¹³⁾ this is clearly the path that has been followed by NAFTA Parties. This recent phenomenon however, is not limited to NAFTA States.⁽²¹⁴⁾ As further discussed below,⁽²¹⁵⁾ a number of recent treaties *not only* explicitly state that 'international law' is an allusion to custom, but *also* provide an express and precise definition of customary international law. States have also started to conclude treaties that contain language that provides additional clarification on the meaning of the FET obligation.⁽²¹⁶⁾ The UNCTAD report speaks of an 'emerging trend' where BITs are adding 'substantive content to FET clauses,' such as the prohibition of denial of justice or the prohibition of arbitrary, unreasonable or discriminatory measures.⁽²¹⁷⁾ The goal of such clauses is to clarify the content of the FET obligation and provide additional predictability with regards to its implementation by States and potential subsequent interpretation by tribunals.⁽²¹⁸⁾ The language of such a clause may, for instance, be intended to *limit* the scope of the content of the FET standard to the denial  *page "43"* of justice. This approach has been adopted by NAFTA Parties⁽²¹⁹⁾ and also by other States.⁽²²⁰⁾

[C]. The Specific Features of NAFTA Article 1105

As mentioned above,⁽²²¹⁾ the present author believes that there are *in general*, good reasons to interpret the term 'fair and equitable treatment' found in most BITs, as a reference to something *other than* the minimum standard of treatment under custom. This is certainly the case when an FET clause is unqualified and contains no reference whatsoever to international law.⁽²²²⁾ One notable difficulty is the interpretation of those other FET clauses that *do* refer to international law. Case law seems to be divided on how to properly interpret such clauses. What was the actual intention of the parties when they made reference to those terms?⁽²²³⁾ In the present author's view, any possible ambiguities disappear when there is clear and undeniable evidence that the intention of the State parties was in fact that the FET standard be considered as a reference to the minimum standard of treatment under custom.⁽²²⁴⁾ This is clearly the case under NAFTA Article 1105.

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It follows that the above-mentioned debate as to whether the FET is an autonomous standard or linked to the minimum standard of treatment under international law is simply *not relevant* in the context of NAFTA Article 1105. Schreuer, for instance, argues that as a result of the FTC Note (further discussed below⁽²²⁵⁾), 'it may now be regarded as established that, in the context of Article 1105(1), the concept of fair and equitable treatment is equivalent to the minimum standard of treatment under customary international law'.⁽²²⁶⁾

Under Article 1105, the FET standard must be considered as *one of the elements* included in the umbrella concept of the minimum standard of treatment.⁽²²⁷⁾ In fact, this is evident because the provision requires NAFTA Parties to provide foreign investors treatment in accordance with 'international law' (a reference to the minimum standard of treatment as reaffirmed by the FTC Note of Interpretation⁽²²⁸⁾), *including* fair and equitable treatment. As further discussed below, several NAFTA tribunals have endorsed this approach.⁽²²⁹⁾ The *Waste Management* tribunal made the first ever attempt by a NAFTA tribunal to provide a comprehensive definition of the FET standard. The tribunal refers to the 'minimum standard of treatment of fair and equitable treatment'.⁽²³⁰⁾ This formulation suggests that the FET standard is part of the larger concept of the 'minimum standard of treatment'. The same conclusion was reached in the *Cargill* ruling:

In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment *is one aspect of this minimum standard*.⁽²³¹⁾

Clearly, Article 1105 must be analyzed under very specific

parameters that do not exist under most other FET clauses. This book examines what those specific features are and how they have influenced NAFTA tribunals' interpretation of that provision. The specific features of Article 1105 also mean, in turn, that many of the findings related to this provision are not easily transferable and applicable to tribunals operating outside of NAFTA. In other words, a great deal of the controversies examined in this book will have no impact outside the NAFTA context. This is certainly the case for the vast [page "45"](#) majority of BITs that contain an *unqualified* FET clause *not* linked in any way to international law.⁽²³²⁾ Yet, the conclusion the present author intends to draw from NAFTA case law will, to a large extent, apply to FET clauses containing language similar to that of Article 1105 for which the standard is expressly linked to international law (or to the minimum standard of treatment under customary international law). Schreuer summarizes the fundamental reasons why findings of tribunals reached in the context of NAFTA are irrelevant in the context of FET clauses that are worded differently:

- Article 1105 refers to the 'Minimum Standard of Treatment' in its heading.
- Article 1105 refers to 'international law, including fair and equitable treatment,' suggesting that the fair and equitable treatment standard is part of customary international law.
- Article 1105 was the object of a binding interpretation by an authorized treaty body.⁽²³³⁾

¹ See, for instance, Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 ASIL Proc. 51 (1939); Edwin Borchard, *The Diplomatic Protection of Citizen Abroad* (Bank Law Publishing Co. 1915); Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 Mich. L. Rev. 445 (1940); Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AJIL 521 (1919); Clyde Eagleton, *The Responsibility of States in International Law*, 103 (New York U. Press 1928); Andreas Hans Roth, *The Minimum Standard of International Law Applied to Aliens* (A.W. Sijthoff 1949).

² See, *inter alia*: M.A. Orellana, *International Law on Investment: The Minimum Standard of Treatment (MST)*, 3 Transnational Disp. Mgmt. 1-2 (2004); Todd Weiler, *An Historical Analysis of the Function of the Minimum Standard of Treatment in International Law*, in: *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Todd Weiler & Freya Baetens eds., Martinus Nijhoff 2011); Alireza Falsafi, *The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard*, 30 Suffolk Transnat'l L. Rev. 317 (2006-2007); Hussein Haeri, *A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law*, 27 Arb. Int'l 31-32 (2011).

³ Martins Paporinskis, *The International Minimum Standard and Fair and Equitable Treatment*, 39-83 (Oxford U. Press 2013); T. Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context*, (Martinus Nijhoff, 2013).

⁴ C. Schreuer & R. Dolzer, *Principles of International Investment Law*, 11-12 (Oxford U. Press 2008); Ionna Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law*, 60 (Oxford U. Press 2008). This period is examined in detail in: Weiler, *supra* n. 2, at 337 ff.

⁵ M. Somarajah, *The International Law on Foreign Investment*, 19-20 (2nd ed., Cambridge U. Press 2004).

⁶ *Ibid.*

⁷ Dong Wang, *China's Unequal Treaties: Narrating National History* (Rowman & Littlefield 2008).

⁸ Weiler, *supra* n. 2, at 346.

⁹ It is noteworthy that the 1933 *Montevideo Convention on the Rights and Duties of States* (Article 9, in AJIL, (1934) supp. 75) indicated that aliens and nationals were on the same footing and that 'foreigners may not claim rights other or more extensive than those of nationals'. These issues are discussed in: Falsafi, *supra* n. 2, at 326 ff.

¹⁰ Jeswald W. Salacuse, *The Law of Investment Treaties* 47 (Oxford U. Press 2010).

¹¹ Orellana, *supra* n. 2, at 1-2.

¹² Weiler, *supra* n. 2, at 345, providing a number of examples of such interventions and referring to 'no fewer than one hundred instances of "protection by force" between 1813 and 1927 by the United States alone, including two dozen in the 20th century'.

¹³ This issue is discussed in: Falsafi, *supra* n. 2, at 324 ff.

- ¹⁴ Weiler, *supra* n. 2, at 351.
- ¹⁵ Orellana, *supra* n. 2, at 1.
- ¹⁶ Paparinskis, *supra* n. 3, at 64.
- ¹⁷ Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment*, 146-147 (Wolters Kluwer 2012).
- ¹⁸ Schreuer & Dolzer, *supra* n. 4, at 12-13.
- ¹⁹ Salacuse, *supra* n. 10, at 47; J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17(1) ICSID Rev. 26 (2002).
- ²⁰ Root, *supra* n. 1, at 521 (emphasis added). On this question, see Paparinskis, *supra* n. 3, at 39-46.
- ²¹ J. Roman Picherack, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?* 9(4) J. World Invest. & Trade, 265 (2008). *Contra*: Falsafi, *supra* n. 2, at 354 (for whom the minimum standard of treatment is a contingent standard).
- ²² *S.D. Myers Inc. v. Canada*, UNCITRAL, First Partial Award, (13 November 2000), para. 259.
- ²³ M. Kinnear, A. Bjorklund & J.F.G. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006), section on Article 1105, at 11-12.
- ²⁴ See, *inter alia*: *Roberts v. Mexico*, UNRIAA, Award, (2 November 1926), Vol. IV, at 77; *Chevreau v. United Kingdom*, UNRIAA, Award, (9 June 1931), Vol. II, at 1113; *George W. Hopkins v. Mexico*, UNRIAA, Award, (31 March 1926), Vol. IV, at 41, 50.
- ²⁵ *USA (LF Neer) v. Mexico*, UNRIAA, Award, (15 October 1926), Vol. IV, at 60.
- ²⁶ *Ibid.*, at 61.
- ²⁷ *Ibid.*, at 61-62.
- ²⁸ Paparinskis, *supra* n. 3, at 64.
- ²⁹ Roth, *supra* n. 1, at 95. The case is discussed in detail in: Thomas, *supra* n. 19, at 29 ff; Paparinskis, *supra* n. 3, at 48-54.
- ³⁰ For instance, Ian Brownlie, *Principles of Public International Law*, 527-528 (Oxford U. Press 1998); J.L. Brierty, *The Law of Nations* 280 (6th ed. Clarendon Press 1963); G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 201 (Stevens & Sons 1949).
- ³¹ Stephen M. Schwebel, *Is Neer far from Fair and Equitable?* 27(4) Arb. Int'l (2011), at 555-561.
- ³² *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012), at para. 216. The tribunal also added that 'by the strict standards of proof of customary international law applied in *Glamis Gold*, *Neer* would fail to prove its famous statement (...) to be an expression of customary international law'.
- ³³ R. Jennings, *General Course on Principles of International Law*, 121 Recueil des cours (1967-II), at 487; Jean-Pierre Lavie, *Protection et promotion des investissements, étude de droit international économique*, 88 (P.U.F. 1985).
- ³⁴ Jan Paulsson, *Neer-ly Misled?*, Miami Law Research Paper, at 247 (see also: J. Paulsson & G. Petrochilos, *Neer-ly Misled?* 22(2) ICSID Rev. 242-257 (2007)). See also: Schwebel, *supra* n. 31.
- ³⁵ *Mondev International Ltd. v. United States* [hereinafter *Mondev v. United States*], ICSID No. ARB(AF)99/2, Award, (2 October 2002), para. 115. See also: *Memill & Ring Forestry L.P. v. Canada* [hereinafter *Memill & Ring v. Canada*], UNCITRAL, Award, (31 March 2010), para. 197 (noting that the *Neer* and others cases were 'dealing with situations concerning due process of law, denial of justice and physical mistreatment, and only marginally with matters relating to business, trade or investments'), 204 ('No general rule of customary international law can thus be found which applies the *Neer* standard, beyond the strict confines of personal safety, denial of justice and due process').
- ³⁶ *Saluka v. Czech Republic*, UNCITRAL, Partial Award, (17 March 2006), para. 295; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentina*, ICSID No. ARB/02/1, Decision on Liability, (3 October 2006), para. 123.
- ³⁷ Paulsson, *supra* n. 34, at 247.
- ³⁸ *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Respect of Damages, (31 May 2002), para. 57.
- ³⁹ *ADF Group Inc. v. United States* [hereinafter *ADF v. United States*], ICSID No. ARB(AF)00/1, Second Submission of Canada Pursuant to NAFTA Article 1128, (19 July 2002), para. 33 ('Canada's position has never been that the customary international law regarding the treatment of aliens was "frozen in amber at the time of the *Neer* decision". Obviously, what is shocking or egregious in the year 2002 may differ from that which was considered shocking or egregious in 1926. Canada's position has always been that customary international law can evolve over time, but that the threshold for finding violation of the minimum standard of treatment

is still high. The [Pope] Tribunal mischaracterized Canada's position').

⁴⁰ See, the discussion at Chapter 2 section §2.03[B][2] below.

⁴¹ Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 237 (Kluwer 2009); Tudor, *supra* n. 4, at 64; Roland Kläger, *Fair and Equitable Treatment in International Investment Law*, 53 (Cambridge U. Press 2011); Paulsson, *supra* n. 34, at 257. For Paparinskis, *supra* n. 3, at 216, the *Neer* case 'operates as the default rule', to be 'replaced by more specific and detailed rules on the Issue when they exist or are developed' (at 53).

⁴² *ADF v. United States*, Award, (9 January 2003), para. 181.

⁴³ *Mondev v. United States*, Award, (2 October 2002), paras. 116, 117 ('it would be surprising if, this practice [of recent BITs] and the vast number of provisions it reflects, were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927'); *Loewen Group, Inc. and Raymond L. Loewen v. United States* [hereinafter *Loewen v. United States*], ICSID No. ARB(AF)/98/3, Award on Merits, (26 June 2003), at para. 132.

⁴⁴ *Cargill, Inc. v. Mexico*, Award, (18 September 2009), para. 284.

⁴⁵ *Glamis Gold, Ltd. v. United States* [hereinafter *Glamis v. United States*], UNCITRAL, Award, (8 June 2009), para. 616.

⁴⁶ In the context outside of NAFTA, the *Genin* tribunal (*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltol v. Estonia*, ICSID Case No. ARB/99/2, Award, (25 June 2001), para. 93) also described the FET standard in words very similar to those used in the *Neer* ruling ('acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith').

⁴⁷ See, the discussion at Chapter 2 section §2.03[B][2] below.

⁴⁸ Paparinskis, *supra* n. 3, at 64.

⁴⁹ *Ibid.*, at 67-73, 83.

⁵⁰ Georges Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 Howard L.J., 118 (1962).

⁵¹ *Ibid.*, at 100. Accordingly, a revision of the existing rules of customary international law was needed in order 'to redress the balance of centuries of domination and exploitation by these big power of the newly independent states' (at 119). See also: Guha-Roy, *Is the Law of Responsibility of States for Injuries to Aliens A Part of Universal International Law?*, 55 AJIL 863, 866 (1961): 'The history of the establishment and consolidation of empires overseas by some of the members of the old international community and of the acquisition therein of vast economic interests by their nationals teems with instances of a total disregard of all ethical considerations. A strange irony of fate now compels those very members of the community of nations on the ebb tide of their imperial power to hold up principles of morality as shields against the liquidation of interests acquired and held by an abuse of international intercourse. Rights and interests acquired and consolidated during periods of such abuse cannot for obvious reasons carry with them in the mind of the victims of that abuse anything like the sanctity the holders of those rights and interests may and do attach to them. To the extent to which the law of responsibility of states for injuries to aliens favours such rights and interests, it protects an unjustified status quo or, to put it more bluntly, makes itself a handmaid of power in the preservation of its spoils'.

⁵² Somarajah, *supra* n. 5, at 140 ff; OECD, *International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives*, 82 (2005).

⁵³ S.M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, 3(2) Transnational Disp. Mgmt. 3 (2006).

⁵⁴ G.A. Res. 1803 (XVII), 14 December 1962.

⁵⁵ G.A. Res. 3281 (XXIX), 12 December 1974. The 'Hull formula' was first articulated by the US Secretary of State, Mr. Cordell Hull, in a letter to his Mexican counterpart in response to Mexico's nationalization of U.S. companies in 1936. Mr. Hull argued that international law required 'prompt, adequate and effective' compensation for the expropriation of foreign investments (in: Green H. Hackworth, 3*Digest of International Law*, 228 (1942).

⁵⁶ *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, ICJ Reports 1970, 3, at 46-47.

⁵⁷ R. Dolzer & A. von Walter, *Fair and Equitable Treatment - Lines of Jurisprudence on Customary Law*, in *Investment Treaty Law, Current Issues 1199* (F. Ortino ed., 2007). See also: Kläger, *supra* n. 41, at 264; Orellana, *supra* n. 2, at 3; Lavieć, *supra* n. 33, at 87-88; Jean d'Aspremont, *International Customary Investment Law: Story of a Paradox*, in *International Investment Law: The Sources of Rights and Obligations* 15-17 (E. de Brabandere & T. Gazzini eds., Martinus Nijhoff 2012).

⁵⁸ Schreuer & Dolzer, *supra* n. 4, at 16.

59 *Ibid.*

60 See, at sections §1.02[B] and §1.02[C] below.

61 See, Stephen M. Schwebel, *Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law*, 98 ASIL Proc. 27-30 (2004); Steffen Hindelang, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited*, 5 J. World Invest. & Trade 789-809 (2004); Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 Colum. J. Transnat'l L. 123-130 (2003); Bernard Kishoiyan, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14(2) Northwestern J. Int'l L. 327-375; A. Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38(4) Va.J.Int'l L. 639-688 (1998); Abdullah Al Faruque, *Creating Customary International Law Through Bilateral Investment Treaties: A Critical Appraisal*, 44 Indian JIL 292 (2004); T. Gazzini, *The Role of Customary International Law in the Protection of Foreign Investment*, 8(5) J. World Invest. & Trade 691 (2007); C. McLachlan, *Investment Treaties and General International Law*, 57(2) ICLQ 361-401 (2008); Cai Congyan, *International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules*, 7(3) Chinese JIL, 659-679 (1998).

62 Schwebel, *supra* n. 61, at 27 (emphasis added).

63 *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Award, (14 March 2003), para. 498.

64 *Mondev v. United States*, Award, (2 October 2002), para. 125 (emphasis added).

65 Ian A. Laird, *A Community of Destiny - The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims*, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* 95-96 (T. Weiler ed., Cameron May 2005).

66 D'Aspremont, *supra* n. 57, at 20.

67 P. Dumberry, *Are BITs Representing the "New" Customary International Law in International Investment Law?*, 28(4) Penn State ILR 675-701 (2010).

68 A different question is whether or not a tribunal has jurisdiction to enforce the minimum standard of treatment. On this point, see: UNCTAD, *Fair and Equitable Treatment*, (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2012), at 19: 'The question is whether an investor would be able to enforce the minimum standard of treatment of aliens through an IIA's investor-State dispute settlement (ISDS) mechanism. This will depend on the breadth of the treaty's ISDS clause. For instance, the ISDS clause in the India Singapore Comprehensive Economic Cooperation Agreement applies only to disputes "concerning an alleged breach of an obligation of the former under this Chapter" (Article 6.21); therefore, given the absence of the FET clause in the treaty, claims alleging breaches of the minimum standard of treatment of aliens will fall outside the tribunal's jurisdiction. In contrast, the New Zealand-Thailand Closer Economic Partnership Agreement's arbitration clause encompasses all disputes "with respect to a covered investment" (Article 9.16) – there is no requirement that relevant claims arise from a violation of the Agreement itself. Such a clause is broad enough to include, among others, claims of violation of the minimum standard of treatment of aliens under customary international law.'

69 OECD, *1967 Draft Convention on the Protection of Foreign Property*, in 7 ILM, 117, 120 (1968), commentary on Article 1 of the Draft Convention indicating that the FET standard 'conforms in effect to the "minimum standard" which forms part of customary international law.'

70 OECD, *supra* n. 52, at 82 ('The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property').

71 *Mondev v. United States*, Award, (2 October 2002), para. 121 ('the phrase "minimum standard of treatment" has historically been understood as a reference to a minimum standard under customary international law').

72 *Waste Management, Inc. v. Mexico* ("Number 2") [hereinafter *Waste Management v. Mexico*], ICSID No. ARB(AF)/00/3, Award, (30 April 2004), para. 91, where the tribunal endorsed the position taken by the *Mondev* tribunal: 'the *Mondev* tribunal found that the FTC interpretation ... resolves any dispute about whether there was such a thing as a minimum standard of treatment of investment in international law in the affirmative.'

73 *Glamis v. United States*, Award, (8 June 2009), para. 627,

referring to 'the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA'.

⁷⁴ J.C. Thomas, *Fair and Equitable Treatment under NAFTA's Investment Chapter; Remarks*, 96 ASIL Proc. 9, 14 (2002); Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties*, 58 (Martinus Nijhoff Publ. 1995); Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law*, vol. I (Peace: Introduction and Part 1), 931 (9th ed., Longman 1996); L. Reed, J. Paulsson & N. Blackaby, *A Guide to ICSID Arbitration*, 48 (Kluwer Law 2004); Tudor, *supra* n. 4, at 61-62, 67; Newcombe & Paradell, *supra* n. 41, at 234; Diehl, *supra* n. 17, at 145; Gabriel Cavazos Villanueva, *The Fair and Equitable Treatment Standard: The Mexican Experience* 63-64 (VDM Verlag 2008); D. Carreau, *Investissements*, in: *Répertoire de droit international*, para. 135 (Dalloz 1998); Marcela Klein Bronfman, *Fair and Equitable Treatment: An Evolving Standard*, 10 Max Planck Yrbk. UNL, 624 (2006); Picherack, *supra* n. 21, at 265; Graham Mayeda, *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties*, 41(2) J. World Trade, 273-291, 280 (2007).

⁷⁵ M.C. Porterfield, *An International Common Law of Investor Rights?*, 27 U. Pa. J. Int'l Econ. L., 81-82 (2006).

⁷⁶ *Ibid.*, at 98. See also at 103, 113.

⁷⁷ Somarajah, *supra* n. 5, at 213.

⁷⁸ *Ibid.*, at 92-93.

⁷⁹ *Ibid.* The author admits (at 89) that there are 'few' rules of custom in the field of international investment law. He also argues elsewhere (at 151) that 'it is difficult to establish that state responsibility for economic injuries to alien investors was recognized as a principle of customary international law. Latin American states as well as African and Asian States must be taken to be persistent objectors to the formation of such customary international law'. See also: M. Somarajah, *Power and Justice in Foreign Investment Arbitration*, 14(3) J. Int'l Arb., 103-140, 118 (1997); Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 British YIL, 99 (1999), at footnote 305.

⁸⁰ P. Dumberry, *The Last Citadel! Can a State Claim the Status of 'Persistent Objector' to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?*, 23(2) Leiden JIL 379-400 (2010). See also, more generally: P. Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 ICLQ 779-802 (2010).

⁸¹ M. Somarajah, *The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?* in *Investment Treaty Law: Current Issues II* 177 (Federico Ortino et al. eds., British IICL 2007); Somarajah, *supra* n. 5, at 328. This position is also presented in: J. Fouret, *The Notion of Fair and Equitable Treatment of Foreign Direct Investment*, McGill University, LL.M. Thesis (2003), at 133 ff.

⁸² *ADF v. United States*, Award, (9 January 2003), para. 178.

⁸³ *Mondev v. United States*, Award, (2 October 2002), para. 120.

⁸⁴ Roth, *supra* n. 1, at 127.

⁸⁵ Newcombe & Paradell, *supra* n. 41, at 236.

⁸⁶ *ADF v. United States*, US Post Hearing Submission, (27 June 2002), at 2-4. See also: *Glamis v. United States*, US Counter-Memorial, (9 September 2006), at 223; *Loewen v. United States*, US Counter-Memorial, (30 March 2001), at 124; *Methanex Corporation v. United States* [hereinafter *Methanex v. United States*], UNCITRAL; US Memorial on Jurisdiction and Admissibility, (13 November 2000), at 43-44.

⁸⁷ *Glamis v. United States*, Award, (8 June 2009), para. 618: 'As the United States explained in its 1128 submission in *Pope & Talbot*, and as Mexico adopted in its [Article] 1128 submission to the ADF tribunal: "fair and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated into Article 1105(1). ... The international law minimum standard [of treatment] is an umbrella concept incorporating a set of rules that has crystallized over the centuries into customary international law in specific contexts'. (Citing and quoting the following documents: *Pope & Talbot Inc. v. Canada*, US Fourth Article 1128 Submission, (1 November 2000), paras. 3, 8; *ADF v. United States*, Mexico's Second Article 1128 Submission, (22 July 2002), at 8).

⁸⁸ *Glamis v. United States*, Award, (8 June 2009), para. 618, citing *ADF v. United States*, Mexico's Second Article 1128 Submission, (22 July 2002), at 8.

⁸⁹ *Cargill Inc. v. Mexico*, Award, (18 September 2009), para. 268 (citing the position of Mexico in *ADF v. United States*, Mexico's Second Article 1128 Submission, (22 July 2002), at 8). In its award, the *Mobil* tribunal endorsed the position taken by *Cargill (Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada* [hereinafter *Mobil v. Canada*], ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012), para. 135).

- ⁹⁰ Somarajah, *supra* n. 81, at 172; Somarajah, *supra* n. 5, at 328; Porterfield, *supra* n. 75, at 80.
- ⁹¹ UNCTAD, *supra* n. 68, at 28. See also at 44.
- ⁹² *Ibid.*, at 46-47.
- ⁹³ Roth *supra* n. 1, at 185-186, identifying the following eight rules that general international law imposes on States with regards to the treatment of aliens: '(1) An alien, whether a natural person or a corporation, is entitled by international law to have his juridical personality and legal capacity recognized by the receiving state. (2) The alien can demand respect for his life and protection for his body. (3) International law protects the alien's personal and spiritual liberty within socially bearable limits. (4) According to general international law, aliens enjoy no political rights in their State of residence, but have to fulfil such public duties as are not incompatible with allegiance to their home state. (5) General international law gives aliens no right to be economically active in foreign States. In cases where national economic policies of foreign States allows aliens to undertake economic activities, however, general international law assures aliens equality of commercial treatment among themselves. (6) According to general international law, the alien's privilege of participation does not go so far as to allow him to acquire private property. The State of residence is free to bar him from ownership of all certain property, whether movables or realty. (7) Where an alien enjoys the privilege of ownership of property, international law protects his rights in so far as his property may not be expropriated under any pretext, except for moral or penal reasons, without adequate compensation. Property rights are to be understood as rights to tangible property which have come into concrete existence according to the municipal law of the alien's State of residence. (8) International law grants the alien procedural rights in his State of residence as primary protection against violation of his substantive rights. These procedural rights amount to freedom of access to court, the right to a fair, non-discriminatory and unbiased hearing, the right to full participation in any form in the procedure, the right to a just decision rendered in full compliance with the laws of the State within a reasonable time'.
- ⁹⁴ OECD, *supra* n. 52, at 82. This definition is endorsed by Tudor, *supra* n. 4, at 62.
- ⁹⁵ UNCTAD, *supra* n. 68, at 44. A very similar approach is adopted by Somarajah, *supra* n. 81, at 172: '[t]he precise extent of the content of an international minimum standard has yet to be worked out. ... Yet, the international minimum standard, the existence of which is denied collectively by the developing states, has not been fleshed out. Outside the standards applicable to expropriation and to state responsibility for denying protection and security to aliens which are separately provided for in investment treaties, international minimum standard captures the category which involves a denial of justice'. See also: Somarajah, *supra* n. 5, at 329 ('There are three instances in which the old cases on state responsibility may provide guidance as to the international minimum standard. These relate to compensation for expropriation, responsibility for destruction or violence by non-state actors and denial of justice').
- ⁹⁶ OECD, *Fair and Equitable Treatment Standard in International Investment Law*, Working Papers on International Investment Law, No. 2004/3 (2004).
- ⁹⁷ UNCTAD, *supra* n. 68, at 44.
- ⁹⁸ *Ibid.*, at 45. See also, Kläger, *supra* n. 41, at 53 ('the concept of the international minimum standard, in its classic sense, may have produced rules for the compensation for expropriation, the physical protection of aliens and the enforcement of the pertinent laws. Beyond that, however, it is highly questionable whether it entails any further guidelines relating to the protection of economic interests of foreign corporations or individuals').
- ⁹⁹ Based on the list mentioned by the tribunal in *Waste Management v. Mexico*, Award, (30 April 2004), para. 98, Newcombe & Paradell, *supra* n. 41, at 238, indicate that a 'number of specific elements of the minimum standard of treatment where state responsibility may arise for mistreatment of foreign investors and investment, including, but not exhaustively: denial of justice, lack of due process, lack of due diligence, and instances of arbitrariness and discrimination'. Paparinskis, *supra* n. 3, at 182, 239, 246-247, 256, argues that denial of justice, arbitrariness and non-discrimination are elements of the minimum standard of treatment.
- ¹⁰⁰ See, at section §1.03[A].
- ¹⁰¹ S. Schill, *The Multilateralization of International Investment Law* 78 (Cambridge U. Press 2009); Meg Kinnear, *The Continuing Development of the FET Standard*, in *Investment Treaty Law: Current Issues III* (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., British IICL 2009), 18 (paper version); Dolzer & Stevens, *supra* n. 74, at 58; A.A. Fatouros, *Government Guarantees to Foreign Investors* 135-41 (Columbia U. Press 1962); U.N. Centre on Transnational Corporations, *Key Concepts in International Investment Arrangements and Their Relevance to Negotiations on*

International Transactions in Services 12 (1990); Katia Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments*, in *Standards of Investment Protection* 111 (A. Reinisch ed., Oxford U. Press 2008); Vasciannie, *supra* n. 79, at 105–106.

¹⁰² This question is further discussed at Chapter 4 section §4.05 below. See, however, the critical analysis of Kläger, *supra* n. 41, at 305 ('the differentiation between absolute and relative standards is based on a fundamental misconception related to the myth of the intrinsic content of vague general clauses like fair and equitable treatment (...). Moreover, the gateway character of fair and equitable treatment and the associated process of balancing display the inherently flexible nature of this norm, resembling by no means the misguided image of an absolute standard of protection'). He believes that the 'common distinction between relative (or contingent) and absolute (or non-contingent) obligations should be abandoned'.

¹⁰³ UNCTAD, *supra* n. 68, at 6.

¹⁰⁴ See *inter alia*: Vasciannie, *supra* n. 79, at 99; Thomas, *supra* n. 19; Kinnear et al., *supra* n. 23; UNCTAD, *Fair and Equitable Treatment* (UNCTAD Series on Issues in International Investment Agreements 1999); UNCTAD, *supra* n. 68, at 5 ff.; Haeri, *supra* n. 2, at 83 ff.

¹⁰⁵ See the analysis of Theodore Kill, *Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations*, 106 Mich. L. Rev. 869 ff (2008).

¹⁰⁶ *Ibid.*, at 870–871.

¹⁰⁷ See: Thomas, *supra* n. 19, at 40 ff.; Kill, *supra* n. 105, at 871–873. A number of other initiatives are discussed in: Weiler, *supra* n. 2, at 358 ff.

¹⁰⁸ Havana Charter for an International Trade Organization, 24 March 1948, Article II(2), in: U.N. Conference on Trade & Employment, Final Act and Related Documents 8–9, U.N. Doc. E/Conf. 2/78, U.N. Sales No. 1948.II.D.4 (1948).

¹⁰⁹ Vasciannie, *supra* n. 79, at 108.

¹¹⁰ Organization of American States, Economic Agreement of Bogotá, Art. 22, May 1948, L. Treaty Ser. No. 25, OAS Doc. No. OEA/Ser.A/4 (SEPF). The full provision reads as follows: '[f]oreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied'.

¹¹¹ Kill, *supra* n. 105, at 873.

¹¹² *Ibid.*

¹¹³ Article 1. Hermann Abs & Hartley Shawcross, *The Proposed Convention to Protect Private Foreign Investment: A Round Table: Comment on the Draft Convention by its Authors*, 9 J.P.L., 115–132 (1960).

¹¹⁴ OECD, *Draft Convention on the Protection of Foreign Property*, Article 1 cmt., adopted 12 October 1967, 7 ILM 117 (1967).

¹¹⁵ Article 1(a).

¹¹⁶ See, at section §1.02[B].

¹¹⁷ K.J. Vandeveld, *Bilateral Investment Treaties: History, Policy and Interpretation*, 199 (Oxford U. Press 2010).

¹¹⁸ OECD, *supra* n. 96, at 2 ff.

¹¹⁹ *Ibid.*; Tudor, *supra* n. 4, at 19; Bronfman, *supra* n. 74, at 161.

¹²⁰ K.J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AJIL, 621, 628 (1998); Vasciannie, *supra* n. 79, at 113.

¹²¹ Vasciannie, *supra* n. 79, at 113.

¹²² These instruments are examined in detail by Vasciannie, *supra* n. 79, at 114–119; Bronfman, *supra* n. 74, at 616; OECD, *supra* n. 52, at 78; Weiler, *supra* n. 2, at 358 ff.

¹²³ Article 48, U.N. Centre on Transnational Corporation, *The United Nations Code of Conduct on Transnational Corporations*, Current Studies, Series A (United Nations 1986) UN Doc. ST/CTC/SER. A/4, Annex 1.

¹²⁴ Article III (2)(3), World Bank, *Guidelines on the Treatment of Foreign Direct Investment* (1992), '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 the Guidelines'.

¹²⁵ Thomas, *supra* n. 19, at 43.

¹²⁶ Salacuse, *supra* n. 10, at 219; Paparinskis, *supra* n. 3, at 90–92.

¹²⁷ Vandeveld, *supra* n. 117, at 196.

¹²⁸ UNCTAD, *supra* n. 104, at 8–9; OECD, *supra* n. 52, at 78.

¹²⁹ M. Khalil, *Treatment of Foreign Investment in BITs*, 8 ICSID Rev. 355 (1992).

¹³⁰ See the analysis of Newcombe & Paradell, *supra* n. 41, at 268;

Thomas, *supra* n. 19, at 44, 47; Dominique Carreau & Patrick Julliard, *Droit international économique*, 454 (4th ed., L.G.D.J. 1998).

¹³¹ See, for instance: Picherack, *supra* n. 21, at 264 ('When the language of fair and equitable treatment first began to emerge in draft multilateral instruments and investment agreements in the 1950s and 1960s, it was likely then intended to serve as a reference to the minimum standard of treatment existing in international law. ... The desire to set down a fair and equitable treatment provision in the text of multilateral instruments and investment agreements could be seen as an attempt at the time to solidify the minimum international standard in the face of the Calvo doctrine and many developing countries' assertions which denied the existence of a minimum standard of treatment in customary international law separate from a national treatment standard'); Paparinskis, *supra* n. 3, at 160-163 ('If one takes together the pre- and post-Second World War materials pre-dating investment arbitrations, it seems permissible to conclude that the ordinary meaning of fair and equitable treatment was a reference to customary minimum standard, in particular regarding administration of justice'); S. Montt, *State Liability in Investment Treaty Arbitration* (Hart Publ. 2009), at 69 ('If the historical background is to be taken seriously, then the FET standard, when first used, could not have meant anything higher than IMS. At a time when the opposing North-South legal camps were, respectively, IMS and national treatment, the FET standard could not have referred to either an autonomous standard or to a higher standard than those minima').

¹³² Vasciannie, *supra* n. 79, at 112-113; UNCTAD, *supra* n. 104, at 8; OECD, *supra* n. 96, at 4.

¹³³ OECD, *supra* n. 114, at 119.

¹³⁴ *Ibid.*

¹³⁵ Thomas, *supra* n. 19, at 48 referring to: OECD Committee on International Investment and Multinational Enterprise, *Inter-Governmental Agreements Relating to Investment in Developing Countries*, Doc. No. 84/14, 27 May 1984, at 12, para. 36 ('[a]ccording to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated').

¹³⁶ See the examples examined by Newcombe & Paradell, *supra* n. 41, at 268 (referring to US, UK, Swiss and Canadian treaty practice); Thomas, *supra* n. 19, at 48-51; Paparinskis, *supra* n. 3, at 162 ('pleadings in the ICJ (...) show that such States as Belgium, Spain, the UK, and the US used the language of fair and equitable treatment to refer to the customary of law administration of justice'). On Swiss practice, see: Statement of the Swiss Department of External Affairs (Mémoire, JAAC 1979, fasc. 43/IV, no. 113) in: L. Caflisch, *La pratique suisse en matière de droit international public*, 36 ASDI 178 (1980) ('On se réfère ainsi au principe classique du droit des gens selon lequel les États 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'). This position is examined in: Matthias-Charles Kraft, *Les accords bilatéraux sur la protection des investissements conclus par la Suisse*, in *Foreign Investment in the Present and New International Economic Order* (D.C. Dicke ed., Univ. Press, Fribourg, 1987) at 79; Huu-Tru Nguyen, *Le réseau suisse d'accords bilatéraux d'encouragement et de protection des investissements*, 92 RGDIP 605 (1988); Jean-Christophe Liebeskind, *The Legal Framework of Swiss International Trade and Investments*, 7(3) J. World Invest. & Trade 368 (2006).

¹³⁷ Kill, *supra* n. 105, at 876-877; Bronfman, *supra* n. 74, at 615.

¹³⁸ Kill, *supra* n. 105, at 879.

¹³⁹ Newcombe & Paradell, *supra* n. 41, at 263-264. See also: *AWG Group v. Argentina*, UNCITRAL, Decision on Liability, (30 July 2010), Judge Nikken's separate opinion, paras. 14-15 ('Therefore, it is not so easy to say that the concept of international minimum standard was a *well-established* concept. It certainly was for the capital-exporting countries, but not for the rest of the world (...) Clauses on the treatment of foreign investment referring to the "international minimum standard" could hardly be agreed upon, as some of the Parties to those treaties were not willing to accept it *expressis verbis*. "International minimum standard" was a "forbidden phrase" in a treaty for the very many countries that had rejected that standard, because it was associated with unjust international relations, as has been recognized by scholars who have addressed the issue. The explanation suggested by the NAFTA Free Trade Commission interpretation, which reveals the intention of the NAFTA Parties to consider fair and equitable treatment and international minimum standard as identical, was that a formula had to be found for saying the same thing but with different words, neutral words, which were not historically demonized. The phrase "fair and equitable treatment" is a neutral expression in relation to which there was no controversy and it had been used in another context in the

Havana Charter signed in 1948 and in the Economic Agreement of Bogota, also signed in 1948').

¹⁴⁰ Newcombe & Paradell, *supra* n. 41, at 263-264. See also: Montt, *supra* n. 131, at 69-70.

¹⁴¹ Vasciannie, *supra* n. 79, at 162 ('In practice, however, such [developing] States have historically been reluctant to incorporate the fair and equitable standard in their investment relations, mainly because, on one interpretation, the fair and equitable standard is synonymous with the international minimum standard consistently supported by capital-exporting countries'). On China's practice, see Norah Gallagher & Wenhua Shan, *Chinese Investment Treaties* (Oxford U. Press 2009), noting that 'most principles of general/customary international law had emerged and been developed in the context of Europe and among developed states, and China has not participated in this process' (at 128) and that 'China has been cautious, particularly in her earlier years, in accepting "principles of international law". Mainly this was due to fears that it would lead to the application of customary international law or the IMS standard' (at 130).

¹⁴² See, the analysis of Thomas, *supra* n. 19, at 48. *Contra*: Paporinskis, *supra* n. 3, at 163.

¹⁴³ Schreuer & Dolzer, *supra* n. 4, at 124. See also: Bronfman, *supra* n. 74, at 621; Lavieć, *supra* n. 33, at 94; Salacuse, *supra* n. 10, at 226; Vasciannie, *supra* n. 79, at 105; UNCTAD, *supra* n. 104, at 13.

¹⁴⁴ This issue is further discussed below at section §1.02[C].

¹⁴⁵ In 2011, the present author received funding from the Canadian federal government ('SSHRC') to investigate the existing rules of customary international law in the field of international investment law. As part of the project, 365 BITs from 28 countries were examined. The findings with respect to the FET clause will be published in 2014-2015. This project is hereinafter referred to as 'P. Dumberry, *Rules of Customary International Law in the Field of International Investment Law*, SSHRC Research Project, (2012-2014)'.

¹⁴⁶ UNCTAD, *supra* n. 104, at 13.

¹⁴⁷ Schreuer & Dolzer, *supra* n. 4, at 124.

¹⁴⁸ Diehl, *supra* n. 17, at 151.

¹⁴⁹ Vasciannie, *supra* n. 79, at 131. See also: UNCTAD, *supra* n. 104, at 13 ('Attempts to equate the two standards may be perceived as paying insufficient regard to the substantial debate in international law concerning the international minimum standard. More specifically, while the international minimum standard has strong support among developed countries, a number of developing countries have traditionally held reservations as to whether this standard is a part of customary international law. Against this background of uncertainty, it is difficult to assume that most countries have accepted that the international minimum standard should be applied to their investment treaties in instances in which they have not opted to incorporate that standard *expressis verbis*); Salacuse, *supra* n. 10, at 226-7; Diehl, *supra* n. 17, at 152.

¹⁵⁰ See, at section §1.03 below.

¹⁵¹ Khalil, *supra*, n. 129, at 351-355.

¹⁵² Vasciannie, *supra* n. 79, at 129.

¹⁵³ *Ibid.*, at 114.

¹⁵⁴ Tudor, *supra* n. 4, at 23.

¹⁵⁵ Dumberry, *supra* n. 145.

¹⁵⁶ See, the analysis in: Tudor, *supra* n. 4, at 45 ff.

¹⁵⁷ These treaties are listed in: OECD, *supra* n. 52, at 78.

¹⁵⁸ See, for instance, Article 12(d), *Convention Establishing the Multilateral Investment Guarantee Agency*, in ILM 24 (1985) 1605: *Fourth Convention of the African, Caribbean and Pacific Group of States (ACP) and the European Economic Community (EEC) ("Lomé IV")*.

¹⁵⁹ OECD, *supra* n. 52, at 78; Vasciannie, *supra* n. 79, at 119, 122; UNCTAD, *supra* n. 68, at 4; OECD, *supra* n. 96, at 5.

¹⁶⁰ *Energy Charter Treaty* (1995), Article 10(1), in: 34 ILM 373 (1995).

¹⁶¹ *Colonia Protocol on Reciprocal Promotion and Protection of Investments*, Article 3, signed by the MERCOSUR States in 1994, in: UNCTAD, *International Investment Instruments: A Compendium*, Vol. 2 (United Nations 1996) at 513.

¹⁶² *ASEAN Treaty for the Promotion and Protection of Investments*, Article IV, in: 27 ILM 612 (1987).

¹⁶³ *Common Market for Eastern and Southern Africa (COMESA)*, Article 159(1)a).

¹⁶⁴ Vasciannie, *supra* n. 79, at 129-130; OECD, *supra* n. 96, at 5.

¹⁶⁵ Vasciannie, *supra* n. 79, at 129.

¹⁶⁶ Kläger, *supra* n. 41, at 22.

¹⁶⁷ The present typology is based on the work of Tudor, *supra* n. 4, at 22 ff; Kläger, *supra* n. 41, at 9 ff.; Diehl, *supra* n. 17, at 129 ff.

UNCTAD, *supra* n. 68, at xiii, identifies four different approaches: '(a) Unqualified obligation to accord fair and equitable treatment; (b) FET obligation linked to international law; (c) FET obligation linked to the minimum standard of treatment of aliens under customary international law; (d) FET obligation with additional substantive content such as denial of justice'.

¹⁶⁸ Dumbery, *supra* n. 145.

¹⁶⁹ See also: Jack Coe, *Fair And Equitable Treatment Under NAFTA's Investment Chapter*, 96 ASIL Proc. 9, 18 (2002), examining some 500 BITs and finding only 12% of them containing a reference to international law.

¹⁷⁰ These approaches are examined in: Newcombe & Paradell, *supra* n. 41, at 263; Tudor, *supra* n. 4, at 53 ff.

¹⁷¹ UNCTAD, *International Investment Agreements: Key Issues*, 212 (2004); Newcombe & Paradell, *supra* n. 41, at 264.

¹⁷² See, at Chapter 2 section §2.03[B][3] below.

¹⁷³ See, Tudor, *supra* n. 4, at 65-68; Diehl, *supra* n. 17, at 10-11, 125-153, 175-179; Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 2 Bus. L. Int'l, 188 (2002); I. Laird, *Betrayal, Shock and Outrage - Recent Developments in NAFTA Article 1105*, in *NAFTA Investment Law and Arbitration: The Early Years* 70, 74 (T. Weiler ed., Transnational Publ. 2004); Jan Schokkaert & Yvon Heckscher, *International Investments Protection: Comparative Law Analysis of Bilateral and Multilateral Interstate Conventions, Doctrinal Texts and Arbitral Jurisprudence Concerning Foreign Investments* 331 (Bruylant 2009).

¹⁷⁴ Tudor, *supra* n. 4 at 62, 65, for whom the minimum standard 'remains a customary international law standard to be respected by the State, independently from the FET' (at 67), but adding that 'each one of the two standards is designed however to operate in a specific field of international law, has a distinctive function, and is enforceable under different circumstances and in different types of fora' (at 66).

¹⁷⁵ UNCTAD, *supra*, n. 41, at xv; Bronfman, *supra* n. 74, at 623.

¹⁷⁶ Newcombe & Paradell, *supra* n. 41, at 264.

¹⁷⁷ See, at section §1.02[B] above.

¹⁷⁸ F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 British YBIL, 241, 244 (1981) ('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 the 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'); Newcombe & Paradell, *supra* n. 41, at 263; Dolzer & Stevens, *supra* n. 74, at 60; Vasciannie, *supra* n. 79, at 144 ('These considerations point ultimately towards the conclusion that the two standards in question are not identical: 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 an investment instrument does not automatically incorporate the international minimum standard for foreign investors'); P. Muchlinski, *Multinational Enterprises and the Law*, 635-647 (2nd ed. Oxford U. Press 2007); C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration: Substantive Principles*, 226-247 (Oxford U. Press 2007); Dolzer & Schreuer, *supra* n. 4, at 124-128; Tudor, *supra* n. 4, at 53-104; Diehl, *supra* n. 17, at 151-152; C. Schreuer, *Fair and Equitable Standard (FET): Interaction with Other Standards*, 4(5) Transnational Disp. Mgmt. 17 (2007); R. Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39(1) Int'l Law, 360 (2005); Haeri, *supra* n. 2, at 34 (2011); Kinnear, *supra* n. 101, at 7; Margaret Clare Ryan, *Glamis Gold, Ltd. v. The United States and the Fair and Equitable Treatment Standard*, 56(4) McGill LJ 932-934 (2011); Salacuse, *supra* n. 10, at 226-227; Roy Preiswerk, *New Developments in Bilateral Investment Protection - With Special Reference to Belgian Practice*, 3 RBDI 173, 186 (1967); Nigel Blackaby, Constantine Partasides, Alan Redfern & J. Martin H. Hunter, *Redfern and Hunter on International Arbitration*, 494 (Oxford U. Press 2009).

¹⁷⁹ Picherack, *supra* n. 21, at 260-262, 265, 291 ('there is good evidence that States intended for the fair and equitable treatment standard in their investment agreements to be a reference to the minimum standard of treatment. The minimum standard of treatment in customary international law has traditionally been construed narrowly, though it has evolved according to the evolution in State practice and international law. The fair and equitable treatment standard should be understood and applied in accordance with this narrow scope, as outlined in many NAFTA and other non-NAFTA decisions'); Thomas, *supra* n. 19, at 50 ('While the precise wording

varied, it is evident that states propounding the negotiation of investment protection treaties saw a clear and intended link between constant (or full) protection and security, fair and equitable treatment, and the international minimum standard at general international law. The former were considered to be expressions of the latter'); Mayeda, *supra* n. 74, at 273-291; Orellana, *supra* n. 2, at 7; Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law*, 6(2) *J. World Invest. & Trade* 317-320 (2005); Somarajah, *supra* n. 81, at 170 ff.; Charles Leben, *L'évolution du Droit International des Investissements*, in: Société Française pour le Droit International, *Un accord multilatéral sur l'investissement: d'un forum de négociation à l'autre?* 7-28 (1999); Maximo Romero Jiménez, *Considerations of NAFTA Chapter 11*, 2 *Chicago JIL* 243, 244 (2001); Paparinskis, *supra* n. 3, at 163; Montt, *supra* n. 131, at 302-310.

¹⁸⁰ Tudor, *supra* n. 4, at 65-66; Haeri, *supra* n. 2, at 34.

¹⁸¹ Tudor, *supra* n. 4, at 65-68. *Contra*: Paparinskis, *supra* n. 3, at 164.

¹⁸² Tudor, *supra* n. 4, at 67. *See also*: Diehl, *supra* n. 17, at 151.

¹⁸³ Tudor, *supra* n. 4, at 67. *See also*: Diehl, *supra* n. 17, at 151.

¹⁸⁴ Bronfman, *supra* n. 74, at 666.

¹⁸⁵ *Ibid.*, at 666, 678.

¹⁸⁶ Diehl, *supra* n. 17, at 152.

¹⁸⁷ Bronfman, *supra* n. 74, at 673. *See also*: Kläger, *supra* n. 41, at 87 ('fair and equitable treatment should construed as representing only one single concept. Any division into distinct constructions of the standard - such as a presumably lower customary minimum standard and a presumably higher self-contained standard - would threaten consistency in international investment law. It would furthermore cause remarkable uncertainties for states and investors in relation to the implications of slightly differing formulations in investment treaties. Additionally, it would encourage forum shopping of investors, in order to receive the highest possible level of protection').

¹⁸⁸ Salacuse, *supra* n. 10, at 228; Vasciannie, *supra* n. 79, at 103.

¹⁸⁹ Picherack, *supra* n. 21, at 261.

¹⁹⁰ Vasciannie, *supra* n. 79, at 103.

¹⁹¹ Orellana, *supra* n. 2, at 7, adding that such 'kind of second-guessing of governmental action ... invited by this type of standard is antithetical to democracy and is indefensible'.

¹⁹² UNCTAD, *supra* n. 68, at 28. *See also*: Kläger, *supra* n. 41, at 264.

¹⁹³ McLachlan et al., *supra* n. 178, at 203. *See also*: Kläger, *supra* n. 41, at 86 ('it seems that the "controversy" is misguided, and [that] the dichotomy presented by the opposing views is a false one on a number of levels. Arguably, these misconceptions are based on simplistic premises and a false perspective in addressing fair and equitable treatment. In particular, the dichotomy is presented as a struggle between a presumably restrictive and clear-cut minimum standard and a far reaching fair and equitable treatment obligation that is at the disposal of arbitrators'). For him, both approaches are 'ultimately incapable of explaining comprehensively the role of international law in the construction of fair and equitable treatment' (at 111). He insists that tribunals should take 'arguments from any source of international law' so that they have 'the opportunity to provide comprehensive reasoning and thereby to manage all social and legal developments influencing a particular investment dispute' without 'being based on the wrong premise of pegging a high or low level of protection for foreign investors' (at 111).

¹⁹⁴ *See*, at section §1.02[C].

¹⁹⁵ UNCTAD, *supra* n. 68, at 17.

¹⁹⁶ UNCTAD, *supra* n. 68, at xiv; Newcombe & Paradell, *supra* n. 41, at 263-264; Paparinskis, *supra* n. 3, at 94.

¹⁹⁷ OECD, *supra* n. 96, at 40. *See also*: Yannaca-Small, *supra* n. 101, at 113-114.

¹⁹⁸ UNCTAD, *supra* n. 68, at 8.

¹⁹⁹ *Ibid.*, at 22.

²⁰⁰ Haeri, *supra* n. 2, at 26 ('the fair and equitable treatment standard has emerged in investment arbitration jurisprudence as a distinct and relatively broad standard where it is not expressly linked with the international minimum standard. By contrast, the development of the international minimum standard, in accordance with customary international law, has been more cautious: the threshold for violating the standard remains high'); R. Dolzer, *Fair And Equitable Treatment International Law, Remarks*, 100 *ASIL Proc.* 69 (2006); Yannaca-Small, *supra* n. 101, at 115; Christopher F. Dugan, Don Wallace, Jr., Noah Rubins & Borzu Sabahi, *Investor-State Arbitration* 496 (Oxford U. Press 2008); Dolzer & Schreuer, *supra* n. 4, at 126; Kläger, *supra* n. 41, at 85. On the contrary, *see* the position adopted by the following writers: Stephan Schill, *Fair and Equitable Treatment as an Embodiment of the Rule of Law*, in

The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years 33 (R. Hofmann & C. Tams eds., Nomos 2007) (stating that it is 'questionable whether substantial differences result from the different framing of the standard with a view to the actual practice of investment tribunals'); Kenneth J. Vandeveld, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. Int'l L. & Pol. 47 (2010) ('Differences in the contexts in which the standard appears have made little difference to tribunals interpreting the standard. Rather, the awards have yielded a single coherent theory of the standard, although perhaps not consciously so').

²⁰¹ See Newcombe & Paradell, *supra* n. 41, at 263-264, referring to the following cases: *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, (25 May 2004), paras. 110-112; *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN3467, Final Award, (1 July 2004), paras. 188-190; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, (12 May 2005), paras. 282-284; *Saluka v. Czech Republic*, Partial Award, (17 March 2006), paras. 286-295; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v. Argentina*, Decision on Liability, (3 October 2006), para. 125-131; *PSEG Global Inc. and Konya Igin Elektrik Üretim ve Ticaret Limited Şirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, (19 January 2007), para. 239.

²⁰² See, for instance, *Siemens AG v. Argentina*, ICSID No. ARB/02/8, Award, (17 January 2007), para. 291.

²⁰³ *Saluka v. Czech Republic*, Partial Award, (17 March 2006), para. 294. '[Article 3.1 of the Treaty] omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulties that may arise under treaties (such as the NAFTA) which expressly tie the "fair and equitable treatment" standard to the customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty. This clearly points to the autonomous character of a "fair and equitable treatment" standard such as the one laid down in Article 3.1 of the Treaty'.

²⁰⁴ *Ibid.*, para. 293. See also: *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID No. ARB/01/3, Award, (22 May 2007), para. 258.

²⁰⁵ *Saluka v. Czech Republic*, Partial Award, (17 March 2006), para. 292.

²⁰⁶ UNCTAD, *supra* n. 68, at 22.

²⁰⁷ See, in particular, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID No. ARB/03/6, Award, (31 July 2007), para. 369 ('The Tribunal notes that fair and equitable treatment conventionally obliges States parties to the BIT to respect the standards of treatment required by international law. The international law mentioned in Article II of the BIT refers to customary international law ...').

²⁰⁸ See, for instance, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID No. ARB/97/3, Award, (20 August 2007), paras. 7.4.5 ff.; *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID No. ARB(AF)/00/2, Award, (29 May 2003), para. 155.

²⁰⁹ Laird, *supra* n. 173, at 51; Picherack, *supra* n. 21, at 260; L. Paradell, *The BIT Experience of The Fair And Equitable Treatment Standard*, in *Investment Treaty Law, Current Issues II* 123 (Federico Ortino et al. eds., British IICL 2007); Vandeveld, *supra* n. 200, at 47.

²¹⁰ *Enron v. Argentina*, Award, (22 May 2007), para. 258. See also: *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, (28 September 2007), para. 302; *Azurix Corp. v. Argentina*, ICSID No. ARB/01/12, Award, (14 July 2006), para. 361; *Lemire v. Ukraine*, ICSID No. ARB/06/18, Decision on Jurisdiction and Liability, (21 January 2010), paras. 253-254.

²¹¹ *Occidental Exploration and Production Co v. Ecuador*, Award, (1 July 2004), paras. 188-190; *Lauder v. Czech Republic*, UNCITRAL, Final Award, (3 September 2001), para. 292; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Estonia*, Award, (25 June 2001), para. 367.

²¹² UNCTAD, *supra* n. 68, at 29, explaining the reasons why States may want to make such changes: 'from the host country perspective, linking the FET standard to the minimum standard of treatment of aliens may be seen as a progressive step, given that this will likely lead tribunals to apply a higher threshold for finding a breach of the standard, as compared with unqualified FET clauses'.

²¹³ See, at Chapter 2 section §2.02[C][5] below.

²¹⁴ Many treaties are mentioned in: UNCTAD, *supra* n. 68, at 25.

²¹⁵ See, at Chapter 2 section §2.02[C][5] below.

²¹⁶ UNCTAD, *supra* n. 68, at 13; Haeri, *supra* n. 2, at 43, 45; Tudor, *supra* n. 4, at 33; David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile*

Free Trade Agreement, 19(4) Am. U. L. Rev., 724-731 (2003).

²¹⁷ UNCTAD, *supra* n. 68, at 30.

²¹⁸ *Ibid.*, at 29–30.

²¹⁹ See, for instance, the specification that the FET standard ‘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’ which is found in the following two BITs entered by the United States: Treaty between the United States and Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, with Annexes and Protocol, signed on 4 November 2005, entered into force on 1 November 2006, Article 5(1)(2); Treaty between the United States and Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, signed on 19 February 2008, entered into force on 1 January 2012, Article 5(1)(2). A similar clause indicating that ‘For greater certainty, “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the customary international law minimum standard of treatment of aliens’ is also found in one BIT entered into by Canada: Agreement between Canada and Romania for the Promotion and Reciprocal Protection of Investments, signed on 8 May 2009, entered into force on 23 November 2011, Article II(2).

²²⁰ See, for instance, ASEAN *Comprehensive Investment Agreement* (2009), Article 11; *Investment Agreement for COMESA* (2007) Article 14.

²²¹ See, at section §1.02[B] below

²²² Kläger, *supra* n. 41, at 61; Haeri, *supra* n. 2, 33 (‘Thus, absent specific treaty wording linking the fair and equitable treatment standard with the international minimum standard in customary international law, the better view is that the fair and equitable treatment standard is an autonomous standard. In such circumstances, the fair and equitable treatment standard cannot be construed as a reference to the international minimum standard in customary international law’); C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. World Invest. & Trade, 363-366, 365, 385 (2005) (‘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’).

²²³ Paparinskis, *supra* n. 3, at 160 (‘in abstract terms, differences in treaty practice may, as always, be read in two ways. They may signify that when States wish to refer to customary law they do so in express terms, and the absence of such a reference *a contrario* suggests that the analysis should be limited to treaty law. Alternatively, the uncontroversial practice of making the references to customary law could suggest that some States make *ex abundanti cautela* express an arrangement that would have been otherwise valid’).

²²⁴ The technique of reference (*renvoi*) is often used in treaties: Paparinskis, *supra* n. 3, at 160.

²²⁵ See, at Chapter 2 section §2.02[C][3] below.

²²⁶ Schreuer, *supra* n. 222, at 363.

²²⁷ Diehl, *supra* n. 17, at 150 (‘the wording of Article 1105(1)- especially the reference to the “Minimum standard of Treatment” in the heading - suggests that under the NAFTA provision FET is part of general international law, more specifically IMS’).

²²⁸ See, at Chapter 2 section §2.02[C][3] below.

²²⁹ See, for instance, *United Parcel Service of America Inc. v. Canada* [hereinafter *UPS v. Canada*], UNCITRAL, Award (Jurisdiction), (22 November 2002), para. 97 (‘the obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard. Our reasons in brief are, first, that that reading accords with the ordinary meaning of article 1105. That obligation is “included” within the minimum standard’).

²³⁰ *Waste Management v. Mexico*, Award, (30 April 2004), para. 98.

²³¹ *Cargill, Inc. v. Mexico*, Award, (18 September 2009), para. 296 (emphasis added). It should be noted that the tribunal in *Glamis v. United States*, Award, (8 June 2009), para. 627, speaks of ‘the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA’. This formulation suggests that FET and full protection and security are in fact the *only two* elements comprised in the umbrella concept of the minimum standard of treatment.

²³² Schreuer, *supra* n. 222, at 363-365; Dolzer & Schreuer, *supra* n. 4, at 126; Salacuse, *supra* n. 10, at 227-228; Emmanuel Gaillard, *C.I.R.D.I., Chronique des sentences arbitrales*, 130 JDI 164 (2003).

²³³ Schreuer, *supra* n. 222, at 364. See also: Salacuse, *supra* n. 10, at 226.

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