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on issues in international investment agreements

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NOTE

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Preface

The United Nations Conference on Trade and Development (UNCTAD) is implementing a work programme on a possible multilateral framework on investment, with a view towards assisting developing countries to participate as effectively as possible in international investment rule-making at the bilateral, regional, plurilateral and multilateral levels. The programme embraces capacity-building seminars, regional symposia, training courses, dialogues between negotiators and groups of civil society and the preparation of a series of issues papers.

This paper is part of that series. It is addressed to government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers. The series seeks to provide balanced analyses of issues that may arise in discussions about international investment agreements. Each study may be read by itself, independently of the others. Since, however, the issues treated closely interact with one another, the studies pay particular attention to such interactions.

The series is produced by a team led by Karl P. Sauvant and Pedro Roffe. The principal officer responsible for its production is John Gara who oversees the development of the papers at various stages. The members of the team include Victoria Aranda, Ruvan de Alwis, Obiajulu Ihonor and Jörg Weber. The work is carried out under the overall direction of Lynn K. Mytelka. The series' principal advisors are Arghyrios A. Fatouros, Sanjaya Lall and Peter T. Muchlinski. The present paper is based on a manuscript prepared by Stephen Vasciannie. The final version reflects comments received from Joachim Karl, Mark Koulen and Marinus Sikkel. The paper was desktop-published by Teresita Sabico.

Rubens Ricupero
Secretary-General of UNCTAD

Geneva, May 1999

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UNCTAD has carried out a number of activities related to the work programme in cooperation with other intergovernmental organizations, including the Secretariat of the Andean Community, the Inter-Arab Investment Guarantee Corporation, the League of Arab States, the Organization of American States, l'Organisation Internationale de la Francophonie, and the World Trade Organization. UNCTAD has also cooperated with non-governmental organizations, including the Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico - Universidad de Buenos Aires, the Consumer Unity and Trust Society - India, the Economic Research Forum - Cairo, the European Roundtable of Industrialists, the Friedrich Ebert Foundation, the International Confederation of Free Trade Unions, Oxfam, SOMO - Centre for Research on Multinational Corporations, the Third World Network, Universidad del Pacifico, University of the West Indies, and World Wildlife Fund International.

Funds for the work programme have so far been received from Australia, Brazil, Canada, France, the Netherlands, Norway, Switzerland, the United Kingdom and the European Commission. Countries such as Egypt, India, Jamaica, Morocco and Peru have also contributed to the work programme by hosting regional symposia. All of these contributions are gratefully acknowledged.

Table of contents

Page

Preface .... **v**

Executive summary **1**

INTRODUCTION **3**

I. EXPLANATION OF THE ISSUE **7**

A. History of the standard 7

1. Origins 7
2. Recent usage 8

B. The meaning of fair and equitable treatment 10

1. The plain meaning approach 10
2. International minimum standard 12
3. "Equitable" vs. "fair and equitable" treatment 13

C. The relationship with other treatment standards 15

D. Principal drafting issues 16

1. The need for an express provision 16
2. Formulating the standard 18

II. STOCKTAKING AND ANALYSIS **21**

A. Trends in the use of the standard 21

B. Models based on State practice 22

Page

1. No reference to fair and equitable treatment 22
2. The hortatory approach 24
3. Reference to "fair and equitable" treatment, "just and equitable" treatment or "equitable" treatment 26
4. Reference to "fair and equitable" treatment with related standards 31
   a. Does the fair and equitable standard constitute an overriding obligation? 34
   b. Is the fair and equitable standard the same as the international minimum standard? 37

III. INTERACTION WITH OTHER ISSUES AND CONCEPTS 43

CONCLUSION: ECONOMIC AND DEVELOPMENT IMPLICATIONS AND POLICY OPTIONS 53

A. The economic and development implications of incorporating the standard 54

B. Policy options 58

References 63

Selected UNCTAD publications on transnational corporations and foreign direct investment 67

Questionnaire 77

Table

1. Interaction across issues and concepts 43

Executive summary

In recent years, the concept of fair and equitable treatment has assumed prominence in investment relations between States. While the earliest proposals that made reference to this standard of treatment for investment are contained in various multilateral efforts in the period immediately following World War II, the bulk of the State practice incorporating the standard is to be found in bilateral investment treaties (BITs) which have become a central feature in international investment relations.

In essence, the fair and equitable standard provides a yardstick by which relations between foreign direct investors and Governments of capital-importing countries may be assessed. It also acts as a signal from capital-importing countries, for it indicates, at the very least, a State's willingness to accommodate foreign capital on terms that take into account the interests of the investor in fairness and equity. Furthermore, as most capital-importing countries have now entered into agreements that incorporate the standard, reluctance to accept this standard could prompt questions about the general attitude of a State to foreign investment.

At the same time, uncertainty concerning the precise meaning of the phrase "fair and equitable treatment" may, in fact, assume practical importance for States. The phrase carries at least two possible meanings. First it could be given its plain meaning, so that beneficiaries are entitled to fairness and equity as these terms are understood in non-technical terms. Secondly, it would mean that beneficiaries are assured treatment in keeping with the international minimum standard for investors. In practical terms, this uncertainty may influence the policy decisions of a host country that is willing to accept a treaty clause on fair and equitable treatment, but that is not prepared to offer the

international minimum standard. This may be particularly the case where the host country believes that the international minimum standard implies that foreign investors could be entitled to more favourable treatment than local investors.

Although the concept of fair and equitable treatment now features prominently in international investment agreements, different formulations are used in connection with the standard. An examination of the relevant treaties suggests at least four approaches in practice, namely:

- An approach that omits reference to fair and equitable treatment.
- An approach in which it is recommended that States should offer investment fair and equitable treatment, but such treatment is not required as a matter of law (the hortatory approach).
- A legal requirement for States to accord investment "fair and equitable" treatment, "just and equitable" treatment, or "equitable" treatment.
- A legal requirement for States to accord investment fair and equitable treatment, together with other standards of treatment, such as most-favoured-nation (MFN) and national treatment.

These different approaches can serve as models for future practice, though it should be noted that the approach that combines fair and equitable treatment with related standards of treatment has received most support in recent practice.

Because all States would, as a matter of course, seek to treat local and foreign enterprises fairly and equitably, the inclusion of a clause on the fair and equitable standard in investment agreements does not, generally speaking, raise complex issues, except that the precise meaning of the fair and equitable standard may vary in different contexts.

INTRODUCTION

The concept of fair and equitable treatment now occupies a position of prominence in investment relations between States. Together with other standards that have grown increasingly important in recent years, the fair and equitable treatment standard provides a useful yardstick for assessing relations between foreign direct investors and Governments of capital-importing countries. As a general proposition, the standard also acts as a signal from capital-importing countries: for, if a host country provides an assurance of fair and equitable treatment, it presumably wishes to indicate to the international community that investment within its jurisdiction will be subject to treatment compatible with some of the main expectations of foreign investors.

The current prominence given to the idea of fair and equitable treatment in investment relations owes its origin primarily to BITs between developed and developing countries, as well as countries with economies in transition. Such BITs have become major instruments regulating the investment relations between foreign investors and host countries, and as such, they have exerted influence on State practice concerning investment relations. In the majority of these BITs, the parties concerned agree to grant each other fair and equitable treatment in investment matters, and contemplate that, if need be, an independent third party may be called upon to settle disputes concerning whether this standard has been violated.

Although the concept of fair and equitable treatment occurs most frequently in BITs of recent vintage, it has also had a place in multilateral efforts in the area of international investment law. For instance, in a provision that precedes most, if not all, references to the fair and equitable standard in investment law, the Havana Charter of 1948 contemplates that foreign investment should be assured just and equitable treatment.[1] Though the Havana Charter did not enter into force, its use of the term

"just and equitable" has served as a precedent for subsequent efforts to reach agreement on treatment standards for foreign investment in international law. Thus, the Abs-Shawcross Draft Convention on Investments Abroad (Abs and Shawcross, 1960) and the Draft Convention on the Protection of Foreign Property (the OECD Draft Convention) proposed by the Organisation for Economic Co-operation and Development (OECD) in 1967 (OECD, 1967), two draft documents that generally reflect the perspective of capital-exporting countries, adopted the language of fair and equitable treatment in setting out basic protection for foreign investors. Likewise, the most recent multilateral draft treaty on investment issues prepared under the auspices of the OECD, the Multilateral Agreement on Investment (MAI) (OECD, 1998), also contemplated that, with respect to investment protection, the basic standard should include fair and equitable treatment. As a preliminary observation, therefore, multilateral treaty efforts among the capital-exporting countries share the tendency in favour of a fair and equitable treatment clause, which has become a common feature of BITs.

This is not to suggest, however, that only capital-exporting countries have supported fair and equitable treatment in their treaty practice. From a somewhat early stage in the United Nations efforts to formulate a Code of Conduct on Transnational Corporations, the concept was tentatively included in the main draft provisions on investment promotion and protection (UNCTC, 1988, pp. 241-242). The broad perception that most countries are prepared to guarantee fair and equitable treatment to foreign investors is further reinforced by investment provisions in various regional instruments. Among such instruments, the Fourth Convention of the African, Caribbean and Pacific group of States (ACP) and the European Economic Community (EEC) known as Lomé IV and the North American Free Trade Agreement (NAFTA) may be mentioned as treaties that now incorporate the standard.

Notwithstanding its currency in investment instruments, however, the fair and equitable standard still prompts a number of difficult questions in investment law. The precise meaning of the concept is sometimes open to enquiry, not least because

the notions of "fairness" and "equity" do not automatically connote a clear set of legal prescriptions in some situations. Broadly speaking, most legal systems strive to achieve fairness and equity as a matter of course; however, when parties to a treaty agree, as a matter of law, that fair and equitable treatment must be granted to foreign investors, it may be presumed that the parties accept a common standard of treatment. One of the challenges in this area of the law is to identify the main elements of this common standard.

Questions also arise concerning the different policy options open to States that wish to include a fair and equitable treatment clause in an agreement. Having regard to the investment instruments published to date, States have made references not only to "fair and equitable" treatment, but also to "just and equitable" treatment and "equitable" treatment. In other cases, they have adopted language that recommends "fair and equitable treatment", but does not require it as a matter of law, and, in many instances, they have combined "fair and equitable treatment" with other standards. What are the implications of these apparently divergent approaches? To what extent do these implications vary according to the particular form of words used? And what is the significance of juxtaposing "fair and equitable" treatment alongside general treatment standards such as the most-favoured-nation and national treatment standards? This paper addresses such questions.

Another important issue concerns the economic and development implications of the fair and equitable standard for host countries. As a matter of law, States are not obliged to allow foreign investments into their territory, but, especially in the prevailing liberal environment, most developing countries actively seek foreign investment as a means of encouraging growth and development. In this context, States have been willing to incorporate the fair and equitable standard in their investment agreements in the hope that this will enhance their reputation as countries hospitable to foreign capital. In practice, however, because the fair and equitable standard is often incorporated with other standards, and is often presented as only one element among several factors affecting investment decisions, it is difficult

to identify the extent to which the fair and equitable guarantee, on its own, influences investor choices.

Note

1 Unless otherwise noted, all instruments cited herein may be found in UNCTAD (1996a). All signed BITs between specific countries cited herein may be found in ICSID (1972a).

Section I

EXPLANATION OF THE ISSUE

A. History of the standard

1. Origins

The fair and equitable standard has been an important aspect of international investment law since the period immediately following the Second World War. Shortly after the war, in the course of efforts to establish an International Trade Organization in 1948, the standard was incorporated in Article 11(2) of the Havana Charter of 1948, as a desirable basis for the treatment of investments in foreign countries. Although the Charter did not enter into force, its reference to the fair and equitable standard served as a precedent in subsequent instruments concerned with international investment. So, for example, at the regional level, when the Ninth International Conference of American States (1948) adopted the Economic Agreement of Bogota, an agreement covering the provision of adequate safeguards for foreign investors, the parties concerned expressly contemplated fair and equitable treatment for foreign capital (Documents on American Foreign Relations, 1948).

Like the Havana Charter, however, the Economic Agreement of Bogota failed to come into effect owing to lack of support. But, this did not undermine the early treaty practice concerning the fair and equitable standard because, at the bilateral level, the United States and various other countries provided for this standard in a series of Friendship, Commerce and Navigation (FCN) treaties in the 1950s. More specifically, the United States FCN treaties with Belgium and Luxembourg, France, Greece,

Ireland, Israel, Nicaragua and Pakistan contained the express assurance that foreign persons, properties, enterprises and other interests would receive "equitable" treatment, while other United States FCN treaties -- including those with Ethiopia, the Federal Republic of Germany, Oman and the Netherlands -- contemplated "fair and equitable" treatment for a similar set of items involved in the foreign investment process.

The approach taken in most United States FCN treaties in the 1950s was not fundamentally dissimilar from that incorporated in the next major development concerning the standard, namely, the Draft Convention on Investments Abroad, proposed in 1959 by a number of European businesspersons and lawyers under the leadership of Hermann Abs and Lord Shawcross. By virtue of its origins, and by its emphasis on investor protection, the Abs-Shawcross Draft was widely perceived as favouring the perspective of capital-exporting countries. To a certain degree, this observation is also applicable to the most influential of the early postwar drafts on investment, namely, the OECD Draft Convention. The Convention, first published in 1963 and revised in 1967, was actually approved by the Council of the OECD (with Turkey and Spain abstaining), but it was never opened for signature. As an unratified treaty, its importance rests mainly in the fact that, at a time when most developing countries -- and some developed countries too -- were very supportive of national controls over foreign direct investment, it placed emphasis on the protection of foreign investments. Given the economic and political influence represented by the OECD acting as a group, the draft agreement reflected the dominant trends and perspectives among capital-exporting countries in investment matters.

2. Recent usage

Since the early 1960s, BITs between capital-exporting and capital-importing countries have assumed increasing importance in regulating foreign investment issues. While some of the earlier BITs did not expressly refer to the standard, by the 1970s, this had changed substantially, so that the vast majority

of BITs now place clear reliance on fair and equitable treatment. At the multilateral level, no comprehensive treaty on foreign investment incorporating the language of fair and equitable treatment exists. However, two major efforts in this direction since the formulation of the OECD Draft Convention should be mentioned. First, in the draft United Nations Code of Conduct on Transnational Corporations, it was contemplated that transnational corporations operating in foreign countries should receive fair and equitable treatment; while some issues concerning that standard remained outstanding in the draft United Nations Code -- and bearing in mind the differences of opinion among capital-exporting and importing States concerning the draft -- agreement on fair and equitable treatment, albeit in preliminary form, was a point of significance. Secondly, the MAI negotiated in the OECD placed emphasis on fairness in the treatment of investment. In addition to suggesting in the draft preamble that investment regimes should be fair, the proposed MAI contemplated both fair and equitable treatment as well as full and constant protection and security for investments.

Among regional treaties, Lomé IV and NAFTA are important treaties that also incorporate the fair and equitable standard. More particularly, Lomé IV, which entered into force for a 10-year period on 1 March 1990, is noteworthy in the present context because it reflects the perspective of a significant cross-section of both capital-exporting and capital-importing countries.

Reference should also be made to private sector initiatives designed to influence public policy on foreign investment. In this regard, the Abs-Shawcross Draft has already been mentioned. But other efforts -- such as the International Code of Fair Treatment for Foreign Investors, as approved by the International Chamber of Commerce (ICC) in 1949, and the ICC's Guidelines for International Investment -- should also be mentioned as documents that use the standard of fair and equitable treatment. More recently, the World Bank, through its 1992 Guidelines on Treatment of Foreign Direct Investment (the World Bank Guidelines), has also given support for fair and equitable treatment, and has sought to provide guidance on ways in which this standard may be given specific application with respect to investment issues

such as security of person and property rights, the granting of permits and licences and the repatriation of capital.

B. The meaning of fair and equitable treatment

At least two different views have been advanced as to the precise meaning of the term "fair and equitable treatment" in investment relations:

- the plain meaning approach; and
- equating fair and equitable treatment with the international minimum standard.

1. The plain meaning approach

In this approach, the term "fair and equitable treatment" is given its plain meaning: hence, where a foreign investor has an assurance of treatment under this standard, a straightforward assessment needs to be made as to whether a particular treatment meted out to that investor is both "fair" and "equitable".[1]

The plain meaning approach is consistent with accepted rules of interpretation in international law. Also, because there appear to be no judicial decisions on the precise meaning of the fair and equitable standard in particular situations, there may be a tendency to assume that the expression is so readily understood that it has not generated significant differences of opinion. This would suggest that States are agreed on the meaning of the term; in the absence of clear pronouncements to the contrary, this would also suggest that States are agreed that the term should be understood in its plain, or literal, sense.

Generally, however, the plain meaning approach is not without its difficulties. In the first place, the concepts "fair" and "equitable" are by themselves inherently subjective, and therefore lacking in precision. Consequently, if one relies only on the plain meaning of the words, it is conceivable that a given

situation satisfies the standard of fair and equitable treatment in the perspective of a capital-importing country but fails to do so from the point of view of the foreign investor or the capital-exporting country. This is especially true in circumstances in which the parties involved have different legal traditions or approach the issue with different cultural assumptions (Walker, 1957-1958, p. 812). Secondly, difficulties of interpretation may also arise from the fact that the concepts, "fair and equitable treatment", in their plain meaning, do not refer to an established body of law or to existing legal precedents. Instead, the plain meaning approach presumes that, in each case, the question will be whether a foreign investor has been treated fairly and equitably, without reference to any technical understanding of the meaning of "fair and equitable treatment" (Fatouros, 1962, p. 215). But this is problematic because, with there being no particular agreement as to the content of the term, the plain meaning approach could give rise to conflicting interpretations in practice.

On the other hand, although the plain meaning approach is vague in its application, this is not altogether disadvantageous. In some circumstances, both States and foreign investors may view lack of precision as a virtue, for it promotes flexibility in the investment process (Walker, 1957-1958, p. 812). Investment treaties and contracts are usually prepared in advance of the projects to which they are directly applicable; and, in most cases, the parties to these treaties and contracts cannot predict the range of possible occurrences that may affect the future relationship between a State and particular investors. Accordingly, States and investors may support the fair and equitable standard precisely because they believe it does not provide a detailed *a priori* solution to certain issues that could arise in the future.

This is not to suggest, however, that the plain meaning approach is devoid of content. In the first place, if a dispute arises, it is likely that the fair and equitable standard will be applied objectively: none of the agreements including the standard suggest that the interpretation of what is fair and equitable shall be as determined by the investor or the host country. Rather, provision is normally made for third party dispute settlement.

In these circumstances, both sides may present their subjective views on the requirements of the fairness and equity standard in the particular case, but the third party is called upon to apply an objective standard.

In addition, some guidance on the plain meaning of fair and equitable treatment may be derived from international law in general. Specifically, although international law has had opportunities to incorporate concepts of equity from particular national legal systems, this has not been done. By extension, while maxims of equity from specific legal systems could add certainty to the concept of fair and equitable treatment, this approach should be avoided. At the same time, however, it is possible to identify certain forms of behaviour that appear to be contrary to fairness and equity in most legal systems and to extrapolate from this the type of State action that may be inconsistent with fair and equitable treatment, using the plain meaning approach. Thus, for instance, if a State acts fraudulently or in bad faith, or capriciously and wilfully discriminates against a foreign investor, or deprives an investor of acquired rights in a manner that leads to the unjust enrichment of the State, then there is at least a *prima facie* case for arguing that the fair and equitable standard has been violated.

2. International minimum standard

The second approach to the meaning of the concept suggests that fair and equitable treatment is synonymous with the international minimum standard in international law. This interpretation proceeds from the assumption that, under customary international law, foreign investors are entitled to a certain level of treatment, and that treatment which falls short of this level gives rise to liability on the part of the State. If, in fact, fair and equitable treatment is the same as the international minimum standard, then some of the difficulties of interpretation inherent in the plain meaning approach may be overcome, for there is a substantial body of jurisprudence and doctrine concerning the elements of the international minimum standard.

At the policy level, however, an approach that equates fair and equitable treatment with the international minimum standard is problematic in certain respects:

- If States and investors believe that the fair and equitable standard is entirely interchangeable with the international minimum standard, they could indicate this clearly in their investment instruments; but most investment instruments do not make an explicit link between the two standards. Therefore, it cannot readily be argued that most States and investors believe fair and equitable treatment is implicitly the same as the international minimum standard.

- 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.*

3. "Equitable" vs. "fair and equitable" treatment

In most treaties and other instruments that provide for fair and equitable treatment for investments, the words "fair" and "equitable" are combined in the form of a reference to "fair and equitable treatment". This is particularly true with respect to recent investment instruments. So, for instance, the model BITs prepared by Chile, China, France, Germany, the United States, and the United Kingdom, as well as regional instruments such as NAFTA, the 1993 Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA)

and the 1994 Energy Charter Treaty, all use the phrase "fair and equitable treatment" apparently as part of a single concept.

This approach suggests that there is, in fact, a single standard, the fair and equitable standard, as distinct from two separate standards, one concerning fairness, and the other equity. Certain considerations support this perspective. First, the consistency with which States have linked the two terms in the format of "fair and equitable" treatment creates the impression that these States believe there is one standard. With respect to the OECD members, this interpretation is reinforced by the Notes and Comments to Article 1 of the OECD Draft Convention, which expressly assumed that there was only one standard. Secondly, if States wished to indicate that "fair and equitable" treatment actually referred to two separate standards, this option would be open to them. They could, for instance, set out the fairness standard in one treaty provision, and the equity standard in another; arguably, they have not done so precisely because they believe the phrase "fair and equitable treatment" connotes a single standard.

In some cases, however, treaties and other investment instruments contain references not to "fair and equitable" treatment, but to "equitable" treatment only. This applies, for instance, to some of the FCN treaties entered into by the United States and various other countries, including, for example, Greece, Ireland, Israel and Nicaragua. Having regard to the fact that other FCN treaties of the United States expressly contemplated "fair and equitable" treatment, this could prompt the view that the United States sought to make a legally significant distinction by using two different terms. This, however, does not seem to be the case. Given the similarity between the two terms in plain language, it is difficult to identify actions by a State towards foreign investors that would be "equitable" but not "fair", and vice versa. This approach also derives support from those who argue that the variation in the form of words in the United States FCN treaties "seems to be of no great importance" (Fatouros, 1962, p. 167). In fact it has been suggested that the phrase "fair and equitable treatment" used in recent United

States BITs is the equivalent of the "equitable treatment" set out in various earlier FCN treaties (Vandevelde, 1988, p. 221).

C. The relationship with other treatment standards

In some of the post-war multilateral and regional instruments on investment, such as the OECD Draft Convention, the Bogota Agreement and the Abs-Shawcross Draft, the relevant treatment standards, while referring to fair and equitable treatment, do not include direct reference to the national or MFN treatment standards. This, however, is exceptional, for, in the vast majority of investment instruments, the standard of fair and equitable treatment is incorporated with both the MFN and national treatment standards, or with at least one of the latter standards. The more recent multilateral and regional efforts (including the MAI and the NAFTA investment provisions) conform to this general trend. At the same time, a study of approximately 335 BITs in force in the early 1990s found that no less than 183 combined the fair and equitable standard with the MFN and national treatment standards (Khalil, 1992, p. 355). The study also found that, as of the early 1990s, another 92 BITs combined fair and equitable treatment with the MFN standard, while 8 contained a combination of fair and equitable treatment and national treatment.

The frequency with which these standards are incorporated together in modern investment treaties raises the question of the relationship between fair and equitable treatment on the one hand, and national and MFN treatment on the other. In essence, fair and equitable treatment denotes a non-contingent or absolute standard. This means that the fair and equitable treatment standard applies to investments in a given situation without reference to standards that are applicable to other investments or entities; it may apply to other investments or entities, but its content does not vary according to how other investments or entities are treated (Walker, 1957-1958, p. 811). In contrast, both national and MFN treatment are contingent or relative standards. The actual content of a contingent standard is ascertained by reference, not to the contingent standard itself,

but to an exterior state of law or fact. Thus, in the case of national treatment, in determining the content of the standard as it applies to foreign investment, reference must be made to the treatment of nationals of the country concerned; and, similarly, in determining the content of the MFN standard in any particular case, reference must be made to the treatment granted to investments from the "most favoured nation".

Therefore, where a capital-importing nation offers both fair and equitable treatment and combined national and MFN treatment, this provides foreign investors with both non-contingent and contingent forms of protection. From the perspective of the investor, the fair and equitable component provides a fixed reference point, a definite standard that will not vary according to external considerations, because its content turns on what is fair and reasonable in the circumstances. The fair and equitable standard will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances. Simultaneously, national and MFN treatment, as contingent standards, protect each beneficiary of these standards by ensuring equality or non-discrimination for that beneficiary vis-à-vis other investments.

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

D. Principal drafting issues

1. The need for an express provision

Under customary international law, each State has the right to determine whether it will act as a host country to foreign investors and to specify the terms and conditions under which

it will accept foreign investments in its territory (Brownlie, 1998, p. 522; UNCTAD, 1999a, p. 7). This legal position, derived from the practice of States, acknowledges the exclusive control that each State has over its territory; it means that, whenever investors enter a foreign country, they do so subject to the discretion of the country concerned. It also means that, in many instances, the rules that govern foreign investment are set out in treaties concluded between capital-exporting countries and their capital-importing counterparts. In this general context, it is not surprising that most references to the fair and equitable standard in investment law are to be found in treaties and that, therefore, treaty law is the principal source for provisions on this standard and on related standards of treatment in international law.

Nevertheless, it is also possible, as a matter of theory, that the standard of fair and equitable treatment has become a part of customary international law. This possibility arises from the fact that, in some instances, where a treaty provision is norm-creating in character, this provision may pass into customary law once certain criteria are satisfied.[2] However, in the case of the fair and equitable standard, it is not likely that this has occurred in practice, essentially because States have not demonstrated any clear will to have the standard included in the body of customary international law.

This has practical results for the drafting of provisions concerning fair and equitable treatment in investment treaties. Specifically, if a host State enters into a treaty with a capital-exporting counterpart, and this treaty does not contain a reference to fair and equitable treatment, then it should not be assumed that the fair and equitable standard is applicable to the investments covered by that investment treaty; on the contrary, on the assumption that the standard has not passed into the body of customary international law, it is applicable in international law only in those cases in which the parties to a treaty make express provision for fair and equitable treatment. States wishing to ensure that their investment relations are governed by the fair and equitable standard would, therefore, need to include a provision on this issue in their investment treaties.

2. Formulating the standard

Where States have decided to incorporate the standard of fair and equitable treatment in an investment instrument, a number of possible formulations of the standard are open to them. With reference to the practice of States, the following models merit consideration:

- Model 1: no express reference to "fair and equitable" treatment;
- Model 2: the hortatory approach;
- Model 3: reference to "fair and equitable" treatment, "just and equitable" treatment or "equitable" treatment; and
- Model 4: reference to "fair and equitable" treatment together with related standards of treatment.

The content and implications of each of these models will be considered in greater detail in section II below. For the present purpose, however, certain general observations are appropriate. First, in the hortatory approach, no binding obligation is contemplated; under this approach, sometimes reflected in preambular statements in investment instruments, the parties acknowledge the importance of fairness in the investment process but refrain from expressly specifying a legal duty for the parties to act in accordance with the standard of fair and equitable treatment. Secondly, in some instances, the hortatory approach may be combined in the same instrument with a provision that gives rise to an obligation to provide fair and equitable treatment. In such instances, the hortatory reference to the need for fairness and equity provides the rationale for the operative provision which is binding on the relevant parties. Thirdly, where the fair and equitable standard is combined with other standards, such as full protection and security, or juxtaposed along with national treatment and/or MFN treatment, then the combined standard will connote more substantial protection for the investor than the equitable standard on its own.

In addition, it is open to conjecture whether a reference to "equitable" treatment or "just and equitable" treatment connotes weaker legal protection for investors than a reference to "fair and equitable" treatment. A reference to fairness and equity in conjunction must provide, at the very least, the same degree of protection as "equitable" treatment. However, given the similarity in meaning between fairness, on the one hand, and equity, on the other, in the context of investment relations, it is difficult to identify ways in which the conjunction of the two provides greater protection for investors in practice than the equitable standard on its own. Similarly, while the term "just and equitable" treatment occurs in some treaties, it is difficult to identify ways in which this formulation may be distinguished, in substance, from the fair and equitable standard.

Notes

1 According to the dictionary definition, treatment is fair when it is "free from bias, fraud, or injustice; equitable, legitimate... not taking undue advantage; disposed to concede every reasonable claim" (The Oxford English Dictionary, 2nd ed. 1989); equitable treatment is that which is "characterized by equity or fairness... fair, just, reasonable" *(ibid)*.

2 See, for example, the "North Sea Continental Shelf Cases" (ICJ, 1969); Baxter, 1970, p. 27.

Section II

STOCKTAKING AND ANALYSIS

A. Trends in the use of the standard

One of the underlying trends in the investment area has been the increasing use of the fair and equitable standard in treaty law in the post-war era. This trend reflects in part investor desire to have the safety net of fairness, in addition to assurances of national treatment and MFN treatment. To some extent, however, it also reflects the general movement towards greater liberalization that has come to characterize international economic relations since the end of the 1970s. This liberalization has been accompanied by greater legal safeguards for foreign investors, including assurances of fairness and equity.

But, even in the context of greater liberalization, the practice has not been universal, as a number of international instruments pertaining to investment do not incorporate the language of fair and equitable treatment in express terms. Some of these instruments reflect the context in which they were adopted. So, for instance, the Charter of Economic Rights and Duties of States, adopted 12 December 1974, which sought, *inter alia*, to assist in the establishment of "a new system of international economic relations based on equity, sovereign equality and interdependence of interests of developed and developing countries" does not address the issue of treatment standards in foreign investment. Admittedly, the Charter is not an investment instrument *per se*; however, because some of its terms itemize State rights in relation to investment, the absence of references to duties owed to investors demonstrates, implicitly, the absence of consensus between capital-exporting and -importing States on treatment issues during the period of deliberations concerning a New International Economic Order.

Other instruments that omit reference to the standard may reflect regional perspectives on investor-State relations. For example, for much of the post-war period, Latin American countries following the Calvo tradition were reluctant to enter into treaty arrangements that would result in the transfer of jurisdiction over foreign investment matters from domestic courts.[1] Consistent with this approach in favour of national control over foreign investment, certainly up to the early 1980s, these countries preferred to treat foreign investors in a way that would not be tantamount to discrimination against national investors.[2] As a contingent standard, national treatment may, in fact, amount to fair and equitable treatment, but the two standards are not necessarily the same.[3]

The increasing trend in favour of incorporating fair and equitable treatment in investment instruments is most pronounced with respect to BITs. Of some 335 BITs signed up to the early 1990s, only 28 did not expressly incorporate the standard (Khalil, 1992, p. 355). With the further explosion of BITs in the 1990s, to a total of 1,513 by the end of 1997 (UNCTAD, 1998a), the pattern has not changed, so that today BITs that omit reference to fair and equitable treatment constitute the exception rather than the rule.[4]

B. Models based on State practice

An examination of the practice in multilateral, regional and bilateral treaties, together with the practice in other investment instruments, reveals that the use of the concept of fair and equitable treatment does not convey the same legal result in each case. More particularly, because the context in which the term is used may vary from one text to another, the type of protection offered will not be constant. On the basis of the relevant practice, four distinctive models are the subject of analysis in this section.

1. No reference to fair and equitable treatment

Although the fair and equitable standard has been included in several draft multilateral instruments on investment and finds

its place in the vast majority of bilateral agreements in this area, there are instances in which it has been omitted from investment arrangements among States. On the multilateral level, for example, no reference is made to the standard in the Agreement on Trade-Related Investment Measures, the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights, though these instruments expressly rely on the MFN and national treatment concepts. And, at the bilateral level, the 1978 agreement between Egypt and Japan, as well as the agreement between Italy and Romania, may be mentioned as instances, among others, in which the standard is not expressly incorporated in inter-State investment relations.

Where the formulation is not expressly included in an investment agreement, its presence cannot readily be implied. This is so because, as suggested in section I, the fair and equitable standard is generally not accepted as a part of customary international law. Accordingly, where an agreement omits reference to fair and equitable treatment, two possibilities arise concerning the standard of protection available to foreign investors covered by that agreement:

- Reliance may be placed, as a matter of priority, on the particular standard expressed in the agreement.

- Reliance may be placed on the standard of treatment for foreign investors available under customary international law. The precise formulation of the customary international law standard remains a matter of controversy, but most States now seem inclined to support the view that customary law guarantees an international minimum standard of due diligence in the protection of investors.

Finally, in their practice, States appear to have an "all-or-nothing" attitude to the fair and equitable standard. More particularly, international investment agreements do not incorporate the fair and equitable standard for some purposes but not for others; nor do they make provision for fair and equitable treatment

and then subject the standard to a list of exceptions or derogations. This, of course, is in contrast to the approach taken in modern agreements with respect to the national treatment and MFN standards, both of which allow for more flexibility in application. It is suggested that the "all-or-nothing" approach to fair and equitable treatment derives from the nature of this standard. When a State offers fair and equitable treatment to foreign investors, it makes a general statement about its attitude to foreign investment. If it were to qualify this statement, by having it apply to some types of foreign investment but not others, this would raise the implication that in some matters, the State is prepared to be "unfair" or "less than fair", or that it is prepared to be "inequitable" in its attitude to some foreign investors. Simply put, this would be highly unattractive to foreign investors.

2. The hortatory approach

As a general rule, investors and capital-exporting countries wish the fair and equitable standard to act as a source of binding obligation, a type of safety net that ensures that basic standards of justice and fairness are granted to each investor. In some cases, however, the pertinent instruments that use the terminology of fairness and equity do not achieve this result.

A leading example in this regard is the Havana Charter of 1948, which as previously mentioned is a multilateral text prepared as the basis for establishment of an International Trade Organization. The post-war idea of establishing an international organization that would focus primarily on trade matters was proposed by the United States in its "Proposals for Expansion of World Trade and Employment" of 1945 (Nwogugu, 1965, p. 137). Notwithstanding the focus on international trade, however, an important objective of the Charter, as eventually drafted, was to encourage economic development, especially in developing countries, and to foster "the international flow of capital for productive investment". Consequently, the Havana Charter contained a number of provisions concerning foreign investment and the relationship between the State and foreign investors.

Article 11(2) of the Havana Charter contained the main reference to treatment standards. It stated that the International Trade Organization would be authorized to:

> "(a) make recommendations for and promote bilateral or multilateral agreements on measures designed:
> (i) to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another; ..." (UNCTAD, 1996a, vol. I, p. 4).

Among other things, the organization would be authorized to promote arrangements that facilitated "an equitable distribution of skills, arts, technology, materials and equipment", with due regard to the needs of all member States. Also, member States recognized the right of each State to determine the terms of admission of foreign investors on its territory, to give effect to "just terms" on ownership of investment, and to apply "other reasonable requirements" with respect to existing and future investments.

The reference in Article 11(2) to "just and equitable" treatment did not create a legal obligation on host countries vis-à-vis foreign investors. Instead, it merely authorized the International Trade Organization to recommend that this standard be included in future agreements. As such, Article 11(2) was simply an exhortation with respect to future activities.

Other instruments that adopt a non-binding approach to the standard include the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), the Guidelines for International Investment adopted by the Council of the International Chamber of Commerce in 1972, and the Pacific Basin Charter on International Investments, approved by the Pacific Basin Economic Council in 1995.

The MIGA Convention refers to fair and equitable treatment, but does not seek to create a direct obligation on States to provide such treatment to investors. Rather, it specifies

in Article 12(d) that, in order to guarantee an investment, MIGA must satisfy itself that "fair and equitable treatment and legal protection for the investment" exist in the host country concerned. Thus, though the provision does not create liability on a host State where there has been a breach of the fair and equitable standard, it is designed to create a broad incentive for States to accord that standard of treatment.

The ICC Guidelines for International Investment consist of a substantial list of recommendations for investors, the investor's home country Government, and host country Governments. In the relevant provision, Section V, Article 3(a)(i), the ICC recommends that host country Governments should respect:

> "recognised principles of international law, reflected in many international treaties regarding the treatment of foreign property, concerning ... (f)air and equitable treatment of such property" (UNCTAD, 1996a, vol. III, p. 287).

Similarly, the Pacific Basin Charter shows deference for the principle of fairness, by noting as "basic principles" that domestic legislation affecting foreign investment should be "fair and reasonable among all types of investors" and that Government policies on investment should be applied "on a fair basis" (UNCTAD, 1996a, vol. III, p. 378 and 376) . The non-binding character of the ICC Guidelines and the Pacific Basin Charter does not suggest doubt on the part of the sponsors of either instrument about the place of the fair and equitable standard in investment relations. Rather, these provisions are worded in exhortatory language because the instruments in which they are placed were not designed in the format of binding treaties.

3. Reference to "fair and equitable treatment", "just and equitable" treatment or "equitable" treatment

In the preceding discussion, "fair and equitable treatment" has been regarded as the primary form of words used in investment treaties to ensure that notions of equity, fairness and justice are

incorporated in investment instruments. This approach is based on the marked preference that States have demonstrated for this phrase in their practice. Among others, the phrase has been used in United States FCN treaties, the Abs-Shawcross Draft, the OECD Draft Convention, Lomé IV, the MAI, NAFTA, and the model BITs of a significant majority of capital-exporting States. Naturally, the precise context and usage of the phrase varies from one instrument to another, but, as a general matter, the pattern of usage demonstrates consistency in some respects.

In some cases, the fair and equitable standard is the only general treatment standard specified in an investment instrument without reference to contingent standards. Such cases include, for instance, the Abs-Shawcross Draft and the OECD Draft Convention. Article 1 of the Abs-Shawcross Draft stipulates that:

> "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the management, use, and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures" (Abs and Shawcross, 1960, p. 116).

This provision clearly covered the idea that an investor, once established in a foreign country, would have a prescribed degree of protection. Noticeably, the Abs-Shawcross Draft did not expressly provide for any contingent standards, though it did indicate that property to be accorded "fair and equitable treatment" should also be accorded "most constant protection and security" and non-discriminatory treatment. At the same time, the Abs-Shawcross Draft, which was intended by its draftspersons to represent "fundamental principles of international law regarding the treatment of property, rights and interests of aliens" in the late 1950s, did not provide for a right of establishment for investors, an approach that distinguished it from the bilateral FCN treaties that prevailed during the same period.

The OECD Draft Convention also exemplifies the approach relying on fair and equitable treatment without reference to contingent standards. Thus, in language that follows the Abs-Shawcross approach, the OECD sought to enshrine fair and equitable treatment, together with a reference to "most constant protection and security", in Article 1 of its Draft Convention. For the avoidance of doubt, however, the OECD Draft Convention also indicated that preferential treatment for investors from some States did not necessarily amount to discriminatory treatment under the law. Therefore, the Abs-Shawcross Draft and the OECD Draft Convention did not fully reflect all the primary interests that investors today may have in respect of foreign investment.

Also, in some instances in which both capital-exporting and capital-importing States reach agreement concerning investment treatment, the fair and equitable standard, without related contingent standards, is accepted by both sides. In particular, Article 258 of the Lomé IV Convention, while "recognizing the importance of private investment in the promotion of ... development cooperation" among ACP and EEC States, expressly mentions only the fair and equitable standard with respect to treatment of investors. As a similar provision was included in Article 240 of the Third ACP-EEC Convention, signed at Lomé on 8 December 1984, this implies, but does not necessarily prove, some degree of acceptance of the standard among capital-importing States (EC, 1985). The Association of South-East Asian Nations (ASEAN) Agreement for the Promotion and Protection of Investments (ASEAN Treaty), by providing fair and equitable treatment, without more, in Article IV, also gives credence to this point of view.

As noted in section I, a number of investment instruments rely on the terminology of "just and equitable treatment" or "equitable treatment", as distinct from "fair and equitable treatment", in providing legal protection for foreign investors. The first of these in the post-war period was the Economic Agreement of Bogota, Article 22 of which stated, in mandatory form, that:

> "... Foreign 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..." (Documents on American Foreign Relations, 1998, p. 521).

In addition, States would agree not to set up "unreasonable or unjustifiable impediments that would prevent other States from obtaining on equitable terms the capital, skills, and technology needed for their economic development" (Article 22). Though the Economic Agreement of Bogota did not enter into force, the provisions in Article 22 may still provide a useful model. It is noteworthy, for instance, that, in addition to the reference to equitable treatment, Article 22 also provides some guidance as to the substance of the equitable treatment standard: the structure of the article strongly suggests that, in the view of the draftpersons, treatment will fall short of the standard if it is "unjustified, unreasonable or discriminatory" and it would affect legally acquired rights or interests of foreign investors.

But, though the form of words differs slightly from the "fair and equitable" formulation, the level of protection offered to foreign capital in the Bogota Agreement was, in effect, fair and equitable treatment. One explanation for the difference in formulation is the fact that, as an early instrument setting out the standard, the Bogota Agreement was drafted at a time when the particular formulation of "fair and equitable" treatment had yet to crystallize as the primary form of words to capture the standard under consideration. This historical background also furnishes an explanation for the reference to "just and equitable" treatment in the Havana Charter: as the concept developed in investment law, formulations such as "just and equitable" and "equitable" eventually became subsumed under the category of "fair and equitable" treatment.

In some cases, however, references to "just and equitable" treatment have occurred in regional and bilateral treaties, and in national legislation, of recent vintage. At the regional level, the member States of MERCOSUR have adopted this formulation in the Colonia Protocol on Reciprocal Promotion and Protection

of Investments within MERCOSUR, signed in January 1994. Article 3 of this treaty expressly grants to investors from each MERCOSUR country "un tratamiento justo y equitativo". And, more generally, the Protocol on Promotion and Protection of Investments coming from States not Parties to MERCOSUR, signed in August 1994, extends the same treatment to investments of investors from third States (Article 2). Likewise, at the bilateral level, the French model BIT, and a number of BITs involving Switzerland, use the phrase "un traitement juste et équitable", in setting out the degree of protection contemplated for foreign investors. It would be misleading, however, to conclude that the countries involved in this practice wish to make a distinction of substance between "just and equitable" treatment, on the one hand, and "fair and equitable" treatment, on the other. On the contrary, as the phrases "un tratamiento justo y equitativo" and "un traitement juste et équitable" may readily be translated into English as "fair and equitable" treatment, the usage described in the MERCOSUR treaties and the French and Swiss BITs is tantamount to the fair and equitable standard.

The idea that "just and equitable treatment" is no more than another way of setting down the fair and equitable standard could be slightly bolstered by reference to investment legislation in Angola and Cape Verde. National legislation rarely makes express provision for fair and equitable treatment for foreign investment; nevertheless, in the case of these two countries, foreign investors are offered "just and equitable treatment".[5] It is suggested that Angola and Cape Verde, as developing countries wishing to attract foreign capital, have sought to incorporate the fair and equitable standard in their national legislation. That they have used alternative formulations without suggesting that they wish to depart from the majority practice gives marginal support to the view that countries regard phrases such as "just", "fair" and "equitable" as interchangeable in the context of investment protection.

One instrument that may raise some doubt about whether "equitable" treatment is equivalent to "fair and equitable treatment" is the draft United Nations Code of Conduct on Transnational

Corporations. More specifically, Article 48 of the draft Code stated that:

> "Transnational corporations should receive [fair and] equitable [and non-discriminatory] treatment [under] [in accordance with] the laws, regulations and administrative practices of the countries in which they operate [as well as intergovernmental obligations to which the Governments of these countries have freely subscribed] [consistent with their international obligations] [consistent with international law]" (UNCTAD, 1996a, vol. I, pp. 172-173).

Bearing in mind that brackets were inserted by participants in the Code negotiations to indicate language on which consensus had not been reached, it is evident that States had not reached agreement on whether to use the term "fair and equitable treatment" or the term "equitable treatment" up to 1986, the date for the provision quoted above. To some extent, this lack of agreement arose because some countries assumed that the use of the phrase "fair and equitable treatment" could possibly have introduced the international minimum standard of treatment into the provision on investment protection,[6] while reference to "equitable" treatment would not have done so. In the Code negotiations, however, this debate was inconclusive.

4. Reference to "fair and equitable" treatment with related standards

In terms of frequency, the leading trend with respect to treatment standards is for fair and equitable treatment to be combined with national and MFN treatment. A recent example in this regard is the MAI. The MAI, in its preamble, indicates that "fair, transparent and predictable investment regimes complement and benefit the world trading system". This emphasis on fairness is then given legal form in Article IV(1)(1.1), which specifies that:

> "Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. In no case shall a Contracting Party accord treatment less favourable than that required by international law" (OECD, 1998, p. 57).

In separate clauses, the MAI also provides for national treatment and MFN standards, and contemplates that contracting parties shall not impair the operation, management, maintenance, use, enjoyment or disposal of investments in their territory by investors of another contracting party. Significantly, then, this approach combines fair and equitable treatment and full protection and security with the two main contingent standards in investment law, and provides even further assurance for investors by confirming that the treatment for investors shall not fall below the requirements of international law, and such treatment shall not impair particular investor activities. This approach represents the most extensive level of protection contemplated for investors in multilateral arrangements to date.

The NAFTA investment provisions, which attach considerable weight to the role of foreign private investment in fostering national development, also preserve the main safeguards sought by capital-exporting countries, including national and MFN treatment with respect to the acquisition, expansion, management and disposition of investments. In addition, Article 1105(1) of NAFTA, under the rubric "Minimum Standard of Treatment", stipulates that each State party shall accord to investments of other parties "treatment in accordance with international law, including fair and equitable treatment" -- a general approach that also finds favour in the Energy Charter Treaty (Article 10).

Recent bilateral treaty practice places emphasis on the comprehensive approach that incorporates various standards in addition to fair and equitable treatment. For instance, the model BIT of the United States, dated April 1994, stipulates that, subject to specified exceptions, in matters concerning the establishment, acquisition, expansion, management, conduct,

operation and sale or other disposition of foreign investments, the host State shall accord national treatment or MFN treatment, whichever is more favourable (Article II(1)). This rule is then reinforced by Article II(3)(a), which stipulates that:

> "Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law" (UNCTAD, 1996a, vol. III, p. 198).

The approach in the 1994 United States model, which combines fair and equitable treatment with other standards, is broadly similar in substance, though not identical, to most United States treaties completed to date, including bilateral agreements with Panama, the Democratic Republic of Congo (then Zaire), Grenada, Cameroon, and Bangladesh. These treaties depart from the 1994 United States model in one particular respect, namely, they envisage that the treatment, in addition to being fair and equitable and no less favourable than international law, should also be "in accordance with applicable national laws". The 1994 model, by omitting this reference to national laws, makes the point that treatment entirely consistent with the laws of the host State may nonetheless fall short of the fair and equitable standard.

In most United States BITs, therefore, the fair and equitable standard is presented as one of a number of general standards applicable to foreign investment, and it is implied that all the standards are to be applied concurrently. At first glance, a slightly different approach appears to be taken in the model BIT prepared by the Federal Republic of Germany. Here, investments, nationals and companies of each contracting party are also offered both national and MFN treatment, as well as full protection and security. One distinguishing feature of the German approach, however, is that it sets the fair and equitable treatment standard apart, by stating that, while each Contracting Party shall promote investments and admit those investments in accordance with its legislation, the host State shall "in any case accord such investments fair and equitable treatment".

Though this form of words places emphasis on the applicability of the fair and equitable standard -- an approach that is also found in German treaties with Indonesia, Kenya, the Philippines, Sri Lanka (Ceylon, as it then was), Swaziland and Syria, among others -- it does not actually differ in substance from the United States approach. This is so because in each case investors are accorded a combination of national and MFN treatment, together with a general assurance of fairness and equity.

Two important questions that arise from the interaction between the fair and equitable standard and related standards are:

- Does the fair and equitable standard constitute an overriding obligation which includes other standards?
- Is the fair and equitable standard the same as the international minimum standard?

a. *Does the fair and equitable standard constitute an overriding obligation?*

Where the fair and equitable standard is applied with other standards, the question arises as to whether the fair and equitable standard sets out the general rule while the other standards amount to specific applications of the general rule. There is some support for this perspective in practice. In the United Kingdom model BIT, Article 2 (2) reads as follows:

> "Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may

> have entered into with regard to investments of nationals or investments of the other Contracting Party" (UNCTAD, 1996a, vol. III, p. 187).

If this paragraph is read as a whole, it could be suggested that the injunction against unreasonable or discriminatory measures is actually required by the standard of fair and equitable treatment. And, similarly, the idea of *pacta sunt servanda*, stated in the third sentence, may also be viewed as a part of the fair and equitable standard. This interpretation could also be applied to the United States prototype treaty prepared in 1984. This general approach has merit; by including non-discrimination, reasonableness and respect for contractual obligations as elements of the fair and equitable standard, it accords with the plain meaning of fairness and equity.

But the point may be taken further. On one reading of the United Kingdom BITs, the proposition that investments shall have fair and equitable treatment and full protection and security constitutes the "overriding obligation" concerning investment protection. And, it has been argued, this overriding obligation is wider than simply a prohibition on arbitrary, discriminatory or abusive treatment; it also embraces the MFN and national treatment standards, so that "it may well be that other provisions of the Agreements affording substantive protection are no more than examples or specific instances of this overriding duty" (Mann, 1990, p. 238).

Such an expansive perspective on the fair and equitable standard is broadly supported by the approach taken by the World Bank Guidelines, which stipulate, among other things, that "[e]ach State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines" (Guideline III(2)). They then indicate, with greater specificity, the standards of treatment that are to be accorded to foreign investors in matters such as security of person and property rights, the granting of permits and licences, the transfer of incomes and profits, the repatriation of profits and so on. The approach suggested in the Guidelines is that, where treatment of a foreign

investor falls short of any of the recommended standards, including the standard of national treatment, this amounts to a failure to satisfy the overarching requirement of fair and equitable treatment.

At the bilateral level, some treaties also imply acceptance of this perspective. For instance, Article 1 of the 1964 investment agreement between Belgium and Luxembourg on the one hand, and Tunisia on the other, reads as follows:

> "Each of the High Contracting Parties undertakes to assure on its territory fair and equitable treatment of investments ... of the other contracting party, and to take steps to ensure that the exercise of the right so recognized is not impeded by unjust or discriminatory measures.
>
> To that end, each of the contracting parties shall confer on these investments, ... at least the same security and protection that it grants to those of its own nationals or to the investments of nationals and companies of third states."

In other words, the national and MFN treatment contemplated in the second paragraph of this provision is granted expressly to ensure that fair and equitable treatment is not impeded. In practical terms, this is not much different from suggesting that fair and equitable treatment is the overriding duty, and the other standards are designed to ensure the fulfilment of this overriding duty.

The suggestion that fair and equitable treatment is perceived by States as a standard that encompasses other standards is also bolstered by instances in which reference is made to achieving the goal of ensuring equitable treatment in the preamble to a particular treaty. In this regard, consideration should be given to the 1948 FCN treaty between the United States and Italy (United Nations, 1951) and to the Agreement signed on 26 September 1951 supplementing this treaty (United Nations, 1961) . The FCN treaty indicated in its preamble that it was "based in general upon the principles of national and most-

favoured-nation treatment in the unconditional form...", and it reflected this approach in a number of operative provisions. It also incorporated the standards of "most constant protection and security" and "full protection and security required by international law". Subsequently, however, the Supplementary Agreement stipulated in its preamble that it sought to amplify "the principles of equitable treatment" set forth in the main treaty. In this context, the reference to principles of equitable treatment could be interpreted to mean that the national, MFN and other standards in the main treaty were simply particular forms of the overriding obligation to provide equitable treatment to investments.

Nevertheless, although some instances of practice support the notion that the fair and equitable treatment encompasses the other treatment standards in most investment instruments, this is the minority position. In most cases, fair and equitable treatment stands independently of the MFN and national treatment standards, and *vice versa*; following the plain meaning of the words, the general position is that, while the standards may overlap in particular instances, the national treatment and MFN standards will not always be a part of the fair and equitable standard. Accordingly, where a treaty makes provision for fair and equitable treatment, but does not expressly incorporate the national treatment standard, it cannot be assumed that the treaty automatically includes the national treatment standard. This approach would also be true with respect to the relationship between fair and equitable treatment and the MFN standard. Still with reference to plain meaning, however, if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, the fair and equitable standard has been violated.

b. *Is the fair and equitable standard the same as the international minimum standard?*

As indicated in section I, another issue concerning the fair and equitable standard is whether it is tantamount to another standard or set of standards that form part of the international

law on protection of nationals in foreign territory. On this issue a number of sources, derived mainly but not exclusively from traditional, capital-exporting perspectives, indicate that the fair and equitable standard is, in fact, equivalent to the international minimum standard, which a number of countries believe constitutes a part of customary law. In this regard, reference may be made especially to the OECD Draft Convention which, though not ratified, highlights the view of OECD member States on the point. More particularly, in the Notes and Comments to Article 1 of the OECD Draft Convention, which provided for fair and equitable treatment, the Committee responsible for the Draft indicated that the concept of fair and equitable treatment 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". The Committee added:

> "The phrase 'fair and equitable treatment', customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that ... protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. *The standard required conforms in effect to the 'minimum standard' which forms part of customary international law*" (emphasis added)(OECD, 1967, p. 120).[7]

However, in assessing the practice, there have been contrary conclusions on the relationship between fair and equitable treatment and the international minimum standard. It has been argued, for instance, that it is both pointless and misleading to equate the two concepts because fair and equitable treatment envisages conduct "which goes far beyond the minimum standard and afford[s] protection to a greater extent and according to a much more objective standard than any previously employed form of words" (Mann, 1990, p. 238). By this interpretation,

therefore, in ascertaining the content of the fair and equitable standard, no other form of words is appropriate: for each dispute, the content of the standard is to be determined by inquiring whether "in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable" (Mann, 1990, p. 238). In effect, this amounts to the application of the plain meaning of the words "fair and equitable" in each individual case, independently of other standards. In practice, too, it may mean giving considerable discretion to the tribunal entrusted with determining whether a breach of the standard has occurred, bearing in mind the subjectivity inherent in the notions of fairness and equity.

Some items of State practice also support the view that the fair and equitable standard does not necessarily amount to the international minimum standard. In a number of BITs involving the United States, and in its model BIT, the fair and equitable standard is combined with full protection and security, and this combined standard is reinforced by the rule that each party to the agreement "shall in no case accord treatment less favorable than that required by international law" (Article II(3)(a)). At the same time, however, the United States has consistently maintained that customary international law assures the international minimum standard for all foreign investments; it is therefore fair to assume that the reference to international law in Article II(3)(a) is an assurance that the international minimum standard shall form a safety net for all investments. This approach -- fair and equitable treatment with full protection and security on the one hand, and treatment no less favourable than that required by international law on the other -- suggests that the two sets of standards are not necessarily the same. To be sure, the reference to treatment no less than that required by international law could possibly be made *ex abundante cautela*, but its presence in most bilateral treaties involving the United States suggests that it is not perceived as verbiage.

Generally, therefore, the law on this point is characterized by some degree of contradiction and uncertainty. If the fair and equitable standard is the same as the international minimum standard which is traditionally supported by capital-exporting

countries, then reference to fair and equitable treatment in investment instruments will incorporate by reference an established body of case law on the minimum standard for foreigners: States would fail to meet the minimum standard, and, by this reasoning, the fair and equitable standard, if their acts amounted to bad faith, wilful neglect, clear instances of unreasonableness or lack of due diligence.[8] On the other hand, the instances in which States have indicated or implied an equivalence between the fair and equitable standard and the international minimum standard appear to remain relatively sparse. Also, as noted above, 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 all States would have accepted the idea that this standard is fully reflected in the fair and equitable standard without clear discussion.

These considerations point ultimately towards fair and equitable treatment not being synonymous with the international minimum standard. Both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors. Where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and inequitable.

* * *

Overall, therefore, investment instruments prepared to date reveal a number of options for future consideration. Although the multilateral treaty practice has spanned a substantial portion of the post-war period, efforts to create a comprehensive treaty incorporating standards of treatment, including the fair and equitable standard, have met with mixed results. Nonetheless, the international efforts have helped to create a stock of

approaches to fair and equitable treatment which, in some measure, influence State perspectives and practice. Partly because States have not adopted a multilateral investment treaty incorporating treatment standards, the bilateral practice, together with non-governmental efforts, has contributed substantially to the range of options concerning the standard. In some cases, the different options are similar in substance, so that in practice, for instance, where different treaties refer to "fair" treatment, "equitable" treatment or "fair and equitable" treatment, the same level of treatment may be contemplated for each case. In others, however, the different formulations reflect divergent perspectives on fair and equitable treatment. On occasion, the standard is designed as hortatory, while in other instances, it clearly has mandatory effect. In still other instances, the standard is designed to provide the only general measure of investor protection, while at other times, it is juxtaposed with other treatment standards in a variety of patterns.

Notes

1 As used in the text, the "Calvo tradition" or the "Calvo doctrine" denotes the idea that foreign investors are, or ought to be, required to settle their foreign investment disputes exclusively in the courts of the host State. For a general overview, see, for instance, Jiménez de Aréchaga, 1968, pp. 590-593; O'Connell, 1970, pp. 1059-1066.

2 See, for example, Decision 24 of the Commission of the Cartagena Agreement, Article 50: "Member countries may not accord to foreign investors treatment more favourable than to national investors."

3 Latin American investment instruments that did not include reference to fair and equitable treatment included Decisions 24 and 291 of the Commission of the Cartagena Agreement, dated 1970 and 1991, respectively. In keeping, however, with the trend towards incorporating the fair and equitable standard, some Latin American countries, such as the members of MERCOSUR, provide for such treatment in their investment instruments (see, for example, the Colonia Protocol on Reciprocal Promotion and Protection of Investments within MERCOSUR, signed in January 1994).

4 In contrast to treaty practice, the standard of fair and equitable treatment has not assumed prominence in national investment codes. For instance, a 1991 study of national investment codes found that, while 31 countries offered the national treatment standard to foreign investors, 17 countries made no express provision for general standards of treatment, and only 3 countries -- Angola, Bangladesh and Viet Nam -- incorporated the fair and equitable standard into their legislation (Parra, 1992, p. 436).

5 Angola, Regulations of Law No. 13/88 of July 16, 1988 (Article 19); Cape Verde, Law No. 49/111/89 (1989) (Article 7) (ICSID, 1972b-).

6 For discussion, see, for example, Robinson (1985).

7 With similar effect, in 1979, the Swiss Foreign Office described the fair and equitable standard in the following terms:
"On se réfère ainsi au principe classique de droits des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du 'standard minimum' international c'est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques" (quoted by Mann, 1990, p. 238).

8 For case law on the meaning of the international minimum standard, see, for example, The Neer Claim (United States v. Mexico) (1926); Asian Agricultural Products Limited (AAPL) v. Sri Lanka (ICSID, 1990). For discussion, see also Vasciannie, 1992a.

Section III

INTERACTION WITH OTHER ISSUES AND CONCEPTS

The fair and equitable treatment standard interacts with several other issues and concepts that arise in investment practice. A summary of the extent to which this interaction is likely to take place in practice is set out in table 1.

Table 1. Interaction across issues and concepts

Concepts in other papers	Fair and equitable treatment
Scope and definition	++
Admission and establishment	+
Incentives	++
Investment-related trade measures	+
Most-favoured-nation treatment	++
National treatment	++
Taxation	+
Transfer pricing	+
Competition	+
Transfer of technology	+
Employment	+
Social responsibility	+
Environment	+
Home country measures	+
Host country operational measures	+
Illicit payments	+
Taking of property	++
State contracts	+
Funds transfer	++
Transparency	++
Dispute settlement (investor-State)	++
Dispute settlement (State-State)	++
Modalities and implementation	+

Source: UNCTAD.

Key: 0 = negligible or no interaction.
+ = moderate interaction.
++ = extensive interaction.

- **Scope and definition.** The definition of the beneficiaries of fair and equitable treatment has varied considerably in practice (UNCTAD, 1999b). In the main multilateral and regional instruments on the point, beneficiaries have included, among others:

    - "foreign capital",
    - "the property of nationals of other contracting parties",
    - "transnational corporations",
    - "private investors", and
    - "investments of investors of another contracting party".

    This variety merits comment. In some cases, as in the reference to "transnational corporations" in the Draft United Nations Code of Conduct on Transnational Corporations, the beneficiary is defined by the context of the instrument concerned. Also, some references, though using different formulations, appear quite similar. When, for instance, the OECD Draft Convention refers to "the property of the nationals of other Parties" (Article 1), this is similar to the reference, in the MAI, to "investments...of investors of another Contracting Party" (Article IV(1)(1.1)). In either case, the treatment standard applies to the property, rights and interests held directly or indirectly by an investor. But the similarity is not complete; for instance, in the comparison between the OECD Draft Convention and the MAI, fair and equitable treatment is safeguarded for both nationals and permanent residents in the latter draft treaty, while it is contemplated only for nationals in the former.

    In all cases, the standard applies to protect beneficiaries within the host State. Sometimes this is set out in express terms, as in the MAI (Section IV, Article 1.1) and in NAFTA (Articles 1105 and 1101, read together), but in others it is implicit, both from the general foreign investment context of the instrument and from the form of words. Thus, for instance, where the Abs-Shawcross Draft and the OECD Draft Convention provide for fair and equitable treatment

for foreign investments "at all times", this means, at least, that, unless otherwise stipulated, an investment must receive that treatment for its entire period in the host State. Similarly, where the Lomé IV Convention and the 1987 version of the ASEAN Treaty indicate that the treatment standard should be applied, respectively, to investors who, and investments which, comply with certain domestic legal preconditions, it is implicit that fair and equitable treatment within the territory of the host State is contemplated.

With reference to the scope of agreements, another point of difference among the various multilateral and regional instruments is whether fair and equitable treatment is owed only to investors or investments of States party to the instrument in question. More specifically, a significant majority of the multilateral and regional treaties and draft treaties clearly state that the host State is liable to investors of other Contracting Parties. In these cases, the host State will be liable to non-parties under customary international law and pursuant to general principles of law, but, if fair and equitable treatment is to be preferred, it does not arise as a treaty obligation.

Some instruments, however, appear to take a different approach, and could arguably give rise to an obligation for the host State to provide protection to all foreign investors. The Bogota Agreement provides an example in this category, for it simply asserted that "foreign capital shall receive equitable treatment", thus suggesting that the standard should be available to all foreign capital and not simply the capital held by nationals of State parties to the Bogota Agreement. In a similar vein, COMESA makes no distinction between private investors from States parties to COMESA and private investors generally in the relevant treatment provision. As a matter of interpretation, it is not entirely clear that fair and equitable treatment is meant to be offered to non-parties in either the Bogota or COMESA treaties, but this interpretation is possible.

- **Incentives**. Where a State offers incentives to some entities in an industry, the question arises as to whether a provision for fair and equitable treatment would require such incentives to be granted to foreign investors in that industry who are beneficiaries under the provision for fair and equitable treatment. The argument would be that, to deprive a foreign investor in this situation of the incentives would amount to discrimination, and would, therefore, amount to unfair or inequitable treatment. This would be particularly true where the incentives place those receiving them in an advantageous economic position vis-à-vis the beneficiaries under the fair and equitable provision. On the other hand, this approach may be difficult to apply in a case in which there are grounds to argue that the entities receiving incentives are not in the same industry as the beneficiaries under the fair and equitable provision, or where there are other grounds for distinguishing the recipients of incentives from the beneficiaries under the fair and equitable provision.

- **MFN treatment and national treatment**. Some aspects of the interaction between fair and equitable treatment with these other standards have already been considered. In essence, because fair and equitable treatment is an absolute standard, its precise delineation in each case does not depend on other levels of treatment granted by the host State concerned. In contrast, the actual contents of the MFN or the national treatment standard in any particular instance turn entirely on the actions of the host State vis-à-vis investors from third States or its own nationals.

  It has also been suggested that the MFN and national treatment standards are not simply specific examples of the type of treatment generally covered by a provision requiring fair and equitable treatment. This requires further comment. First, the two main contingent standards under consideration have had a well-established place in international commercial relations; thus, if States intend that the fair and equitable standard should automatically

encompass MFN or national treatment, it is likely that their intention would need to be stated with considerable clarity. This has not been done. Secondly, although this may be a rare occurrence in practice, an assurance of fair and equitable treatment may produce a different result from the other standards. For example, in a specific case, the MFN standard may result in an investor receiving treatment from the host State that is significantly better than that required by fairness and equity. This may come about as a result of deliberate policy on the part of a host State, or it may be an indirect result arising from the operation of the MFN provision. In either event, what is required by fairness and equity will be respected, but the investor will receive even more favourable treatment.

Likewise, national treatment may, in some cases, differ significantly from fair and equitable treatment. An assurance of national treatment indicates that the host State will grant to the beneficiary treatment which is "no less favourable than that it accords, in like situations, to investments in its territory of its own nationals or companies". In this sense, national treatment protects foreign investors from differential treatment in favour of domestic investors. But there is no reason to believe that this level of treatment will necessarily satisfy the standard of fair and equitable treatment, for, in some cases, host States treat domestic investors without regard to the elements of fairness and justice. In fact, the perception that national treatment is sometimes deficient from an investor viewpoint helps to explain why capital-exporting countries have sometimes insisted on the international minimum standard, in preference to the national standard which has traditionally been supported by a number of capital-importing countries.

Conversely, from an investor's standpoint, national treatment may also be superior to fair and equitable treatment in some instances. For example, where a host State wishes to promote domestic industries, it may adopt measures that treat local capital far more liberally than the requirements of fairness and equity dictate. The application of the national

treatment standard in such cases could also place foreign investment beneficiaries in an advantageous position with respect to investments that are accorded only fair and equitable treatment.

Significantly, one effect of the growing network of BITs incorporating the MFN standard will be to generalize the applicability of the fair and equitable standard among States. In most instances in which a State has opted not to include an assurance of fair and equitable treatment in a BIT, it has provided for MFN treatment as an alternative treatment standard. Once this State enters into another treaty that grants fair and equitable treatment, then the MFN clause automatically extends fair and equitable treatment even to beneficiaries under the first treaty.

- **Taking of property**. In addition to the treatment provisions so far reviewed, many investment instruments also contain substantive provisions on matters pertaining to the taking or expropriation of foreign investments by a host State. This is especially, but not exclusively, true for BITs, many of which have been completed with concerns about expropriation under consideration. Most current BITs stipulate, as preconditions, that nationalization or expropriation, whether direct or indirect, must take place in the public interest, and must accord with principles of non-discrimination and the due process of law. They further stipulate in numerous instances that compensation for such taking shall be "prompt, adequate and effective", in accordance with the Hull formula.[1] Also, in some instances, the compensation formula expressly refers to equity, providing for effective and equitable compensation in conformity with international law.

  While the dominant trend at the bilateral level is therefore in favour of the home country perspective on issues of expropriation, the situation is less definite with respect to multilateral efforts. Instruments such as the 1967 OECD Draft Convention and the 1949 ICC Code of Fair Treatment

reflect the basic perspectives of the developed countries. On the other hand, developing countries have traditionally maintained that expropriation issues must be settled in accordance with the municipal law of the host State, and the compensation standard may not necessarily amount to the full market value contemplated in the Hull formula.

In a treaty that accords "prompt, adequate and effective compensation" to investors, does an assurance of fair and equitable treatment add to the level of security on matters concerning expropriation? This question arises because, in the absence of language to the contrary, the fair and equitable standard seems to apply to expropriation as much as it does to other issues of treatment. In practice, however, where both fair and equitable treatment and particular provisions on expropriation are incorporated in an investment instrument, there is scope for the view that reference will be made primarily to the latter. This approach places emphasis on the particular provisions on expropriation because they are included in the investment instrument expressly and specifically to address expropriation issues. In the unlikely event that a treaty were to provide for fair and equitable treatment generally, but have no specific provision on compensation for a taking of property, then, where a taking has occurred, it would be open to the foreign investor affected to argue that the level of compensation should be fair and equitable in the circumstances. This approach would give some assurance to foreign investors, but it would be subject to the difficulties of interpretation concerning the precise meaning of fair and equitable treatment discussed in section I.

- **Funds transfer**. As in the case of taking of property, many investment agreements contain substantive provisions on matters pertaining to funds transfer. Thus, the specific safeguards for the investors are also complemented by the general duty on the part of the host State to provide fair and equitable treatment. In such case, it may be thought that the specific should prevail over the general, so that primary reference should be given to the particular

provision in the investment instrument concerning free funds transfer. But this does not necessarily render the fair and equitable concept superfluous in the area of funds transfer. It is possible, for instance, that the provisions on funds transfer as drafted in a given instrument do not expressly give rise to liability on the part of the State in a particular set of circumstances. In such instances, fair and equitable treatment, as a general standard, would be applicable, and, assuming that the State action concerning the transfer of funds or payment for losses fell short of the requirements of fairness and equity, then liability would ensue.

One possible area of uncertainty concerning fund transfers deserves particular mention. Most BITs provide for the repatriation of investment-related funds. In some instances, however, as in the United Kingdom/Jamaica BIT, the right to free transfer is made subject to the host State's right in exceptional balance-of-payments difficulties "to exercise equitably and in good faith" currency restrictions conferred by its laws (Article 7(1)). What result should follow if a host State that is generally obliged to treat investors in accordance with the fair and equitable standard applies this free transfer exception inequitably? The exception also requires "bad faith" for liability to ensue, but the broader fair and equitable standard does not. The result is not clear, but, if it is assumed that the free transfer exception and the fair and equitable provision are to be read as complementary provisions, then arguably the investor will need to establish only the absence of fairness and equity in order to prevail (Mann, 1990, p. 240).

- **Transparency**. States have increasingly provided that host country actions on investment-related issues should be transparent. So, for example, the 1994 United States model BIT stipulates that each State party shall ensure that its "laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions" concerning foreign investments are "promptly published or otherwise made publicly available" (Article

II(5)). At the regional level, this approach has also been included in the Energy Charter Treaty.

The concept of transparency overlaps with fair and equitable treatment in at least two significant ways. First, transparency may be required, as a matter of course, by the concept of fair and equitable treatment. If laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host State, then fairness requires that the investor is informed about such decisions before they are imposed. This interpretation suggests that where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly included in the treaty (UNCTAD, 1999a, p. 34). Secondly, where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action; the degree of transparency in the regulatory environment will therefore affect the ability of the investor to assess whether or not fair and equitable treatment has been made available in any given case.

- **Dispute settlement**. Most multilateral, regional and bilateral instruments incorporate procedures for compulsory third party dispute settlement, even where, as in the case of the MAI, they also contemplate procedures for consultation and conciliation. In several instruments, a distinction is made between investor-State disputes and State-State disputes, but, usually, recourse to compulsory third party settlement is provided for in each case. Most investment instruments that incorporate the fair and equitable standard also make provision for third party dispute settlement. Third party dispute settlement provisions enhance the fair and equitable standard by allowing investors to have their claims about unfair or inequitable treatment considered by tribunals operating outside the control of the host State. Also, given that disputes about fairness may sometimes involve the different cultural and economic perspectives of the host State and the investor, the availability of third

party dispute settlement serves to assure foreign investors that their views on fairness and equity in a particular situation will be given due consideration. However, although dispute settlement provisions enhance the standard, in practice there have been few instances in which investors have sought to have disputes about the meaning of fair and equitable treatment settled by third party tribunals.

Note

1 The "Hull formula" denotes the standard of compensation supported by the major capital-exporting countries in cases concerning expropriation of foreign property. By this formula, named after former United States Secretary of State Cordell Hull, States are said to be in breach of international law if, upon expropriating foreign property, they fail to pay "prompt, adequate and effective" compensation to the foreign investor. For a brief summary and references concerning the formula, see, for instance, Vasciannie, 1992b, pp. 125-129.

CONCLUSION:

ECONOMIC AND DEVELOPMENT IMPLICATIONS AND POLICY OPTIONS

Broadly speaking, an assurance of fair and equitable treatment in an investment instrument is meant to provide foreign investors with a minimum level of security. Accordingly, the standard is one of a number of measures designed to encourage the flow of investment capital across borders in a world that often lacks the degree of economic and political certainty desired by investors. Against this broad canvas, the main question to be considered in this section concerns the economic and development implications of including or not including a fair and equitable treatment standard in international investment agreements.

An important starting point is whether the absence of an express assurance of fair and equitable treatment in an investment treaty means that the standard is not available to investors from the parties to the treaty. This is, in fact, a question of law; for, if the fair and equitable standard has become a part of customary international law, then the standard will be available to investors in foreign countries even where there is no treaty obligation. However, as noted in section II, though this question is not clearly resolved, the stronger view appears to be that the fair and equitable standard is not a part of customary law. In practical terms, this means that, if a State is not bound by a treaty safeguarding the standard, it is not required to accord that standard to investors within its territory. If the conclusion had been that the standard is now a part of customary law, this would have rendered further enquiry into the economic and development implications of the standard largely superfluous,

for most, if not all, States would be required to grant fair and equitable treatment, whether or not they consented to do so in an investment instrument.

A. The economic and development implications of incorporating the standard

There is a broad consensus that foreign direct investment, in general, can contribute to growth and development.[1] From a development perspective, this consensus has helped to stimulate the increasing efforts of developing countries to attract foreign direct investment from developed and developing countries and has prompted developing countries to provide assurances to investors as to the level of treatment they may anticipate upon entry. As noted before, these trends have manifested themselves in the rapid growth in the number of BITs concluded in the present decade; they are also reflected in host country efforts to liberalize their national legislation in ways designed to facilitate investment growth.

But, to what extent may the use of the fair and equitable standard contribute to the development process? In essence, if the standard contributes to development in any significant way, it is through its inclusion in BITs and in regional treaties. However, the precise nature of this contribution is a matter of speculation. This is so for a number of important reasons.

First, because the fair and equitable standard is included in BITs which themselves often include other treatment standards and cover issues other than fair and equitable treatment *simpliciter*, the impact that the standard has within a particular investment treaty may be largely indeterminate. The process of distinguishing the impact on investment flows arising from the standard would involve, among other things, an attempt to identify issues and problems for which fair and equitable treatment would be the only applicable standard. As is evident from the discussion above, however, fair and equitable treatment is often closely interwoven with the MFN and national treatment standards and, in numerous cases, it is at best a matter of judgement as to which of these standards will provide the solution to a given investment

dispute. Accordingly, it may not be possible to specify how much value is to be attached to an assurance of fair and equitable treatment as distinct from the other standards of treatment. However, it is important to note that the fair and equitable treatment standard is an absolute standard, while national treatment and MFN are relative standards. The fair and equitable standard, therefore, remains particularly relevant where there are national treatment and MFN exceptions.

Furthermore, even assuming that some indication could be gathered of the relative contribution of the fair and equitable standard in international investment treaties, there are additional difficulties in assessing the overall contribution which such treaties themselves make in determining the flow of investment (UNCTC, 1988, p. 14; UNCTAD, 1998a; UNCTAD, 1998b). The obvious point is that each investor, in determining the venue for investment, will have particular objectives. These objectives vary on a case-by-case basis; but, under the general heading of profit maximization, they include, among other things, the exploitation of natural resources in host States, access to created assets and market penetration (UNCTAD, 1998a). The general investment climate in prospective host countries may be influenced by an express assurance of fair and equitable treatment in some instances, but not in others. In this context of diverse, and sometimes subjective, considerations, it is again difficult to determine, with any degree of precision, the extent to which an assurance of fair and equitable treatment may influence investment decisions.

Nevertheless, some broad observations on the value of the fair and equitable standard in assisting foreign capital flows may be appropriate. One of the key elements in an investment decision will be the degree of "country risk", a factor that will be weighed against other considerations. In determining country risk, an investor will take into account the efforts by the host country to address this factor; where a host State has made the effort, at least nominally, to safeguard fair and equitable treatment to investors, this provides a signal that the country intends to treat foreign investment fairly. The point may be made more forcefully when viewed from a negative perspective: if

a prospective host State eschews the fair and equitable standard as a matter of policy, foreign investors would regard this as a negative factor in their assessment of the risks within the host economy. Given the preponderance of BITs that incorporate the standard, this risk factor may well assume some degree of importance because it might be presumed that the host State omitted the standard for reasons pertaining to future State intentions. Even countries that resisted entering into BITs until the beginning of the 1980s have abandoned their objections, and now accept the fair and equitable standard in such agreements. Therefore, in each case in which there is resistance to the provision by a host State, the capital-exporting counterpart will understandably wish to know what has motivated this resistance. If an answer satisfactory to the investor viewpoint is not forthcoming, this could undermine confidence in the prospective host country.

It should also be emphasized that, although there may be uncertainty about the precise role played by assurances of fair and equitable treatment in influencing investment flows, the net effect of the standard is likely to be positive. Countries whose foreign direct investment determinants are weak (UNCTAD, 1998a) may use the standard as a part of their investment promotion efforts. But this may be little more than a starting point; for, in the area of investment promotion, while the fair and equitable standard provides a standard sought by foreign investors, for most developing countries and countries with economies in transition, it is not sufficient, in itself, to attract foreign capital.

Finally, given that fair and equitable treatment may be a factor in engendering a positive investment climate, the question arises as to why a particular State may be reluctant to accord this standard to investors in practice. One may be inclined to presume, after all, that all States aspire to providing justice and fairness for both nationals and aliens, and that, therefore, the assurance of fair and equitable treatment for foreign investors would be entirely consistent with State objectives. This, together with the fact that foreign investors themselves have urged home countries to seek the standard in their treaties with host countries,

may provide a case for the inclusion of the standard in investment instruments as a matter of course. And, indeed, the preponderance of references to the standard in modern BITs suggests that this perspective is increasingly pursued by States.

But the question remains as to whether there may be reasons for a State to resist the standard in its investment arrangements. Some States which, in the past, have been reluctant to rely generally on minimum international standards have based their position on the notion that the standard of treatment for foreign investors should be no more, or no less, than that offered to nationals. This approach, which takes its force from the Calvo doctrine, does not necessarily deny foreign investors the assurance that they will be treated fairly and equitably; rather, it simply proceeds on the basis that there should be one standard for all. In this context, some States may have feared that if they expressly singled out foreign investors for "fair and equitable treatment", they could have been accused of discriminating in favour of aliens and, thus, of undermining the principle of equal treatment for nationals and foreigners. This fear, however, may be countered by the suggestion that presumably States assure their own nationals fair and equitable treatment, so no discrimination occurs when the same assurance is given to foreigners.

On a related point, some States may be reluctant to offer fair and equitable treatment in their investment instruments because the implications of the standard are not always easy to anticipate. A capital-importing country may wish, for example, to provide a series of preferences and incentives to local investors in order to generate growth in its economy. The Government of that country may perceive these preferences and incentives as politically important, and may consider that it has the right to grant such preferential treatment to its nationals as part of its sovereign decision-making power. However, there is a possibility that some preferences and incentives may be regarded as incompatible with fair and equitable treatment for foreign investors. A foreign investor who is in competition with local investors in a particular industry may well be inclined to argue that certain incentives to local investors are discriminatory, and, therefore,

unfair. Whether this argument would prevail as a matter of law is not really the point. The point is that, bearing this possibility in mind, a capital-importing country that wishes to pursue domestic preferences may be reluctant to grant fair and equitable treatment because some of its policies could be open to question as unfair or inequitable.

Conversely, foreign investors may support the fair and equitable standard as a means of ensuring that they are not placed at a disadvantage when a host country provides particular incentives for local investors. At the very least, the fair and equitable standard allows foreign investors in an industry with incentives for local investors to raise the argument that it would be unfair discrimination for foreign investors to be denied the same level of incentives. To be sure, where the national treatment standard is also available, it would also be open for foreign investors to argue that the incentives should be extended to foreigners on the basis of this standard alone. However, where provision has not been made for the national treatment standard, or where the national treatment standard is not applicable, foreign investors may rely on the fair and equitable standard as the basis for seeking the same level of incentives as local investors.

B. Policy options

The models of possible formulations of the fair and equitable treatment standard outlined in section II represent the main approaches to fair and equitable treatment based on the practice of States. To the extent that these models represent different approaches to the fair and equitable standard, they indicate different policy options.

- **Option 1: no reference to fair and equitable treatment**. States may opt not to incorporate the fair and equitable standard in their investment relations, in either hortatory or mandatory form. Where this is done, the standard is not likely to be implied in the relevant investment instrument, so that, in effect, the foreign investor will not have the benefits contemplated by the fair and equitable standard.

However, most treaties that omit reference to fair and equitable treatment provide alternative standards of treatment, usually the national treatment standard or the MFN standard. Where this is done, such standards provide some degree of contingent protection to foreign investors; at the same time, a foreign investor will also be able to have customary international law applied to any investor-State dispute which may arise. The particular economic value of this level of protection cannot be fully assessed without regard to the standards included in lieu of fair and equitable treatment. Generally, however, as most BITs now provide expressly for fair and equitable treatment, its absence from such a treaty may prompt investor concerns about the nature of protection to be offered by a host State.

- **Option 2: the hortatory approach**. It is doubtful that the hortatory approach to fair and equitable treatment will give rise to any special economic implications. This is so because, by definition, the hortatory approach does not create a binding obligation on host States to grant investors fair and equitable treatment. Rather, it indicates that fairness and equity are desirable in investment relations, but, without more, it leaves host States with a substantial degree of flexibility as to how they will treat foreign investors. From an investor's perspective, therefore, hortatory language, without more, is really little different from a situation in which no mention is made of fair and equitable treatment: in either case, the particular treatment standard applicable to the investor will be the binding provision in the relevant treaty or national legislation, not fair and equitable treatment.

  In some circumstances, however, the hortatory approach reflects the starting point in a negotiating process in which fair and equitable treatment may be included in binding form in a subsequent investment agreement. This is exemplified by the Havana Charter, which indicated that it would be desirable for States to enter into treaties making provision for the fair and equitable standard. In such cases, States that accept the hortatory language are sending a

signal that they are willing, in principle, to give a guarantee of fairness and equity to investors at a future date. This may not necessarily inspire investor confidence, but it provides the basis for further negotiations concerning the fair and equitable standard. And, again, in some circumstances, hortatory language in a convention may, in fact, serve as an incentive. For example, the Multilateral Investment Guarantee Agency will not guarantee an investment unless, among other things, fair and equitable treatment is available. In the current liberalized economic environment, this type of incentive may prove sufficient to prompt host States to grant fair and equitable treaty as a matter of law. In fact, the hortatory approach was more important when the standard was less well established than it is today.

- **Option 3: reference to "fair and equitable" treatment, "just and equitable" treatment or "equitable" treatment.** It has been suggested above that "fair and equitable" treatment, "just and equitable" treatment and "equitable" treatment appear to be equivalent terms and, though different in formulation, prompt the same degree of protection for investors. In each case, the host State is required, as a matter of law, to accord fair treatment to the foreign investor, and, in almost all instances, it will be left to an independent third party to determine whether the investor has been treated fairly. This model, as outlined in section II, creates a legal environment in which aliens may undertake capital investments with some degree of confidence that they will not be subject to arbitrary or capricious treatment. The investor may also derive confidence from the simple fact that the host country has found no reason to resist offering fair and equitable treatment in practice. However, as noted above, while the assurance of fairness and equity may help generally to enhance investor confidence in the host country, it is difficult, if not impossible, to quantify the extent to which the fair and equitable standard, without more, may contribute to increasing investment flows into particular economies.

- **Option 4: reference to "fair and equitable treatment" and related standards**. Where the fair and equitable standard is combined with other standards such as the MFN and national treatment standards, there is reason to believe that investors will have a more substantial degree of confidence in the host country than in situations where either option 2 or 3 is followed by the host country. In the typical case of option 4, the host country is indicating to the foreign investment community that it is prepared to offer most, if not all, the legal safeguards traditionally sought by investors; in return, the host State expects that, at the very least, the regulatory environment in the host will be perceived as "investor-friendly", and hopes that this will help to prompt capital investment. For this reason, in the open-door climate that prevails in most countries today, this approach has grown increasingly popular. Again, however, even with respect to option 4, which takes investor perspectives fully into account, it should be recalled that a guarantee of fair and equitable treatment in combination with other standards is really only one of a number of considerations that will enter into an investor's assessment of the host country as a venue for investment.

- **Option 5: reference to "fair and equitable treatment" in combination with the international minimum standard.** As pointed out in section II, there have been different conclusions on the relationship between fair and equitable treatment and the international minimum standard. While both standards seem to overlap significantly, fair and equitable treatment is not automatically assumed to incorporate the international minimum standard. Some States may, therefore, specifically reinforce the fair and equitable standard with formulations such as "full protection and security" which imply the international minimum standard.

In conclusion, therefore, although the fair and equitable standard is of more recent vintage than other standards such as the MFN and national treatment standards, it has become common in most modern investment agreements. Its place in

such agreements is likely to remain secure essentially because it provides a guarantee that gives foreign investors some degree of security with respect to their investments, while, at the same time, it does not place a particularly heavy onus on States which, as a matter of course, seek to treat both local and foreign enterprises fairly and equitably. However, the concept is inherently vague, and as a result, foreign investors and capital-importing States may, in particular instances, have different expectations as to the level of protection provided by the standard. Nevertheless, this has not deterred States from relying on the standard and, in so doing, they have used different approaches to indicate their preferences. Thus, references to the standard are sometimes found in hortatory form, while in others, terms such as "fair and equitable", "just and equitable" and "equitable" treatment have assumed prominence. Where the fair and equitable standard is combined with the MFN and national treatment standards, this, in effect, provides the beneficiary of the combined treatment with substantial protection, for it ensures that there is no discrimination against that investor *vis-à-vis* other foreign nationals and local investors, even as it ensures a minimum level of treatment to the beneficiary, regardless of how other investors are treated. The dominant trend in recent practice is this combined level of protection. Making reference to the fair and equitable standard in combination with the international minimum standard is regarded by some States as even further reinforcement of protection; but it is a rare combination in practice.

Note

1 See paragraph 36 of the "Partnership for Growth and Development", adopted by UNCTAD at its ninth session in 1996 (UNCTAD, 1996b).

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