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## Chapter 6 - Minimum Standards of Treatment

### Introduction

#### §6.1 Principle and rationale

International investment agreements (IIAs) provide a series of general and specific minimum standards of treatment. General minimum standards, including treatment in accordance with international law, fair and equitable treatment, the prohibition of arbitrary and discriminatory measures, full protection and security, compensation for extraordinary losses and more favourable treatment clauses are covered in this chapter. Other specific minimum standards on expropriation, transfer rights, performance requirements and observance of undertakings are covered separately in Chapters 7-9.

Unlike the national and most-favoured-nation (MFN) obligations considered in the previous two chapters, in which the standard of treatment is contingent on the treatment of a comparator, (1) the substantive content of minimum standards is not determined by reference to the treatment of other investors or investments. (2) With the exception of the prohibition on discriminatory measures, which involves a comparative analysis, (3) minimum standards of treatment measure state conduct ● against non-contingent, objective standards. (4) Minimum standards of treatment therefore provide a treaty-defined baseline or, in the words of one IIA tribunal, 'a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner.' (5) Minimum standards of treatment serve a key role in promoting and protecting foreign investment by assessing government conduct based on internationally accepted standards of good governance. Standards such as fair and equitable treatment can be viewed as reflecting elements of the rule of law and as serving to restrain abuses of governmental power. (6)

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Six types of general minimum standard provisions commonly appear in IIAs, with most IIAs having one or more of these provisions. First, the IIA may require treatment in accordance with the customary international law minimum standard of treatment of aliens and their property. (7) The substantive content of the minimum standard, however, is usually not specified in any detail. Further, the content of the minimum standard has been and remains contentious. (8) In spite of this, it is now generally accepted that a minimum standard of treatment exists in customary international law. (9) IIAs sometimes refer more generally to treatment in accordance with international law. As discussed below, this requires the state to accord, at the very least, the minimum standard of treatment. Second, and more commonly, IIAs guarantee 'fair and equitable treatment' in some shape or form. There remain significant variations in how the fair and equitable treatment standard is drafted. In some cases it appears as an independent standard, whereas in other cases it is expressly associated with the minimum standard of treatment. Often it appears in the same sentence with other standards. Third, some treaties provide a guarantee against impairment by arbitrary or discriminatory measures. This standard often appears in IIAs that also call for fair and equitable treatment, raising interpretive issues about whether there is a substantive difference between the two standards. Fourth, most IIAs require host states to accord investments 'full ● protection and security' of some kind. Fifth, IIAs often provide for compensation standards that apply to extraordinary losses. Finally, some IIAs have more favourable treatment clauses, sometimes also called 'preservation of rights' or 'non-derogation clauses'. This chapter addresses each of these standards and the complex interrelationships amongst them. (10)

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#### §6.2 Overview

The chapter is divided into eight parts. Part I discusses the minimum standard of treatment in customary international law. Part II considers IIA provisions that accord treatment in accordance with international law. The main part of the chapter, Part III, addresses fair and equitable treatment. Provisions on impairment by arbitrary, unreasonable or discriminatory measures are considered in Part I V. Part V addresses obligations of protection and security. Part VI discusses compensation for extraordinary losses. More favourable treatment clauses are considered in Part VII. Part VIII highlights that IIAs normally do not provide specific exceptions to minimum standards of treatment.

### I The Minimum Standard of Treatment

#### §6.3 The continued relevance of the minimum standard of treatment

States are required under customary international law to accord aliens and their property the minimum standard of treatment. In the absence of an IIA, the minimum

standard of treatment remains the relevant treatment standard in diplomatic protection claims. (11) In IIA treaty-based claims, the minimum standard of treatment remains highly relevant to the interpretation of IIA obligations. First, some treaties expressly incorporate the minimum standard of treatment as the treaty-based standard or require treatment in accordance with international law. Second, fair and equitable treatment has been interpreted to include, at the very least, the protections afforded by the minimum standard of treatment. (12) Further, other general minimum standards, such as full protection and security, reflect elements of the minimum standard of treatment. As a result, the minimum standard of treatment informs the interpretation of other general minimum standards of treatment in IIAs. Further, some commentators have argued that IIA practice has resulted in the evolution of the minimum standard of treatment and that fair and equitable treatment is now a, or the, customary international law standard. (13)

#### 56.4 The content of the minimum standard of treatment

P 236 Respondent states in a series of early IIA cases have cited the 1926 *Neer* case, (14) a decision of the ● Mexico-US General Claims Commission, as reflecting the minimum standard of treatment. (15) In *Neer*, the US claimed that Mexico had failed to properly investigate and prosecute those responsible for the murder of one of its nationals. Although the Commission ultimately held that Mexico had not violated the minimum standard of treatment because its officials had been duly diligent in the criminal investigation, (16) it also stated that:

... the propriety of governmental acts should be put to the test of international standards ... the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial. (17)

P 237 Although respondent states have referred to this statement as reflecting the minimum standard of treatment (at least as of 1926), (18) care must be taken in identifying the minimum standard of treatment with a one or two line definition. (19) Rather, the minimum standard of treatment consists of a series of interconnecting and overlapping elements or standards that apply to both the treatment of ● foreigners and their property. (20) Further, the *Neer* case involved the question of state conduct in response to criminal acts of private parties, and not the treatment by the state itself of foreigners or their property. (21) In *Neer*, the Commission did not purport to provide an exhaustive definition of the minimum standard of treatment. The *Neer* decision is therefore of little value as an articulation of the minimum standard for the purpose of IIA claims. Its importance lies more in its articulation of the now well-accepted principle that state treatment of aliens and their property is to be measured against an international minimum standard.

P 238 IIA tribunals have confirmed that the minimum standard of treatment is constantly in the 'process of development' (22) and has continued to evolve since 1926. (23) ● This evolution includes the thousands of IIAs concluded amongst states. (24) In its 2004 final award in *Waste Management II*, a *North American Free Trade Agreement* (NAFTA) investment tribunal stated that the minimum standard of treatment is infringed by conduct:

... attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant. (25)

The above statement highlights a number of specific elements of the minimum standard of treatment where state responsibility may arise for mistreatment of foreign investors and investment, including, but not exhaustively: denial of justice, lack of due process, lack of due diligence, and instances of arbitrariness and discrimination. Each of these elements of the minimum standard is considered below in more detail.

Although the following sections discuss the elements of the minimum standard of treatment in customary international law, reference is sometimes made to IIA cases, in which the tribunals in question are interpreting IIA provisions. In these cases tribunal statements can be read as reflecting the minimum standard of treatment. In particular, with respect to NAFTA, the NAFTA Free Trade Commission (FTC) has equated Article 1105, NAFTA, with the customary international law minimum standard of treatment. (26) NAFTA tribunal interpretations of Article 1105 therefore address the minimum standard of treatment.

## §6.5 Denial of justice

Denial of justice is a long recognized element of the minimum standard of treatment. Indeed, many of the classic minimum standard of treatment cases arise out of claims with respect to the host state's misadministration or maladministration of justice. (27)

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The term denial of justice has been used to identify a wide variety of international wrongs. As a result, its use has given rise to much confusion. (28) The term has sometimes been used to refer generally to any breach of international law that entails state responsibility for the treatment of foreigners. This formulation is too broad as it equates denial of justice with the minimum standard of treatment. On the other hand, denial of justice is sometimes used narrowly to refer to a denial of access to courts or to the failure of the courts to pronounce a judgment. This approach is too narrow because it does not encompass the variety of ways in which the justice system may fail. A better and more accurate approach is to associate denial of justice with minimum standards of administration of justice. (29) A denial of justice relates to serious inadequacies in the state's judicial or administrative system with respect to the judicial protection of foreigners and their rights. (30) Irrespective of the treatment that a state affords its own nations, foreigners are entitled to a minimum standard of justice.

In 1929, the Harvard Law School prepared a draft codification of international law relating to the treatment of foreigners called *The Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners* (31) (1929 Harvard Draft), which codified the principle of denial of justice as follows:

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Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice or ● a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice. (32)

Denial of justice can therefore arise from procedural irregularities in judicial proceedings, such as undue delays, lack of due process, failure to provide a fair hearing or the non-execution of a judgment. (33) This is sometimes referred to as procedural denial of justice. (34) These elements of denial of justice were highlighted in *Robert Azinian, Kenneth Davitian, & Ellen Bacca v. Mexico*, the first NAFTA investment award, and the first IIA award to address denial of justice. The tribunal noted that a denial of justice could be pleaded 'if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way.' (35) In addition, the *Azinian* tribunal noted that the fact that the national tribunal made an error of law does not constitute denial of justice. (36) IIA tribunals have stated that refusal of access to the courts, undue delay in court proceedings, serious inadequacies in the administration of justice and clearly improper and discreditable court decisions constitute denials of justice. (37)

States can also be held responsible for gross defects in the substance of judicial decisions. Although state responsibility does not arise for an erroneous judgment, it may arise where a court ruling is manifestly unjust. (38) In *Mondev*, the NAFTA tribunal stated that, with respect to judicial decisions, the:

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... test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the ● one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. (39)

Although denial of justice for manifestly unjust judgments is sometimes referred to as substantive denial of justice, (40) this term might be considered a misnomer and potentially confusing because it suggests that IIA tribunals sit in international appellate review of national law. In *Denial of Justice in International Law*, Jan Paulsson rejects the concept of substantive denial of justice, arguing that denial of justice in the form of a manifestly unjust domestic judgment is properly viewed as a deficiency in the process. The manifestly unjust judgment is evidence that the state has failed to provide a judicial system that meets international standards: (41)

Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the state's failure to provide a decent system of justice.

They do not constitute international appellate review of national law. (42)

In other words, the substantive absurdity evidences the procedural defect. It bears emphasizing that customary international law requires states to maintain a judicial system that meets international minimum standards of due process in its treatment of foreigners. These due process protections do not serve to guarantee that final judicial outcomes are reviewable by international tribunals based on a standard of reasonableness. The fact that an international tribunal would have decided a case differently or made different findings of fact or that it considers that the national court made an error of law, is not sufficient to prove denial of justice.

### \$6.6 Denial of justice and exhaustion of local remedies

One of the significant procedural benefits of investor-state arbitration is that, under most IIAs, there is no need to exhaust local remedies. (43) There must be exhaustion of local remedies, however, to claim denial of justice. (44) Denial of justice arises where a national legal system fails to provide justice – not where there is a single procedural irregularity or misapplication of the law at some level of the judicial system. (45) States have an obligation to create a system of justice that allows errors in the administration of justice to be corrected. (46) Since a denial of justice occurs only where ‘there is no reasonably available national mechanism to correct the challenged action,’ (47) the exhaustion of local remedies becomes an inherent and material element of every denial of justice claim. (48)

The requirement for exhaustion of local remedies was at issue in *Loewen*, where a NAFTA tribunal determined that a Mississippi trial proceeding fell short of international standards of due process. (49) In a much criticized decision, (50) the NAFTA tribunal held that it did not have jurisdiction over Loewen's claim because, as a result of a corporate reorganization, the corporate investor had not maintained continuous Canadian nationality. (51) The *Loewen* tribunal also refused jurisdiction (by way of extended *obiter dictum*) on the basis that Loewen had failed to exhaust local remedies because it failed to apply to the US Supreme Court to review the Mississippi proceedings. (52)

The *Loewen* decision has given rise to a lively debate on the need to exhaust local remedies in the context of IIA denial of justice claims. Jan Paulsson has made a strong case that local remedies should be considered exhausted in this context only where they ‘provide no reasonable possibility of an effective remedy,’ (53) one of the alternate formulations proposed by Special Rapporteur John Dugard in his *Second Report on Diplomatic Protection* to the International Law Commission. (54) In *Loewen*, the tribunal found that seeking review of the Mississippi proceedings by the US Supreme Court provided ‘at most a reasonable prospect or possibility of success’ (55) and that Loewen had failed to present evidence to justify the decision to settle with O’Keefe rather than pursuing other local remedies. (56) Yet, in the subsequent request by Raymond Loewen, in his personal capacity, for a supplemental decision (57) it became clear that the claimants had submitted evidence on the rationale for not seeking Supreme Court review. Despite this evidence and the practical difficulties the claimants faced, the NAFTA tribunal stated that it was not satisfied that Loewen's agreement to settle the original claim had been the only option available to Loewen. The *Loewen* tribunal's reasoning and conclusions on the availability of local remedies can be seriously questioned, despite the undoubted eminence of the tribunal members. (58) In light of the expert evidence that the prospects of a successful appeal to the US Supreme Court were ‘illusory,’ the better view is that Loewen had exhausted local remedies. (59)

The requirement to exhaust local remedies in order to claim denial of justice in an IIA proceeding has also been criticized by some commentators as inconsistent with the purpose of investor-state arbitration. (60) It is argued that IIA investor-state arbitration mechanisms, having dispensed with procedural requirements for the exhaustion of local remedies, are being interpreted to require exhaustion as a substantive element for denial of justice claims, (61) introducing the exhaustion requirement through the proverbial back door. Further, if investors are required to exhaust judicial appeals of judicial decisions, should not the same rationale apply to administrative and regulatory decisions (such as the denial of an operating permit by a regulatory agency), which are invariably subject to review by some state judicial authority? Andrea Bjorklund has identified the issue as follows:

From a policy perspective, however, it is difficult to distinguish the desirability of requiring a decision of the highest body within a court system from requiring a final decision from the highest official in an administrative system. Thus, if a lower-level official denies a request for a permit, why not require an applicant to appeal to the official's superiors for a different decision, or to an administrative body with supervisory or appellate oversight? If the *Loewen* tribunal finds that only a final act of a judicial system may give rise to a NAFTA claim, the logical extension of that concept to requiring ‘appeals’ within different hierarchical structures may lead to claims by states party to NAFTA that eviscerate any waiver of the local remedies rule. (62)

In principle, however, the requirement to exhaust remedies within the judicial system is not inconsistent with the fact that investors are not required to exhaust administrative appeal mechanisms to bring an IIA claim. The reason is that there is a fundamental difference in the type of claim being made. The basis for a claim of denial of justice is that the judicial system has failed to provide justice. Special considerations apply to judicial systems in terms of international minimum standards of procedural due process. Further, a judicial system is specifically designed to allow for review and the correction of due process errors. A due process failure can only be made out where the judicial system has been tested and exhausted. An IIA claim arising as a result of the conduct of the executive branch, for example the denial of a business permit by a government department, gives rise to a categorically different type of claim, which may arise based on various IIA standards, such as national treatment, fair and equitable treatment or expropriation. Finally, a court may also violate an IIA standard – not as a denial of justice – but as a direct breach of the IIA attributable to the respondent state with no requirement to exhaust local remedies. For example, a court decree freezing assets is a measure attributable to the state and an IIA claim might be made without the requirement to exhaust local remedies. An unjustified, complete and permanent freezing order on assets, for example, might well amount to an expropriation, for which the state would be responsible.

On a practical level, where there is state conduct that an investor wishes to challenge, under most IIAs the investor will have a choice. It can challenge the state conduct directly in investor-state arbitration under an applicable IIA or it can engage in administrative processes and ultimately judicial processes for reviewing the conduct. Most reasonable business persons are unlikely to proceed directly to investor-state arbitration if there are low cost and effective options for review by local authorities. (63) Further, although investors should generally be required to exhaust local remedies where claims are made based on denial of justice (and not bring claims based on an alleged breach of due process by a lower magistrate in a district court), IIA tribunals should adopt a flexible approach to whether the investor had exhausted local remedies.

### §6.7 Due process

P 245 Due process is required in the administration of justice. If a breach of due process is not corrected by the judicial system, a denial of justice will result. The requirement for due process under customary international law, however, applies also to other forms of government decision-making in which host ● state decisions affect the rights of the investor or investment. For example, a breach of the minimum standard of treatment might occur if there is a complete lack of candour or transparency and unfairness in an administrative process, such as the revocation of a business license without notice and without the possibility for the licensee to be heard. (64) Further, there may be a lack of due process when a decision-maker bases a decision on inappropriate or irrelevant considerations. (65) However, at least one tribunal has stated that the requirements of administrative due process are less than those of a judicial process. (66)

In a number of cases, IIA tribunals have found a lack of due process sufficient to breach fair and equitable treatment. Yet it appears that an application of the customary minimum standard of treatment would yield the same results. In *Pope & Talbot*, the tribunal found a breach of the minimum standard of treatment in Article 1105, NAFTA, owing to Canada's treatment of the investor during an administrative review process. (67) In *Middle East Cement*, the tribunal held that a failure to provide notification of the seizure and auctioning of property (even when there was apparently no domestic law requirement to do so) breached fair and equitable treatment. (68) On the other hand, in *Genin*, although the tribunal criticized the Central Bank of Estonia for not providing notice that a banking license might be revoked or providing an opportunity for the licensee to be heard, the tribunal concluded that there was no breach of fair and equitable P 246 treatment in part because of the investor's own lack ● of forthrightness to Central Bank enquiries. (69) Further, as noted above, in *Waste Management II*, a NAFTA tribunal stated that the minimum standard of treatment would be infringed by 'a complete lack of transparency and candour in an administrative process.' (70)

### §6.8 Due diligence

The requirement to act with due diligence in the protection of foreigners is a well-accepted element of the minimum standard of treatment. (71) The requirement arises in two contexts. First, the host state must use due diligence to protect foreign nationals and their property from the injurious acts of private parties, including mobs and insurgents. Many early minimum standard of treatment cases involved the failure of host states to protect foreign nationals from physical violence. (72) Second, the state must exercise due diligence in the administration of justice, for example, by investigating or prosecuting those responsible for criminal acts against foreign nationals. (73) State responsibility arises from failure to exercise due diligence to prevent crime or in the pursuit, arrest and bringing to justice of the accused. (74)

### §6.9 Arbitrariness

Various elements of the minimum standard of treatment protect the foreign investor and

investment from arbitrary host state conduct. Responsibility for denial of justice, requirements for due process, prohibitions on racial and other forms of discrimination and respect for acquired rights, including the requirement to pay compensation for expropriation, all serve to discipline arbitrary and abusive government conduct. More generally, an overriding obligation to refrain from arbitrary conduct that impairs the acquired rights of aliens is sometimes grounded on the principle of abuse of rights and the requirement of good faith. (75) An abuse of rights may occur when a state exercises its rights in a manner that prevents other states from exercising their rights, exercises rights for a purpose other than that for which the right exists, or arbitrarily exercises rights and causes injury to another state but does not clearly violate its rights. (76) The concept of abuse of rights is an expression of the principle of good faith. In *Case Concerning Rights of Nationals of the United States of America in Morocco*, (77) which dealt with the Nazi practice of imposing flight taxes, the International Court of Justice (ICJ) found an abuse of rights where the state did not exercise its power to value property for the purposes of taxation reasonably and in good faith. Limits on the right of a state to expel aliens is another example of the application of customary international law prohibitions on arbitrariness and abuse of rights. (78)

It is unclear whether, historically, the prohibition on arbitrariness was confined to specific types of due process protections, physical integrity of the individual and respect for acquired rights, or whether the specific instances reflected a more generalized obligation to refrain from arbitrary conduct with respect to the treatment of aliens and their property. In his 1931 Hague lectures Alfred Verdross suggested that a state may not arbitrarily impair the acquired rights of a foreigner. (79) Further, §712 of the *Restatement (Third) of the Foreign Relations Law of the United States* provides that a state is responsible under international law for injury resulting from ... 'other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.' The commentary to §712 notes that 'arbitrary' refers 'to an act that is unfair and unreasonable, and inflicts serious injury to established rights of foreign nationals, though falling short of an act that would constitute an expropriation.' (80)

On the other hand, if there was a general prohibition on arbitrary conduct as an overarching principle in customary international law, it is surprising that neither the 1929 nor the 1961 Harvard Draft Conventions attempted to codify it. Rather, both draft instruments identify specific elements of the minimum standard of treatment where arbitrary conduct may give rise to responsibility. (81)

What, then, amounts to arbitrariness in the context of the treatment of foreign investors and investment? Different approaches to the meaning of arbitrary conduct in the foreign investment treaty context are reflected in *Elettronica Sicula S.p.A (ELSI)*. (82) In *ELSI*, one of the issues in dispute was whether the requisition of a foreign-owned factory by the local mayor was an arbitrary measure under the Italy-US *Treaty of Friendship, Commerce and Navigation* (FCN Treaty). (83) The Italian courts had found the mayor's requisition of the ELSI plant to have been unlawful and beyond the administrative powers of the mayor. The US argued that arbitrary measures include an unreasonable or unfair exercise of government authority. (84) In contrast, Italy argued that an arbitrary measure is one for which there is a complete lack of justification, in the sense that there is no lawful basis for the exercise of power. (85) In Italy's view, the mayor had the power to requisition under Italian law and the fact that the requisition had been found to be illegal did not make his conduct arbitrary. The majority of the Chamber of the ICJ agreed with Italy's position and held that illegality under local law was not sufficient to make the mayor's conduct 'arbitrary' under international law:

To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication ... (86)

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' (*Asylum, Judgment, I.C.J. Reports 1950*, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. (87)

In his dissent, Judge Stephen Schwebel found that the Italian measures were arbitrary. He based this finding on three factors: (i) the local courts had found the requisition to be arbitrary; (ii) the requisition was unreasonable and capricious because, among other things, it was illegal, issued to assuage public opinion and incapable of achieving its purported purpose; and (iii) a review of the mayor's order by the Italian courts could not correct the arbitrariness of the mayor's act. (88) Judge Schwebel found that since the treaty in question prohibited arbitrary measures, Italy was required to achieve a specified result – that of relieving ELSI from the effects of the arbitrary measure. (89) On this last point, Judge Schwebel distinguished between whether the protection from

arbitrary or discriminatory measures' was an obligation of conduct or an obligation of result. (90) In Judge Schwebel's view, arbitrariness for the purposes of the FCN Treaty was an obligation of result. The appeal to the Italian courts and the annulment of the requisition order sixteen months later, did not remedy the initial wrongdoing, or otherwise fully compensate ELSI for the effect of the original act. (91)

P 250 The majority's approach has been criticized because its interpretation of arbitrariness suggests that an investor is not treated arbitrarily as long as the state asserts a lawful basis for its actions and provides due process in local courts. (92) This approach arguably confines the concept of arbitrariness to procedural due process. On the other hand, Judge Schwebel's approach imports a more substantive review by focusing on whether the government measure in question was ● clearly unreasonable. In this respect, Judge Schwebel's view of arbitrariness is closer to the US pleadings in *ELSI* and the position in the US *Third Restatement* that arbitrary refers to an act that is 'unfair and unreasonable.' (93)

As discussed below, IIA jurisprudence to date, although interpreting treaty provisions, suggests more generally that the customary minimum standard of treatment is breached by arbitrary conduct. (94) Respondent states do not appear to have contested that, at least within the IIA framework, the minimum standard of treatment is breached by arbitrary treatment of foreign investment. Further, IIA tribunals have confirmed that conduct that is arbitrary in international law is a breach of the 'fair and equitable treatment' standard. (95) With respect to illegality, IIA tribunals have confirmed that something more than simple illegality or lack of authority (*ultra vires* acts) under domestic law is necessary to breach the minimum standard of treatment. (96)

It is not clear what amounts to arbitrariness under the current international minimum standard. In defining arbitrariness, a number of IIA tribunals have referred to the definition in *ELSI*, quoted above. The literal meaning of 'arbitrary' suggests a decision that is derived from opinion or preference, a capricious and unrestrained exercise of power. In contrast, an unreasonable decision is one not based on sound reasoning, inequitable or unfair. (97) The tribunal in *Waste Management II* stated that the minimum standard of fair and equitable treatment in the NAFTA is breached by conduct that is arbitrary, grossly unfair, unjust or idiosyncratic. (98) It did not equate unreasonableness with arbitrariness. Thus, although the minimum standard of treatment and the fair and equitable treatment standard are both (if indeed they are at all different) breached by arbitrary acts, there is less authority for the proposition that 'arbitrary' is to be equated with 'unreasonable.' (99)

P 251 Finally, it may be useful to distinguish between two types of arbitrariness. The discussion of arbitrariness above focuses on whether the government measures in question fail to meet some yardstick of rationality or proportionality. This could ● be referred to as substantive arbitrariness. The second type of arbitrariness is procedural and overlaps with denial of justice, lack of due process and lack of due diligence.

## §6.10 Discrimination

Discrimination is a relative standard, involving a comparison between two things or situations. The use of the terms 'discrimination' and 'discriminatory' give rise to confusion in the IIA context because IIA texts and tribunals often use the terms generically without specifying what type or types of discrimination are prohibited. Since host state regulatory frameworks typically depend on drawing distinctions of some kind, discrimination cannot be the same as distinction. Discrimination in the IIA context involves a type of illegitimate distinction between persons or things that are in a similar situation.

At least four different types of discrimination claim might arise in the IIA context. The first is discrimination prohibited by international human rights law with respect to individuals, if it is based on factors such as race, sex and religion, unless there is an objective and legitimate justification for the distinction. (100) Racial discrimination and other forms of discrimination contrary to international human rights breach the minimum standard of treatment. For example, in *Waste Management II* the tribunal included conduct that 'is discriminatory and exposes the claimant to sectional or racial prejudice' as prohibited by the minimum standard of treatment.

P 252 Second, there may be other forms of discrimination not prohibited under customary international law that relate to the status of the investor or investment. In particular, it is well-accepted that, subject to treaty obligations, a state may in its legislative measures discriminate on the basis of nationality. (101) For example, foreigners generally have neither the right to vote, nor to political affiliation nor to receive state aid. (102) A state law that limits eligibility to state funding to host state nationals does not breach customary international law. Typically, IIA national and MFN treatment obligations address nationality-based discrimination of this kind by requiring that foreign investors or investments receive no less favourable treatment than either nationals or investments of the host state itself or third party ● states. (103) As discussed below, some IIAs do not have express national and MFN treatment provisions and refer more generally to discriminatory measures. IIA tribunals have interpreted these provisions as including nationality-based discrimination. (104)

Third, foreigners are entitled to the non-discriminatory application of host state law. Although under customary international law may distinguish between foreigners and nationals (e.g., with respect to entitlement to state aid), domestic law must be *applied* without distinction on nationality, unless the distinction in question is expressly provided in the law. If domestic courts apply domestic law in a discriminatory manner (e.g., if a foreigner is denied the right to commence a claim in domestic courts based on the foreigner's nationality), the foreign investor will have grounds for claiming a breach of the customary minimum standard based on a denial of justice. (105)

Fourth, discrimination may occur where the state makes an arbitrary or unreasonable distinction between similarly situated investors or investments. Discrimination in this sense overlaps substantially with concepts of arbitrariness, unreasonableness and unfairness. (106)

### §6.11 Individuals and international human rights law

The pre-World War II (WWII) jurisprudence on the minimum standard of treatment with respect to the treatment of individuals (e.g., denial of justice claims) has to a large extent been eclipsed by the post-WWII development of international human rights law. State measures that affect individual foreign investors may well violate international human rights law and give rise to a claim under regional and international human rights instruments. Violations of international human rights may also give rise to a violation of minimum standard of treatment provisions in IIAs. (107) With respect to procedural rights, there may be significant overlap between claims of human rights violations on the one hand, and claims of denial of justice and due process on the other. (108)

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The extent to which an individual investor may be able to claim a breach of an IIA for human rights violations is unclear. International human rights generally protect the human being and not corporate entities or commercial interests. Furthermore, most minimum standard of treatment provisions only apply to *investments* made by investors and not to individual investors. Depending on the IIA in question, an individual investor may be able to rely on breaches of international human rights obligations to found a breach of the treaty's minimum standards of treatment. Conduct directed at the individual investor, such as arbitrary detention, may also result in the impairment of the investment. (109) Finally, it is important to note that a host state might also rely on its international human rights obligations to justify measures that it has taken. (110)

## II Treatment in Accordance with International Law

### §6.12 IIA clauses

IIAs sometimes provide for treatment 'in accordance with international law'. (111) For example, Article 2(1), Bosnia and Herzegovina-Sweden (2000), provides that neither party 'shall award treatment less favourable than that required by international law.' Article II(2)(a), US-Argentina (1991), provides:

Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

Finally, Article 1105(1), NAFTA, entitled 'Minimum Standard of Treatment,' provides:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

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Although treatment in accordance with international law means at least and by definition the minimum standard of treatment, (112) it could also mean other sources of international law, such as treaty obligations or general principles of law. In the NAFTA context, the parties have clarified that the reference to international law means the minimum standard of treatment and not conventional norms. (113)

There does not appear to be any state treaty practice or *travaux préparatoires* to suggest that references to treatment in accordance with international law in IIAs were intended to extend to a host state's treaty obligations. Further, the implication of this interpretation would be very far reaching – it would provide investors a direct recourse against the state for *any* breach of a state's myriad international treaty obligations. This would mean, for example, that investors could seek damages for a breach of a state's World Trade Organization (WTO) obligations. If states intended to provide this novel and extremely broad right, it would be surprising that it does not appear to be reflected in *travaux préparatoires* or government statements about the meaning of 'international law.'

The better view is that where states have intended to guarantee treatment in accordance with other general treaty obligations they have done so expressly. For example, Article 10(1), Energy Charter Treaty (ECT), provides:

In no case shall such Investments be accorded treatment less favourable than that required by international law, *including treaty obligations*. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party. [Emphasis added.]

This formulation is uncommon in IIAs. On its face it suggests that an investor is entitled to claim a breach whenever a Member State of the ECT breaches any international treaty obligations, including for example obligations under the *General Agreement on Tariffs and Trade* and the *General Agreement on Trade in Services*. (114)

P 255 Recent US, Canadian and Norwegian Model BITs clarify that references to treatment in accordance with international law means treatment in accordance with the minimum standard of treatment. (115) The US and Canadian Models also provide that a breach of another provision of the IIA or a separate international agreement does not establish that there has been a breach of the minimum standard of treatment provision. (116)

### III Fair and Equitable Treatment

#### §6.13 The baseline of investment protection

Fair and equitable treatment has emerged as perhaps the most important standard of treatment in IIAs. Fair and equitable treatment clauses appear in most IIAs. Further, even where there is no express fair and equitable treatment clause in the IIA, the standard is likely to be applicable based on an MFN clause. As discussed below, IIA tribunals have interpreted fair and equitable treatment as providing a wide range of procedural and substantive protections, including the protection of legitimate expectations. (117) Given the breadth of the treatment standard, claims of a breach of fair and equitable treatment can succeed where claims under more specific standards might fail.

#### §6.14 Early treaty practice

P 256 The term fair and equitable treatment has its provenance in post-WWII economic treaties. It was not a term of art in public international law before WWII. (118) The term 'just and equitable treatment' appears in the investment provisions (119) of the 1948 *Havana Charter*, the treaty which would have established the proposed International Trade Organization. (120) The *Economic Agreement of Bogotá* (1948) provided that foreign investment should receive 'equitable treatment.' References to 'equitable' or 'fair and equitable' appear in numerous post-WWII FCN treaties. (121) Fair and equitable treatment was included as a term in post-WWII draft investment conventions including the 1959 *Draft Convention on Investments Abroad* (122) and the 1963 and 1967 drafts of the Organization for Economic Co-operation and Development (OECD) *Draft Convention on the Protection of Foreign Property*. (123) The term is now commonly used in multilateral, (124) regional, (125) sectoral (126) and bilateral (127) treaties.

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#### §6.15 IIA practice

Although the fair and equitable treatment standard is included in the majority of IIAs, (128) there are important variations among IIA texts. The most common practice is for fair and equitable treatment to appear by itself, unqualified by any other terms. (129) This formulation is common in Dutch, German, Swedish, Swiss and US BITs. (130) In many cases, although the requirement for fair and equitable treatment is unqualified, it is combined with other treatment standards in the same sentence. For example, Article II(2) (a), Argentina-US (1991), provides:

Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

Another example is Article 3(1), Czechoslovakia-Netherlands (1991), which provides:

Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. (131)

Rather than using the exact term 'fair and equitable treatment,' there are slight variations in the terms used, including 'equitable and reasonable treatment.' (132) For example, Article III, Lithuania-Norway (1992), provides:

Each contracting party shall promote and encourage in its territory investments of investors of the other contracting party and accept such investments in accordance with its laws and regulations and accord them equitable and reasonable treatment and protection ...

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The tribunal in *Parkerings-Compagniet AS v. Lithuania* regarded the terms 'equitable and reasonable treatment' and 'fair and equitable treatment' as synonymous. (133)

The reference to fair and equitable treatment is sometimes combined with a reference to international law. (134) For example, Article 3, Argentina-France (1991), provides:

Each of the Contracting Parties undertakes to grant, within its territory and its maritime area, fair and equitable treatment according to the principles of international law to investments made by investors of the other Party, and to do it in such a way that the exercise of the right thus recognized is not obstructed *de jure* or *de facto*. (135)

Another approach is to grant treatment in accordance with international law and specify that this includes fair and equitable treatment. NAFTA Article 1105(1) adopts this approach:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

As discussed below, this formulation has given rise to significant debate in NAFTA cases regarding whether Article 1105 provides treatment guarantees beyond the minimum standard of treatment. (136)

A more recent approach is to define fair and equitable treatment expressly as the customary international minimum standard of treatment applicable to aliens and their property. The 2004 US and 2003 Canadian Model BITs, as well as recent US bilateral free trade agreements (FTAs) adopt this approach. (137) For example, Article 5, US-Uruguay (2005), provides:

#### Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
  - (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
  - (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law.
3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

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US-Uruguay (2005) further provides that Article 5 shall be interpreted in accordance with Annex A as follows:

#### Customary International Law

The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Although this formulation clarifies that fair and equitable treatment does not go beyond the minimum standard of treatment, it does not exhaustively define the current content of the minimum standard. (138)

Some provisions clarify the interaction between fair and equitable treatment and other treatment standards. For example, Article 4(1), India-Thailand (2000), provides that fair and equitable treatment shall not be less favourable than national and MFN treatment:

Investments of investors ... shall receive treatment which is fair and equitable and not less favourable than that accorded in respect of the investments and returns of the investor of the latter Contracting Party or of any third State. (139)

Article 10(1), ECT, combines fair and equitable treatment with a host of other standards:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

Article 10(3) clarifies that treatment means ‘treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.’ This suggests that, for the purposes of the ECT, national and MFN treatment are subsumed within fair and equitable treatment.

Some IIAs, particularly French BITs, (140) provide that all restrictions on the purchase or transport of raw materials, fuel, machinery or restrictions on the sale or transport of products amount to a breach of fair and equitable treatment. The reference to ‘all restrictions’ is very broad and it is unclear the extent to which the provision might prevent a state from imposing non-discriminatory restrictions in cases of shortages or for other regulatory reasons.

A small number of IIAs impose the additional qualification that government conduct be necessary to maintain public order. Article 2(2), Morocco-Pakistan (2001), provides that:

Each Contracting Party shall at all times ensure fair and equitable treatment and subject to strictly necessary measures to maintain public order...

A few IIAs appear to define fair and equitable treatment in relation to domestic law. For example, Article IV, Caribbean Common Market-Cuba (1997), provides: ●

Each Party shall ensure fair and equitable treatment of Investments of Investors of the other Party under and subject to national laws and regulations.

The meaning of this provision is unclear. It appears that fair and equitable treatment is qualified by treatment ‘under and subject to national laws and regulations.’ If so, the provision only requires treatment in accordance with domestic law – not international law.

Finally, in some IIAs, there is no provision for fair and equitable treatment. For example, *India-Singapore Comprehensive Economic Cooperation Agreement* (2005) has no fair and equitable treatment clause. A study on fair and equitable treatment clauses found that of 365 BITs surveyed, nineteen did not provide for fair and equitable treatment. (141)

Although the above survey of fair and equitable treatment provisions suggests that there is a fair degree of variation among texts, in practice there are two dominant approaches. The first is to provide for fair and equitable treatment of investment without limitation. The second is to provide for fair and equitable treatment and equate it with the minimum standard of treatment. As discussed below, if the minimum standard of treatment now requires fair and equitable treatment then this is a distinction without a difference. Alternatively, even if fair and equitable treatment goes beyond the minimum standard of treatment, in most cases the application of the two standards is unlikely to result in a different result. Further, where an investment is entitled to MFN treatment and fair and equitable treatment is available in a third state IIA, any potential difference between different formulations of the fair and equitable treatment will likely be moot. (142)

## §6.16 Meaning of treatment

Although the term treatment is used in both national and MFN treatment and fair and equitable treatment provisions, IIAs do not define the term. Treatment is an expansive term that the Oxford English Dictionary defines as ‘[c]onduct, behaviour; action or behaviour towards a person.’ In *Siemens*, in the context of discussing national and MFN treatment, the tribunal stated that ‘treatment’ ordinarily means ‘behaviour in respect of an entity or a person.’ (143) In *Suez, Sociedad General de Aguas de Barcelona S.A., and Interagua Servicios Integrales del Agua S.A. v. Argentina*, in the context of discussing MFN treatment, the tribunal noted that:

The word ‘treatment’ is not defined in the treaty text. However, the ordinary

meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty. (144)

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In *Canfor*, the claimants drew a distinction between 'conduct' and 'treatment', arguing that 'conduct' is what officials do and 'treatment' is the manner in which the officials direct conduct to a specific investor or claimant. (145) This distinction is potentially misleading because it suggests that the state must 'direct' conduct to a specific investor, which might imply either a requirement of specificity or intent. The better view is that, in accordance with the ILC's Articles on State Responsibility, 'conduct' consists of an action or omission, (146) whereas treatment refers to the effect or result of the conduct on the investment or investor in question. 'Treatment' can be further contrasted with the term 'measures' used in expropriation provisions and that focuses on the state conduct in question. (147)

### §6.17 No requirement of impairment

In contrast to minimum standards that prohibit arbitrary or discriminatory measures that impair investment, (148) the fair and equitable treatment standard can be breached without evidence of impairment of the investment. For example, an investment might be subject to an arbitrary decision or process, such as a politically motivated or malicious investigation into the investment's industrial practices. Although the government's actions might breach the standard of fair and equitable treatment, there might be no actual impairment of the investment. For example, in the context of an administrative review by Canadian authorities with respect to exports of softwood lumber, the *Pope & Talbot* tribunal cited a lack of forthrightness in communications, questionable statements and misrepresentations in internal communications as constituting a breach of 'fair and equitable treatment.' (149) Although Canada's action breached fair and equitable treatment, the episode does not appear to have impaired the operation of the investment. Another example might be a situation similar to *ELSI*, in which a state mistreats a business that turns out to be worthless. Despite the fact that the business has no market value, state conduct could be sanctioned by a tribunal finding a breach of fair and equitable treatment, with no or nominal damages awarded for the taking.

### §6.18 Scope of fair and equitable treatment – investment or investors?

P 263 ● The fair and equitable treatment standard in IIAs typically applies only to 'investments' or 'investments of investors' but not to investors alone. (150) It is unlikely that an individual investor would be able to claim a breach of fair and equitable treatment for measures that affect the individual investor personally with no concomitant effect on the investment. IIAs are designed to promote and protect investment and not to protect the individual human rights of the foreign investor, who generally will have to seek recourse under other applicable mechanisms. Although the fair and equitable treatment guarantee is normally limited to the investment, in many situations it will be extremely difficult to separate the treatment of the investor from that of the investment, particularly where the investor participates in the management of the investment. For example, if the individual foreign investor, who also acts as the managing director of the investment, is placed under house arrest on spurious criminal charges, the effect may be that the investment cannot be effectively managed or operated. In this situation, there might be a sufficiently close link between the investor and the investment that mistreatment of the investor significantly affects the investment. The distinction also has remedial consequences. While compensation might be claimed for the unfair treatment of the investment, the individual investor would not be able to obtain personal damages.

When the investor is a legal person, the application of fair and equitable treatment will depend in part on how the investment is structured. If the corporate investor has a locally incorporated subsidiary, the investment will be the subsidiary, which under some IIAs may also qualify as an investor in its own right.

### §6.19 Interpretive approaches to fair and equitable treatment

The ubiquity of fair and equitable treatment provisions in IIAs has not been accompanied by certainty, clarity or agreement with respect to their meaning. As noted previously, historically fair and equitable treatment was not a term of art in public international law. It does not refer to a well defined juridical concept and, as noted by one commentator, does not 'connote a clear set of legal prescriptions.' (151) The irony is that the substantial interpretive uncertainty inherent in the meaning of treatment that is *fair and equitable* may well be one of the reasons for its successful adoption. Unlike the minimum standard of treatment, which some states have historically viewed with suspicion because of the legacy of gun-boat diplomacy and imperialism, (152) the term fair and equitable treatment is not accompanied by unwanted political baggage. Furthermore, in principle no state is likely to oppose fair and equitable treatment – for which state would contend that international law should admit unfair and inequitable treatment of foreign investment? (153) For capital exporting states that traditionally supported the minimum standard, fair and equitable treatment represented a high standard of treatment,

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reflecting at least the ● minimum standard of treatment. On the other hand, for capital importing states fair and equitable treatment might well have served as an empty vessel reflecting a new era of state equality and regulatory sovereignty. In commenting in 1960 on the requirement of equitable treatment in the Abs-Shawcross Draft Convention, Georg Schwarzenberger highlighted that in relations between heterogeneous communities the standard provides 'equality on a footing of commendable elasticity.' (154)

There are three general approaches to the interpretation of a general and unqualified obligation of 'fair and equitable treatment'. First, fair and equitable treatment can be viewed as an independent treaty standard that has an autonomous meaning and provides treatment protections above and beyond the minimum standard of treatment. Second, fair and equitable treatment can be viewed as reflecting the minimum standard of treatment. Since the minimum standard of treatment is a customary standard, it evolves in light of state practice and *opinio juris* (a sense of legal obligation). (155) From this perspective, fair and equitable treatment is an element of the currently existing minimum standard of treatment, which has continued to evolve. Third, assuming fair and equitable treatment is an independent treaty standard beyond the traditional requirements of the minimum standard of treatment, it has been argued that pervasive and consistent treaty practice favours the view that the independent treaty standard of fair and equitable treatment has now emerged as customary international law. In addition, it has been argued that fair and equitable treatment is a general principle of law and therefore legitimized by a defined source of law under Article 38(1)(c), *Statute of the International Court of Justice*.

Before considering each of these views in more detail below, it is important to emphasize two points. As highlighted above in §6.15 on IIA practice, there are significant variations in the drafting of the fair and equitable treatment standard. For example, some IIAs clarify that the governing standard is the minimum standard of treatment and that fair and equitable treatment is not to be interpreted as an autonomous standard. Thus, the interpretation of a specific fair and equitable treatment provision depends, first and foremost, on the interpretation of the actual text of the IIA in question under principles of treaty interpretation. Second, whatever approach is taken, definitions of fair and equitable treatment do not affect the state's duty to accord the current minimum standard of treatment under customary international law.

## §6.20 Fair and equitable treatment as an independent treaty standard with an autonomous meaning

P 265 The dominant approach by tribunals (156) and ● commentators (157) has been to interpret fair and equitable treatment as an independent treaty standard with an autonomous meaning. In a series of cases, IIA tribunals have held that fair and equitable treatment has a meaning independent of the minimum standard of treatment. Interpretation has been guided by a textual interpretation based on the specific wording of the fair and equitable treatment provision, with significant reliance on the expressed purpose of the IIA in question, which in almost all cases is explicitly to promote and protect investment. (158)

Principles of treaty interpretation provide the primary argument in favour of fair and equitable treatment as an independent treaty standard. Article 31(1) of the *Vienna Convention on the Law of Treaties* provides that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Article 31(1) suggests that 'fair and equitable' should be given its ordinary meaning, in the context of other treatment standards and consistent with the overall promotion and protection purpose of the IIA. Since IIA drafters were well aware of the minimum standard of treatment as a term of art and instead chose to use fair and equitable treatment, an ordinary meaning approach supports an interpretation that fair and equitable treatment is an autonomous standard and not the same as the minimum standard of treatment. (159)

The argument in favour of fair and equitable treatment as an independent treaty standard is often attributed to F.A. Mann who argued in an influential article in 1981 that 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. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The ● terms are to be understood and applied independently and autonomously to be material. (160)

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In interpreting fair and equitable treatment, tribunals have tended to rely heavily on treaty preambles to highlight the object and purpose of given IIAs. (161) This is part of the general tendency to rely on treaty titles and preambles in interpreting treaty obligations. (162) For example, in *Siemens*, the tribunal referred to the title and preamble of Argentina-Germany (1991) and noted that:

The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty 'to protect' and 'to promote' investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative. (163)

In *Azurix v. Argentina*, the tribunal stated that:

It follows from the ordinary meaning of the terms fair and equitable and the purpose and object of the BIT that fair and equitable should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. The text of the BIT reflects a positive attitude towards investment with words such as 'promote' and 'stimulate.' Furthermore, the parties to the BIT recognize the role that fair and equitable treatment plays in maintaining 'a stable framework for investment and maximum effective use of economic resources.' (164)

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The *MTD* award is representative of the general interpretive approach to the fair and equitable treatment standard. The tribunal began with the interpretation rules of the *Vienna Convention on the Law of Treaties*, after having referred to an expert opinion on the meaning of the standard. (165) The tribunal next turned to the ordinary meaning of 'fair' and 'equitable' as defined in the *Concise Oxford Dictionary of Current English*, as 'just,' 'even-handed,' 'unbiased,' 'legitimate.' The tribunal then referred to the object and purpose of the BIT as expressed in the preamble, highlighting the parties' desire to create favourable conditions for investment and the need to protect investment. The tribunal then stated that:

... in terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – 'to promote,' 'to create,' 'to stimulate' – rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors. (166)

The tribunal then compared the meaning it attributed to fair and equitable treatment with that attributed by another tribunal that was faced with a 'similar task.' (167) After a detailed review of the facts, the tribunal concluded that Chile treated the claimants unfairly and inequitably by authorizing an investment that could not take place for reasons of existing urban policy. (168)

The use of ordinary meaning however does little to elucidate the meaning of fair and equitable treatment. Substituting the terms 'just' or 'even-handed' does not clarify the content of the standard. (169) It simply results in words of 'almost equal vagueness.' (170) Second, it has been argued that interpretations that focus on the object and purpose of IIAs as creating favourable conditions for investment should not lead to interpretations that are exclusively in favour of investors. (171) The interpretation of fair and equitable treatment needs to balance the legitimate interests of investors and states. In interpreting *Czechoslovakia-Netherlands* (1991), the *Saluka* tribunal noted with respect to the preamble:

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This is a more subtle and balanced statement of the Treaty's aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties mutual economic relations. (172) ●

The interpretation of fair and equitable treatment must take into account legitimate public interests in regulating investments to achieve national objectives and the enforcement of the laws. At the same time, it must be recognized that the express purpose of IIAs is to promote and protect investments and that fair and equitable treatment must be read in this context.

## §6.21 Fair and equitable treatment as reflecting the minimum standard of treatment

There is some state practice amongst major capital exporting states suggesting that fair

and equitable treatment was viewed as reflecting, and as synonymous with, the minimum standard of treatment. For example, some elements of US, UK, Swiss (173) and Canadian treaty practice (174) suggest that these states considered that fair and equitable treatment reflected the minimum standard of treatment. (175) For example, the US State Department official description of the US Model BIT of February 1992 notes that the reference in Article II(2)(a) ('Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law') sets out 'a minimum standard of treatment based on ● customary international law.' (176) Further, there is a distinct lack of conclusive evidence of state practice clearly indicating that it was the intention of any state entering an IIA that fair and equitable treatment would be a new and autonomous standard of conduct. (177)

The commentary to the 1967 Draft OECD Convention – the model for many subsequent IIAs – states that fair and equitable treatment 'indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals' and that it 'conforms in effect to the "minimum standard" which forms part of customary international law.' (178) This view was reconfirmed by the OECD's Committee on International Investment and Multinational Enterprises in 1984. (179) Accordingly, it is arguable that when incorporating the fair and equitable treatment standard into their BITs, OECD states were guided by the meaning ascribed to that language by the intergovernmental organization (IGO) of which they were members.

In answer to the argument that: '[as] a matter of textual interpretation it is inherently implausible that a treaty would use an expression such as "fair and equitable treatment" to denote a well known concept like the "minimum standard of treatment in customary international law,"' (180) it can be argued that the use of a different and more politically neutral term might be explained by the historical political sensitivities regarding the minimum standard of treatment. Fair and equitable treatment may simply have been viewed as a convenient, neutral and acceptable reference to the minimum standard of treatment. (181)

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Respondent states have relied on *Genin*, (182) an early decision on fair and equitable treatment, as equating fair and equitable treatment with the *Neer* standard. (183) In *Saluka*, (184) the tribunal noted, however, that the *Genin* tribunal merely stated that a BIT standard of 'fair and equitable' treatment provides 'a basic and general standard which is detached from the host States' domestic law.' In the view of the *Saluka* tribunal, fair and equitable treatment is an international minimum standard, not the international minimum standard. (185) As noted above, on the whole, IIA jurisprudence supports the view that fair and equitable is an independent treaty standard.

## §6.22 Fair and equitable treatment as an independent treaty standard and customary international law

Since treaties are evidence of state practice, some commentators have suggested that the pervasive and consistent practice of including fair and equitable treatment and other minimum standards of treatment in IIAs has shaped the body of customary international law on the treatment of foreign investment. (186) In *Mondev*, the tribunal noted that:

... [on] a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. (187)

P 271 ● However, even if general and consistent state practice is proven, (188) there is little evidence that states provide treatment beyond the minimum standard of treatment ● out of a sense of legal customary obligation. (189) Rather, economic interests motivate states to enter into IIAs. (190)

In response to the lack of evidence of *opinio juris*, some commentators have suggested either that the practice of states may be understood as confirmation of *opinio juris* or that *opinio juris* has become obsolete for the formation of custom in many areas of law. (191)

An alternative argument is that the various elements of fair and equitable treatment, including good faith, due process, estoppel, unjust enrichment and *pacta sunt servanda* are recognized as general principles of law. Although national legal systems may not use the term fair and equitable treatment, the content of the standard – the procedural and substantive guarantees accorded to foreign investment – are found in domestic law. (192)

A number of tribunals have suggested that, at least in some respects, fair and equitable treatment is not different from the minimum standard of treatment. In *Occidental*, the tribunal stated that the fair and equitable treatment standard in Ecuador-US 'is not different from that required under international law concerning both the stability and the predictability of the legal and business framework of the investment.' (193) Similarly, in *CMS*, the tribunal stated that:

While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law. (194)

P 272 On a practical level, the question of whether fair and equitable treatment has become customary international law is unlikely to be determinative in the majority of IIA cases. Most IIAs already provide fair and equitable treatment as a treaty-based standard in some form. If an IIA has a different treatment standard that the respondent state argues is less onerous than fair and equitable treatment, fair and equitable treatment will likely apply in any event as a result of an MFN clause. Therefore, in practice, the question simply does not arise. Further, the trend in the jurisprudence suggests that there are few, if any, differences between the current minimum standard of treatment and the fair and equitable standard of treatment. (195) This issue is considered in more detail in this chapter following a discussion of the elements of fair and equitable treatment.

### §6.23 Interpretation of Article 1105(1), NAFTA

The question of whether fair and equitable treatment is an independent treaty standard has been the subject of much discussion and jurisprudence in the specific context of Article 1105(1), NAFTA. (196) The first NAFTA investment awards diverged in their interpretation of Article 1105(1). In *Myers*, the tribunal equated 'fair and equitable treatment' with the minimum standard of treatment. (197) Shortly thereafter, the *Pope & Talbot* tribunal stated that fair and equitable treatment is a higher standard than the minimum standard of treatment. According to that tribunal, the fairness element in Article 1105(1) adds to – and is not simply part of – the minimum standard of treatment. P 273 More specifically, it stated that investments are entitled to 'the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be "egregious," "outrageous," "shocking," or "otherwise extraordinary." (198) According to the *Pope & Talbot* tribunal, the purpose of NAFTA is to provide investors a 'hospitable climate that would insulate them from political risks or incidents of unfair treatment.' (199) Consequently, the tribunal held that the fair and equitable treatment guarantee is an additive requirement to be 'ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.' (200)

In response to the *Pope & Talbot* ruling, the NAFTA FTC (201) issued a binding interpretation of Article 1105(1). (202) This interpretation equated the reference to fair and equitable treatment in Article 1105(1) with the minimum standard of treatment. (203) This position reflected the pleadings of all three NAFTA parties before various NAFTA Chapter Eleven tribunals. In this regard the US submission to the *Pope & Talbot* tribunal is representative:

from its first use in investment agreements, 'fair and equitable treatment' was no more than a shorthand reference to elements of the developed body of customary international law governing the responsibility of a State for its treatment of the nationals of another State. It is in this sense, moreover, that the United States incorporated 'fair and equitable treatment' into its various bilateral investment treaties ('BITs'). (204)

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The FTC's interpretation, however, has been criticized. Claimants have argued that the interpretation amounted to an unauthorized amendment of the NAFTA and was therefore beyond the FTC's authority. (205) NAFTA tribunals have accepted, however, that the interpretation is binding on them. (206)

The FTC interpretation has not brought any finality to the debate about the meaning of fair and equitable treatment within the NAFTA since it does not clarify the content of the minimum standard of treatment and, in particular, whether it is what other IIA tribunals have found to be required by fair and equitable treatment. NAFTA tribunals, while accepting that Article 1105(1), NAFTA, provides at least the minimum standard of treatment, (207) have rightly noted that the minimum standard of treatment evolves over time. Its content has been shaped by the considerable developments in substantive and procedural rights since the 1920s, as well as the substantial state practice manifested in the conclusion of thousands of IIAs. (208) As noted by the tribunal in *Mondev*, '[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious.' (209) The tribunal in *Waste Management II*, after reviewing the jurisprudence as of 2004, stated that:

P 275 Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed ● by conduct attributable to the State and harmful to the claimant if the

conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying the standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant. (210)

This restatement of the content of Article 1105, NAFTA, comprises elements similar to those identified by tribunals in interpreting the fair and equitable treatment standard in other IIAs. Thus, even if it were accepted that in principle the standards are different, the trend appears to be towards convergence, not divergence. Further, tribunals have noted that any differences between the standards are more apparent than real. (211)

#### §6.24 General characteristics of the fair and equitable treatment standard

IIA jurisprudence and commentary have identified a series of specific elements of fair and equitable treatment, which are discussed in the next section. A number of more general observations can be made about the requirement for fair and equitable treatment. (212)

*A legal standard.* Fair and equitable treatment is not a subjective standard based on the idiosyncratic view of the tribunal. The fair and equitable treatment standard does not confer upon a tribunal the right to determine the case before it *ex aequo et bono* (according to what is equitable and fair). (213) As noted by the *Saluka* tribunal:

P 276 This does not imply, however, that such standards as laid down in Article 3 of the Treaty would invite the Tribunal to decide the dispute in a way that resembles a decision *ex aequo et bono*. This Tribunal is bound by Article 6 of the Treaty to decide the dispute on the basis of the law, including the provisions of the Treaty. Even though Article 3 obviously leaves room for judgment and appreciation by the Tribunal, it does not set out totally subjective standards which would allow the Tribunal to substitute, with regard to the Czech Republic's conduct to be assessed in the present case, its judgment on the choice of solutions for the Czech Republic's. As the tribunal in *S.D. Myers* has said, the 'fair and equitable treatment' standard does not create an 'open-ended mandate to second-guess government decision-making.' The standards formulated in Article 3 of the ● Treaty, vague as they may be, are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law. Over the last few years, a number of awards have dealt with such standards yielding a fair amount of practice that sheds light on their legal meaning. (214)

An IIA tribunal must make its decision based on the IIA in question and principles of international law, including rules of treaty interpretation. (215) Statements in some early awards to the effect that fair and equitable treatment is subjective are misleading. (216) Although a tribunal must exercise its judgment in applying the standard to a specific factual context, the tribunal applies a legal standard interpreted in accordance with international law. In this context, it is confusing to refer to the application of the standard to the facts of the case as subjective, as suggested in a recent treatise on the standard. (217) Application of general standards to facts is inherent in judicial decision-making. Referring to this process as subjective may improperly suggest that it is based on individual intuition rather than reason.

Fair and equitable treatment is a broad legal standard. While it 'does not provide a tribunal an open-ended mandate to second-guess government decision-making,' (218) it does allow tribunals to assess whether state conduct was clearly unreasonable. Although traditionally state conduct had 'to display a relatively higher degree of inappropriateness' to breach the minimum standard, to breach the fair and equitable treatment standard 'it may be sufficient that States' conduct displays a relatively lower degree of inappropriateness.' (219)

P 277 *One standard.* Tribunals and commentators have treated fair and equitable treatment as a single standard. Although it could be argued that there are two separate standards – fair treatment and equitable treatment – tribunals have not interpreted the ● term in this way and commentators have argued that there is no substantive difference between 'fair and equitable treatment' and 'equitable treatment'. (220)

*No requirement of bad faith or intent to injure.* Bad faith or the intention to injure is not a necessary condition for establishing a breach of fair and equitable treatment. (221) By contrast, bad faith or intent to injure is likely a sufficient condition for establishing a breach of fair and equitable treatment. State conduct that is intended to harm a foreign investment is not fair and equitable treatment.

*Good faith.* The commitment to fair and equitable treatment is an expression of the principle of good faith, (222) though it has been argued that good faith 'adds only

negligible assistance' in interpreting the scope and meaning of fair and equitable treatment. (223) In any case, the various elements of fair and equitable treatment, including due process, due diligence and the protection of legitimate expectations, are manifestations of the more general principle of good faith.

P 278 *Fair and equitable treatment requires at least the minimum standard of treatment.* At a minimum, fair and equitable treatment of investments requires treatment in accordance with the minimum standard of treatment. (224) No IIA awards nor any commentator have suggested that fair and equitable treatment provides less favourable treatment than the minimum standard of treatment. (225) For example, in their interpretation of fair and equitable treatment some tribunals have recognized due diligence and due process as an element of the standard. (226) On the other hand, not every violation of the minimum standard of treatment of aliens will breach the standard of fair and equitable treatment. Fair and equitable treatment does not usually apply directly to individual investors but, rather, only to investments of investors. (227) For example, it is unclear whether mistreatment of an individual foreign investor in police detention would result in a breach of fair and equitable treatment of an investment. In this case, there might be a sufficient nexus if the foreign investor is detained because of activities related to the investment, rather than his or her private activities.

*Substantive and procedural treatment.* The scope of fair and equitable treatment is not limited to the process of state decision-making in terms of ensuring due process and natural justice. State decision-making processes that meet due process and transparency requirements may still lead to treatment that breaches fair and equitable treatment. The fair and equitable treatment standard allows tribunals to assess the substantive fairness of state treatment. (228) Legitimate expectations with respect to fairness and due process in decision-making are protected, as well as legitimate expectations with respect to substantive treatment. (229)

*A highly fact and context dependent assessment.* The determination of whether there has been a breach of fair and equitable treatment is highly fact and context dependent: 'A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.' (230) Furthermore, the tribunal must assess the entire context of investor and state conduct. As noted by the tribunal in *GAMI*: 'It is the record as a whole – not dramatic incidents in isolation – which determines whether a breach of international law has occurred.' (231)

Although the application of fair and equitable treatment is highly fact and context dependent, some awards have done no more than set out the facts in detail and then conclude that there has been a breach of fair and equitable treatment, without sufficient legal analysis. (232) Alternatively, some tribunals posit fair and equitable treatment as an abstract standard and then conclude that there has been a breach of the standard after a review of the facts without specifying what aspect of the standard would have been breached. (233)

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## §6.25 Specific elements of fair and equitable treatment

Fair and equitable treatment is a broad, overarching standard, that contains various elements of protection, including those elements commonly associated with the minimum standard of treatment, (234) the protection of legitimate expectations, non-discrimination, transparency and protections against bad faith, coercion, threats and harassment. As discussed below, there is a substantial degree of overlap among the various elements.

The analysis that follows eschews providing a single conceptual theory for the normative content of fair and equitable treatment. Fair and equitable treatment, and minimum standards more broadly, have been analyzed as an embodiment of the rule of law, (235) as protecting against the abuse of government power, as a manifestation of the principle of good faith, as good governance norms, (236) and as reflecting general principles of law. (237) Although it would appear that fair and equitable treatment promotes these various objectives, it cannot be explained readily by one concept alone. For example, state responsibility to foreign investment under the fair and equitable treatment standard does not arise from sheer bad governance. In our view, while reference to general normative concepts may assist in some cases in elucidating the broad contours of the treatment guarantee, the content of fair and equitable treatment is best addressed by reference to the particular and often overlapping elements of the standard as elaborated in international jurisprudence.

## §6.26 Legitimate expectations

Tribunals have identified the protection of legitimate expectations as a key element of fair and equitable treatment. (238) Indeed, one tribunal has referred to it as the 'dominant element' of the standard. (239) References to legitimate expectations have become ubiquitous in IIA claims and awards. These ubiquitous references, however, might give rise to confusion because the term 'legitimate expectations' is used in at least three ways. In its most specific form, legitimate expectations refers to expectations arising from the foreign investor's reliance on specific host state conduct, usually oral or

written representations or commitments made by the host state relating to an investment. Reliance typically takes the form of making an initial investment or the expansion of an existing one. Protection of legitimate expectations in this sense is closely related to the principle of estoppel and state responsibility under public international law for unilateral acts. (240) Second, tribunals have referred to legitimate ● expectations of a stable and predictable legal and administrative framework that meets certain minimum standards, including consistency and transparency in decision-making. (241) Third, at the most general level, legitimate expectations can be used to refer to the 'expectation that the conduct of the host State subsequent to the investment will be fair and equitable.' (242) This would appear to be simply another way of stating that the investor has a reasonable expectation that the host state will comply with its IIA obligations.

In developing the concept of legitimate expectations as an element of fair and equitable treatment, tribunals and commentators have drawn on a number of sources: the principle of good faith, (243) abuse of rights, estoppel, (244) the jurisprudence of the European Court of Human Rights (ECtHR), (245) and general principles of law, including the development of the legitimate expectations doctrine in domestic law. (246) Whereas in some legal regimes, the principle of legitimate expectations applies only to expectations of due process in decision-making, (247) IIA tribunals have applied the concept to protect substantive expectations about the treatment of an investment. Legitimate expectations with respect to fairness and due process in decision-making are protected, as well as the expectations with respect to the use and benefit of economic rights and interests forming part of the investment. (248)

*Legitimate expectations as a result of investor reliance on state conduct.* Legitimate expectations may arise as a result of specific state conduct directed at the investor upon which the investor relies. Any form of state conduct can, in principle, give rise to legitimate expectations. Typically, the conduct giving rise to the legitimate expectations will be in the form of oral or written representations, undertakings or commitments, various types of administrative acts such as licenses or permits or providing an official opinion or view. Legitimate expectations will also arise where the investor has a contract with the state. An example of the ● protection of investment expectations (in a non-IIA context) is the *SPP* case in which the tribunal held that certain acts of Egyptian officials were:

... cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments. Whether legal under Egyptian law or not, the act ... created expectations protected by established principles of international law. (249)

In the NAFTA context, the *Waste Management II* tribunal stated that the minimum standard of treatment is breached where the state has reneged on a representation upon which the foreign investor reasonably relied. (250) The NAFTA tribunal in *Thunderbird* describes the elements of legitimate expectations as follows:

Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages. (251)

Legitimate expectations about the treatment of investments will arise 'based on the conditions offered by the host State at the time of the investment.' (252) IIA jurisprudence highlights that, to create legitimate expectations, state conduct needs to be specific and unambiguous. (253) Encouraging remarks from government officials do not of themselves give rise to legitimate expectations. (254) There must be an 'unambiguous affirmation' (255) or a 'definitive, unambiguous and repeated' assurance. (256) The conduct must be targeted at a specific person or identifiable ● group. (257) For example in *Tecmed*, *CMS*, *LG&E*, *Enron*, *Azurix*, *BG*, *Sempra* and *Siemens* there were specific representations that were crystallized into the terms of licenses or concession contracts under which the foreign investment operated.

The expectations in question must be legitimate – justifiable and reasonable based on objective criteria. State representations, commitments or undertakings that were obtained by fraud, bribery, coercion or by providing incomplete or inaccurate information do not give rise to legitimate expectations. (258) For example, in *Thunderbird*, the majority of the tribunal held that a foreign investor could not rely on the opinion of the Mexican gambling regulator about the legality of gambling operations because the information the investor presented to the regulator was incomplete and inaccurate. (259) Although legitimate expectations may still arise where host states representations are not consistent with local law (for example where a government regulatory agency represents to the investor that a specific regulatory requirement does not apply to investment activities and local courts later find that it does), a key issue will be whether the investor had clean hands and if the investor's reliance on the representation was

reasonable in light of all the circumstances. (260)

Whether expectations are legitimate and should be protected involves balancing investor interests in maintaining stability and certainty with the likelihood that regulatory regimes change over time. Expectations are not 'not un-conditional and everlasting.' (261) As noted by the tribunal in *Saluka*:

No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. (262)

P 283 This statement, however, must be read in its specific context. All investors must reasonably assume that the regulatory environment, like the business environment, is subject to change (absent a specially negotiated stabilization clause). Where, however, an investment is made based on specific representations by the host state ● regarding the stability of the regulatory regime, radical changes in the regime will likely breach the fair and equitable treatment standard, provided the disappointment of legitimate expectations is sufficiently serious and material. (263)

The failure to satisfy legitimate expectations as an element of the breach of fair and equitable treatment has been identified in a series of IIA awards. In *MTD*, the tribunal found that Chile had breached its fair and equitable treatment guarantee by authorizing a development project under a foreign investment contract for a project that could not proceed on the basis that it ran afoul of predetermined urban development policies. (264) The tribunal found that the government actions were contrary to the investor's 'basic assumptions.' (265) In *CME*, the tribunal found that changes to the business relationship between CME and its Czech partner resulted in CME losing 'its legal protection' for the investment. (266) In the end, it concluded that there had been a breach of fair and equitable treatment (267) 'by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.' (268)

The terms 'basic assumptions,' 'reasonable reliance' and 'legitimate expectations' of the investor, however, must be used with caution when assessing whether the state has been fair and equitable in its treatment of an investment. Fair and equitable treatment provisions normally apply only to investments. Investors have legitimate expectations about the enjoyment of investments because they have acquired rights under domestic law. Normally an investment consists of a bundle of rights, both tangible and intangible. These might include leases of property, licenses and permits, contracts, inventory and other assets. As a consequence, investors have a legitimate expectation that these acquired rights will be protected and treated in accordance with state representations upon which the investor has relied.

P 284 The *Tecmed* case provides a good illustration of the protection of legitimate expectations based on acquired rights. Tecmed, through its subsidiary, Cytrar, had acquired by public auction rights to operate a hazardous waste landfill in Mexico in 1996. The official 1994 authorization to operate the landfill and the subsequent permits granted by Mexican environmental authorities had projected that the landfill would have a ten year life. Cytrar's acquisition included the landfill's tangible assets and permits. The necessary permit to operate the landfill, with an infinite duration, was subsequently transferred to Cytrar. Mexican environmental ● authorities thereafter replaced the original permit with a one-year renewable permit. This amendment was part of a larger general regulatory change by Mexican authorities to facilitate enforcement actions against non-compliant sites. Owing to community opposition to the continued operation of the site, in 1998 Cytrar and the Mexican authorities agreed that Cytrar would relocate the existing site. Cytrar's agreement to the relocation was premised on the continued operation of the existing site until the relocation. Before the relocation occurred, however, Mexican authorities refused to renew Cytrar's permit for its existing facility. (269) The tribunal found that the denial of the permit was not based on any misconduct on the part of Cytrar but, rather, on community opposition to the continued operation of the site. Accordingly, it held that Mexico's conduct amounted to a breach of fair and equitable treatment. (270) The tribunal stated that fair and equitable treatment:

... in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparency in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved there under, but also to the goals underlying such regulations. The foreign

investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. (271)

P 285 In *MTD*, the tribunal found a breach of fair and equitable treatment because, at the time the host state approved the investment under a foreign investment contract, the investment in question (an urban development project) was inconsistent with government urban planning policies. The land MTD acquired could not be developed under the development and zoning laws in force at the time of acquisition. In the tribunal's view, the breach of fair and equitable treatment occurred as a result of the host state authorizing the investment when it was contrary to established government policy. The tribunal, however, failed to address the exact nature of the investment in question, that is, the legally protected rights that the tribunal ● found had been subject to unfair and inequitable treatment. Nor did the tribunal identify the specific legal rights arising from the foreign investment contract. Of particular note, clause four of the contract made the approval in question subject to other necessary authorizations. MTD had not acquired a right or promise to an amendment of zoning or development laws. (272) Even if MTD had a basic assumption that it could proceed with the development, basic assumptions – or legitimate expectations for that matter – alone do not constitute investments. It is clear that MTD was under a mistaken assumption regarding its rights. The fundamental question in *MTD*, as in all cases of mistaken assumptions, is who should bear the risk of the mistaken assumption? While the tribunal held that MTD was fifty percent responsible for the loss, it failed to clearly identify what rights MTD had acquired that amounted to an investment. If the foreign investment contract did not bind the government to allow the project to proceed (which it did not) then, arguably, MTD's entire loss was the result of its own conduct. (273) The tribunal, on the other hand, found that fair and equitable treatment requires the state to engage in coherent and consistent acts. In its view, one organ of state cannot authorize an investment while, at the same time, the investment is contrary to the urban development laws of the state. (274) However, the finding of inconsistency is questionable where the foreign investment contract was clear that the approval to admit the foreign investment was subject to the necessary regulatory approvals. But it could be otherwise when the government consistently reassured the investor in this regard, or was aware of the important investments being made by the claimant and did not warn the investor accordingly.

The *MTD* case highlights another unsatisfactory element in some IIA awards. In the majority of IIAs, the fair and equitable treatment standard applies to investments, not to investors. (275) Strictly speaking, there is no direct obligation under most IIAs to treat foreign investors fairly and equitably. (276) Although tribunals sometimes refer to the basic assumptions or legitimate expectations of investors, caution must be exercised in this regard. Investors have legitimate expectations with respect to the fair and equitable treatment of their investments first and foremost because legitimate expectations crystallize in an acquired right or investment. As noted above, in a series of cases against Argentina (*BG*, *CMS*, *Enron*, *LG&E* and *Sempra*), tribunals have found a breach of fair and equitable treatment because of the evisceration of the investors' rights under gas licenses. In this type of case, investors have legitimate expectations about the use and enjoyment of their investments because they have legitimately acquired rights under domestic or international law. Another example is *M.C.I. Power Group L.C. and New* P 286 *Turbine, Inc. v. Ecuador*, in which the tribunal found that the investor could not have ● legitimate expectations as to the outcome of negotiations because the contract in question did not give rise to an obligation to resolve disputes. (277) A breach of fair and equitable treatment is more likely to arise where the state has made specific representations about the use or enjoyment of the rights that the investor has acquired and where the investor has detrimentally relied on those representations.

*Assessing legitimate expectations.* Whether reliance by a foreign investor upon host state conduct is 'reasonable' is a highly contextual inquiry. Tribunals and commentators have identified a number of factors that are potentially relevant in assessing an investor's reasonable reliance. These include: (i) the timing and specificity of the representation; (ii) whether there were any disclaimers by the state; (iii) the position of the person making the representation within the government hierarchy; (iv) the relative skills and expertise of the parties; (v) the foreseeability of reliance; (vi) changes in circumstances or conditions upon which the representations were based; (vii) the extent to which there were mistaken assumptions; (ix) the extent to which the investor sought to protect itself for a specific risk; (x) the conduct of the investor.

*Stability and predictability of the legal framework.* Tribunals have found that the stability and predictability of the legal framework is an essential element of fair and equitable treatment. (278) When investors acquire rights under domestic law, the fair and equitable treatment standard will protect legitimate expectations about the use and enjoyment of these rights. This requires a basis level of stability and predictability in the legal framework. Fundamental changes in the legal framework that eviscerate legitimately acquired rights are likely to violate fair and equitable treatment.

In a series of claims against Argentina, tribunals have found that the changes Argentina made to its gas regime in the early 2000s to address severe economic conditions

breached the fair and equitable treatment guarantee, because the changes destroyed the stability and predictability of the regulatory regime governing the gas sector. In the first of these cases, *CMS v. Argentina*, the tribunal found that investors have a legitimate expectation of a certain level of stability and predictability.

P 287 The dispute, like other claims, arose out of Argentina's privatization program in the 1990s. CMS – a US company – became a minority shareholder in TGN, a gas distribution company. CMS claimed that its investment was based on a gas tariff regime calculated in dollars and adjusted every six months based on a dollar price index. This regime was specifically established in Argentine law through the Gas Decree and was protected contractually through TGN's license. The license provided, among other things, that its terms could not be changed without the licensee's consent. The crux of the dispute between the parties was whether there was a binding commitment that tariffs would be calculated in US dollars with biannual adjustments or whether the obligation was to provide a fair and reasonable tariff. The tribunal concluded that the license and Gas Decree guaranteed a tariff regime in dollars. The tribunal then turned to whether Argentine measures reforming the currency exchange system and suspending price adjustments were consistent with Argentina's obligations under the US-Argentina BIT which provides in Article II(2)(a):

Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

The CMS tribunal stated that 'fair and equitable treatment is inseparable from stability and predictability.' (279) Likewise, the *LG&E*, *Enron*, *Sempra* and *BG* tribunals found that the abrogation of the specific guarantees granted to the investors violated the stability and predictability underlying the standard of fair and equitable treatment. (280)

P 288 While some awards to date might suggest that the requirement for a stable and predictable framework for investment is an independent element of fair and equitable treatment, caution should be exercised in referring to freestanding obligations of stability and predictability. The majority of cases where tribunals have invoked the element of stability and predictability have arisen in contexts where there was reliance on specific representations or undertakings and the investors in question had acquired investments with those legitimate expectations. In these cases, tribunals have found that the legal framework cannot 'be dispensed with altogether when specific commitments to the contrary have been made.' (281) When the host state has made no specific assurances or guarantees linked to specific acquired rights, such as in a license or permit, tribunals are less likely to find there is a legitimate expectation that the legal framework will not change.

Further, tribunals have noted that stability and predictability are never absolute. In *Parkerings* the tribunal noted:

It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a *stabilization* clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power. (282)

The *Parkerings* award highlights that the legal regime regulating any particular investment will evolve over time. In assessing legitimate expectations regarding stability and predictability, tribunals will also consider the political environment at the time of the investment. For states in transition, legislative changes are more likely to occur compared to other states. (283) The legal and commercial risks that were known by the investor, or could have been known with reasonable due diligence at the time the investment was made, are a significant factor in assessing legitimate expectations. As noted by the tribunal in *Generation Ukraine*:

P 289 ... it is relevant to consider the vicissitudes of the economy of the state that is host to the investment in determining the investor's legitimate expectations, the protection of which is a major concern of the minimum standards of treatment contained in bilateral investment treaties. The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies. The Claimant thus invested in the Ukraine on notice of both the prospects and the potential pitfalls. Its investment was speculative. (284)

Although the dismantling of legal protections will breach fair and equitable treatment, general regulatory changes to address changing public policy needs generally will not. The issue as stated by the tribunal in *Parkerings* at paragraph 332 is whether in modifying

the regulatory regime, the state has acted 'unfairly, unreasonably or inequitably in the exercise of its legislative power.' As noted in *Saluka*, this requires a detailed weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other:

A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.

Finally, it transpires from arbitral practice that, according to the 'fair and equitable treatment' standard, the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities. (285)

### §6.27 Discrimination

IIA tribunals have stated that discriminatory measures violate fair and equitable treatment. (286) Although intuitively it appears reasonable to assume that discriminatory treatment is neither fair nor equitable, it is useful to distinguish five types of discrimination that may arise with respect to the treatment of foreign investors and investment: (i) discrimination contrary to international human rights, such as discrimination based on race or sex; (287) (ii) unjustifiable or arbitrary regulatory distinctions made between things that are alike or treating unlike things in the same way; (288) (iii) conduct targeted at specific persons or things motivated by bad faith or with an intent to injure or harass; (289) (iv) discrimination in the application of domestic law; (290) and (v) nationality-based discrimination.

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The first four forms of discrimination described above would violate the minimum standard of treatment and fair and equitable treatment. (291) The more difficult issue is whether nationality-based discrimination is contrary to fair and equitable treatment. If so, then arguably fair and equitable treatment provisions subsume national and MFN treatment clauses. This view was taken by F.A. Mann, who argued that 'fair and equitable treatment' is an overarching standard of which specific investment guarantees, including national and MFN treatment, are merely expressions. (292)

A number of awards support the view that nationality-based discrimination is contrary to fair and equitable treatment. In *Eureko B. V. v. Poland*, the tribunal found a breach of fair and equitable treatment because Poland acted for 'purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.' (293) In *Eastern Sugar*, the tribunal found a breach of fair and equitable treatment where the state failed to provide a rational explanation for a regulatory regime. The tribunal drew the inference that the system was designed to appease local economic interests to the detriment of foreign investors. (294)

The argument against interpreting fair and equitable treatment as including nationality-based discrimination is that it would make national and MFN treatment provisions redundant, contrary to an *effet utile* interpretation. Second, the prevailing view is that national and MFN treatment are treaty-based obligations that do not arise under customary international law. If fair and equitable treatment is viewed as synonymous with the minimum standard of treatment, national treatment and MFN treatment would have become customary international law obligations. Third, national and MFN treatment obligations are often subject to a number of exceptions and reservations. (295) These reservations typically do not apply to fair and equitable treatment. Since the overwhelming IIA treaty practice is to prohibit nationality-based discrimination through specific national and MFN treatment provisions, the intent to do so through general fair and equitable treatment provisions should not lightly be inferred without specific evidence of the parties' intentions. Accordingly, the better view is that a general fair and equitable treatment clause does not encompass relative standard of treatment guarantees. (296) This general conclusion is subject to the caveat that each IIA must be assessed on the basis of its particular text and negotiating history. If an IIA has no other specific provisions on discrimination or national and MFN treatment, it may be that the treaty parties did not agree to protect against discrimination, or to the contrary intended fair and equitable treatment to be an all encompassing treatment standard that would include nationality-based discrimination.

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### §6.28 Transparency

There is broad agreement among states that transparency is an important element in creating a predictable, stable and secure climate for foreign investment. (297) Despite

broad agreement as to the desirability of transparency in principle, the meaning of transparency in the context of IIAs is less clear.

Given that transparency is such an ambiguous concept, it is useful to identify core elements or obligations that might be said to arise by a requirement for a government to act transparently. International trade law provides some guidance in this respect distinguishing four distinct transparency obligations: (i) the publication of applicable laws, regulations and policies (publication obligations); (ii) notification requirements with respect to laws, regulations and policies and amendments (notification obligations); (iii) requirements to provide a reasonable opportunity to comment on new laws, regulations or policies (comment obligations); and (iv) the fair and transparent administration of laws, regulations and policies (administration obligations). (298) As discussed in Chapter 8 below, a number of IIAs have express publication, notification, comment and administration obligations.

Some IIA awards have stated that fair and equitable treatment imposes a publication obligation with respect to laws, regulations and policies applicable to foreign investment and investors. (299) In *Tecmed*, the tribunal stated that in order to plan, an investor

P 292 expects to: ●

... know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved there under, but also to the goals underlying such regulations. (300)

Given the centrality of publication of laws, regulations and policies to the rule of law and the administration of justice, the conclusion that fair and equitable treatment includes an obligation on host states to publish applicable law, regulations and policies would appear sound.

The position with respect to notification and comment obligations, however, is less clear. In the trade context, notification and comment obligations arise as a result of specific treaty commitments. Even if these obligations appear in some international trade treaties, trade commitments cannot be simply transposed into the investment context through the fair and equitable treatment standard. (301) There is little state practice to suggest that states have a general duty to specifically notify foreign investors of laws or changes to laws that might affect them. *A fortiori*, there is even less authority for the proposition that governments have an obligation to provide foreign investors with an opportunity to comment on changes to state regulation before changes are implemented. That said, a failure by a government to notify foreign investors of changes to laws, regulations and policies and to allow comments may well be one factor in determining whether there has been a breach of fair and equitable treatment.

Although the existence of a general notification or comment obligation arising from fair and equitable treatment may be questionable, the situation is different where the investor has relied on specific government representations about state regulation. Depending on the circumstances, the conduct or representations of the government may give rise to legitimate expectations. (302) In addition, where ● changes to the legal framework would result in changing the terms of an acquired right (such as a business license or permit or changing a royalty rate under a concession), due process requirements of notification and an opportunity to be heard will apply.

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Finally, fair and equitable treatment most certainly imposes an obligation with respect to the impartial administration of state regulation. (303) For example, in the context of an administrative review, the *Pope & Talbot* tribunal cited a lack of forthrightness in communications, questionable statements and misrepresentations in internal communications as constituting a breach of fair and equitable treatment. (304) IIA tribunals have cited haphazard, opaque, contradictory and inconsistent decisions and decision-making as not being transparent. (305) This element of transparency overlaps substantially with requirements for due process.

In addition to these core elements of transparency, the term is also sometimes used in a general way to refer to the totality of government measures that have negatively affected the investment. For example, in *Metalclad*, the tribunal stated that Mexico had:

... failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrated a lack of orderly process and timely disposition in relation to an investor acting in the expectation that it would be treated fairly and justly. (306)

In *Metalclad*, the lack of transparency arose from the inconsistency between government representations that Metalclad would receive all necessary approvals for the project and the actions of local authorities opposed to the project (in particular the denial of a construction permit for reasons outside their jurisdiction and without providing the investor a right to be heard). The use of transparency in this sense overlaps significantly

with the protection of legitimate expectations and due process. (307)

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Tribunals should exercise caution in asserting – as the *Tecmed* tribunal did – that states have an obligation to act ‘in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor.’ (308) In the case of a large investment that involves the jurisdiction of several government ministries and agencies and multiple levels of government, a host state cannot be held to a standard of strict or absolute liability whereby any degree of inconsistency, ambiguity or lack of transparency breaches fair and equitable treatment. (309) Indeed, in federal states it is common for there to be uncertainties regarding administrative competencies. In addition, the fact that there is a certain lack of transparency because regulation is complex, perhaps even arcane or unwieldy, does not mean that a government has breached its obligation to provide fair and equitable treatment. (310) Further, fair and equitable treatment does require a duty of disclosure of all documents in the possession of the state relating to the investment. (311)

### §6.29 Bad faith, coercion, threats and harassment

Bad faith, coercion, (312) threats, public denunciation and harassment of an investment by a host state are in most situations likely to result in a breach of fair and equitable treatment. A breach occurs when a state fails to act in good faith and its conduct is sufficiently severe. In *Pope & Talbot*, the tribunal found a breach of fair and equitable treatment due to state conduct during an administrative review process when the investor was subject to inappropriate treatment including threats. (313) In *Tecmed*, the tribunal found that the denial of a permit renewal was coercive and inconsistent with fair and equitable treatment. (314)

Politically motivated harassment may amount to a breach of fair and equitable treatment where regulatory powers are used for an improper purpose or the host state's reaction is irresponsible, unreasonable and disproportionate. (315) In *Vivendi II*, the tribunal found that the state had imposed charges and fines on the investment in order to coerce negotiation. The tribunal stated that the ‘charges and fines ● constitute a blatant misuse of the Province's regulatory powers for illegitimate purposes’ and that:

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Under the fair and equitable standard, there is no doubt about a government's obligation not to disparage and undercut a concession (a ‘do no harm’ standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation. (316)

State conduct amounting to duress and harassment will call into question whether investor conduct was voluntary and may vitiate the consent of the investor. (317) For example, in *Desert Line Projects LLC v. Yemen*, (318) the tribunal found a breach of fair and equitable treatment where the investor was coerced into a settlement agreement. The settlement agreement provided that Yemen would pay approximately fifty percent of the amount that it was liable to pay under a final and binding arbitral award. The tribunal found that the claimant had no realistic choice but to enter into the settlement agreement given the physical and financial duress it faced:

The settlement agreement according to which the prevailing party in an arbitral proceeding renounces half of its rights without due consideration can only be valid if it is the result of an authentic, fair and equitable negotiation. (319)

In *SGS v. Philippines*, the tribunal noted that ‘an unjustified refusal to pay sums admittedly payable under an award or a contract’ (320) raises arguable issues with respect to a breach of fair and equitable treatment. Particularly where the claimant is able to show that a refusal to pay a sum due is being used coercively, a claim of fair and equitable treatment is likely to be successful. However, it is unlikely that a refusal to pay sums owing breaches fair and equitable treatment provided judicial enforcement remedies are not denied to the investor. (321)

### §6.30 A requirement to create favourable conditions?

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The perambulatory language in many IIAs is framed proactively. (322) IIA preambles often provide ● expressly that the treaty is to create favourable conditions for foreign investment. In *MTD*, the tribunal stated that fair and equitable treatment is intended to promote, create and stimulate investment rather than to provide ‘prescriptions for a passive behaviour of the State or avoidance of prejudicial conduct to the investors.’ (323) The tribunal in that case noted that these favourable conditions contemplate ‘an effective normative framework; impartial courts, an efficient and legally restrained bureaucracy, and the measure of transparency in decisions that has increasingly been recognized as a control mechanism over governments.’ (324) Accordingly, the host state must ‘establish and maintain an appropriate legal, administrative, and regulatory framework that modern investment theory has come to recognize as a *conditio sine qua non* of the success of private enterprise.’ (325)

There is a distinction between the favourable conditions for foreign investment provided by a stable and predictable legal framework based on the rule of law and favourable conditions based on a certain view of appropriate economic policies. Fair and equitable treatment does not require that governments adopt specific types of economic policies. It does not require host states to liberalize, privatize, deregulate, lower taxes or engage in other economic policies that might be viewed as creating favourable conditions for private investment.

The situation is more complicated where a state represents that it is going to undertake regulatory reforms and, in reliance, the investor invests. For example, in *GAMI* the tribunal addressed whether there was a breach of Article 1105, NAFTA, resulting from Mexico's failure to implement a regulatory program in the sugar industry. The tribunal concluded that the claimant had not proven that the failure to implement the program was attributable to the government. Further, the tribunal stated that the investor 'has not shown that the government's self-assigned duty in the regulatory regime was simple and unequivocal. It is impossible to conclude that the failures in the Sugar Program were both directly attributable to the government and directly causative of GAMI's alleged injury.' (326)

One might ask whether an investor can have legitimate expectations where a state makes general statements about regulatory reforms. In such cases, there is no acquired right to a specific type of regulatory framework and changes in government policy remain a business risk. Further, legitimate expectations arise only where there is specific and unambiguous conduct directed at a specific actor or a defined group of actors. (327) Thus, a stronger claim might be made where government officials make specific and direct promises to an investor about changes to the regulatory framework. Whether reliance is reasonable and should be protected will remain a highly fact contingent determination.

### §6.31 The relevance of the conduct of the foreign investor

P 297 A factor in assessing fair and equitable treatment is the conduct of the investor, particularly ● where the state treatment in question is in response to the misconduct of the foreign investor. (328) The conduct of the foreign investor (whether malfeasance, misfeasance and non-feasance) (329) cannot be separated from the issue of legitimate or reasonable expectations and reasonable reliance. Malfeasance, fraud, bribery, misrepresentation or other unlawful acts may be sufficient to destroy any basis for legitimate expectations or reasonable reliance. (330) For example, when a license is obtained through bribery, revoking it on the basis that it was obtained illegally would probably not give rise to a breach of fair and equitable treatment. Contracts obtained on the basis of fraudulent misrepresentation (331) or bribery may be void or voidable based on the governing law of the contract. (332) Further, when investments are not made in compliance with local law, they might be denied protection, *ratione materiae*, under the specific IIA in question. (333)

Illegal activity by the investor does not, however, provide a license for the state to act illegally, particularly where the illegality is technical. Further, even if a state were entitled to revoke a license or permit based on fraudulent misrepresentation, a revocation of the license without due process might amount to an independent breach of fair and equitable treatment. A discriminatory revocation might also give rise to a breach, such as where other license holders in the same circumstances as the investor also obtained their licenses through misconduct but the state failed to revoke their licenses as well.

P 298 Misfeasance or non-feasance by the foreign investment might also be relevant to the fair and equitable treatment analysis. In assessing whether states have ● treated investments in accordance with the treaty standards, tribunals have referred to omissions and a lack of due diligence by the investor relating to the regulatory environment, (334) a failure to obtain legal protection for business risks, (335) relying on misleading advice from professional advisors, (336) failure to assess properly the quality of investment assets, (337) a lack of candour with regulatory authorities (338) and a failure to seek any redress from national authorities. (339)

IIAs do not provide blanket insurance against all forms of business risk. (340) A tribunal will consider whether someone in the situation of the investor would normally take steps to protect the investment from common types of business and legal risks. A failure to take reasonable steps towards self protection may result in a finding of no breach or a reduction in damages. (341)

## IV Arbitrary, Unreasonable or Discriminatory Measures

### §6.32 Background

P 299 A number of post-WWII investment instruments prohibit impairment of legally acquired rights by arbitrary, unreasonable or discriminatory measures. Prohibitions on these types of measures are common in post-WWII FCN treaties. (342) Provisions similar to those in US FCN treaties were included in ● Article I, Abs-Shawcross Draft Convention, (343) and Article 1, 1967 Draft OECD Convention. (344)

### §6.33 Treaty practice

IAs establish guarantees against impairment of investments by arbitrary, unreasonable or discriminatory measures. The guarantee frequently appears in the same clause providing for fair and equitable treatment. For example, after calling for investments to be accorded fair and equitable treatment, Article II(1)(b), Argentina-US (1991), states:

Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. (345)

Rather than 'arbitrary or discriminatory', other BITs refer to 'unreasonable or discriminatory' (346) or 'unjustifiable or discriminatory' measures. (347) For example, Article 3(1), Czechoslovakia-Netherlands (1991), provides:

Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

Similarly, Article 10(1) of the ECT refers to 'unreasonable or discriminatory measures.'

Although most IAs use the disjunctive 'or,' some IAs use the conjunctive 'and.' The conjunctive formulation is reflected in the April 1994 US Model BIT, which refers to impairment by 'unreasonable and discriminatory' measures and appears in Article II(2) (b), Czechoslovakia-US (1991), which provides:

P 300 Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment. For the purpose of dispute resolution ● under Articles VI and VII, a measure may be arbitrary and discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party. (348)

The *Lauder* tribunal, in interpreting this provision, relied on the conjunctive wording to find that the measure must be arbitrary *and* discriminatory to breach the treaty. (349) On the other hand, where the disjunctive 'or' is used, the IIA will be breached by a measure that is either arbitrary or discriminatory. (350)

### §6.34 Elements of the guarantee

P 301 Despite differences in drafting, most provisions share three common elements. First, the standard typically applies to investments and not to investors. Thus, in common with most fair and equitable treatment provisions, the protection afforded by the clause does not extend to protect individual investors. (351) Second, the standard applies to measures rather than to treatment. (352) Third, the standard is breached by measures that 'impair' the investment. The term 'impair' has not been subject to extensive discussion in IIA awards. The Oxford English Dictionary defines 'impair' as follows: 'To make worse, less valuable, or weaker; to lessen injuriously; to damage, injure.' The ordinary meaning of 'impair' suggests that there has to be a detrimental impact on the investment. The commentary to the 1967 Draft OECD Convention notes that the requirement for impairment means that it is insufficient to prove that the measure is unreasonable or discriminatory, it must also be established that, as a consequence of the measure, 'actual possibilities for the exercise of the right in question are reduced.' (353) In *CMS*, the tribunal rejected the claim with respect to arbitrary ● measures on the basis that there had been no impairment in the management or operation of the investment. (354) On the other hand, the tribunal found that other forms of impairment were already covered by the claim of breach of fair and equitable treatment, which the tribunal upheld.

In order to establish impairment by an arbitrary or discriminatory measure, an investor need not exhaust local remedies. This is made express in some IAs, such as Article II(2) (b), Czechoslovakia-US (1991), reproduced above. Government conduct may be arbitrary or discriminatory under the IIA despite that fact that the investor has exercised the opportunity to review the measure in the courts or administrative tribunals of the host state. The US practice on this point may be explained by reference to the *ELSI* case where the US argued that review of the mayor's order (which the US considered arbitrary) by the Italian courts could not correct the arbitrariness of the mayor's act. (355) In other words, international responsibility arose from the mayor's conduct, notwithstanding subsequent corrective action taken by the Italian state. (356) What remains unclear is whether arbitrariness or discrimination by a judicial authority, would automatically breach the standard, or whether, as in claims involving denial of justice, there would be a requirement to exhaust local remedies before the action of judicial authorities would be considered arbitrary or discriminatory for the purposes of the IIA. (357)

### §6.35 Relationship with fair and equitable treatment

Where an IIA accords fair and equitable treatment (expressly or where the treatment guarantee is conferred based on an MFN clause), a separate prohibition on impairment by unreasonable, unjustifiable or arbitrary measures appears to be superfluous. A measure that involves impairment of this kind will breach fair and equitable treatment. (358) On the other hand, tribunals have found a breach of fair and equitable treatment without finding that the conduct in question was arbitrary or discriminatory. (359) As discussed below, the relationship between fair and equitable treatment and discrimination is less clear, owing to the variety of ways in which discrimination can occur. (360)

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### §6.36 Arbitrary measures

IIA tribunals have consistently held that the threshold for what constitutes arbitrariness is high. In interpreting the meaning of arbitrary, tribunals have referred to the *Neer* standard (361) and the definition of arbitrariness set out in *ELSI*. (362) In *Azurix*, the tribunal stated that:

In its ordinary meaning, 'arbitrary' means 'derived from mere opinion,' 'capricious,' 'unrestrained,' 'despotic.' Black's Law Dictionary defines the term, *inter alia*, as 'done capriciously or at pleasure,' 'not done or acting according to reason or judgment,' 'depending on the will alone.'... The Tribunal finds that the definition in *ELSI* is close to the ordinary meaning of arbitrary since it emphasizes the element of wilful disregard of the law. (363)

In *Enron*, the tribunal found that Argentina's measures to address its economic crisis were not arbitrary because they were based on:

... what the Government believed and understood was the best response to the unfolding crisis. Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place. (364)

The requirement that some important measure of impropriety be manifest suggests a high standard. Other tribunals, including other tribunals considering claims arising out of the Argentine financial crisis, have applied a similarly high standard. (365)

In *LG&E*, the tribunal highlighted that determining whether a measure is arbitrary involves an assessment of the decision-making process involved in implementing the measure:

It is apparent from the Bilateral Treaty that Argentina and the United States wanted to prohibit themselves from implementing measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process. Such process would include a consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments. Certainly a State that fails to base its actions on reasoned judgment, and uses abusive arguments instead, would not 'stimulate the flow of private capital.' (366)

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A measure is likely to be found arbitrary when motivated by inappropriate considerations, as was the case in *Lauder*, (367) or not based on reason, as the tribunal found in *Siemens*. (368)

The high threshold of impropriety required to establish arbitrariness is high-lighted by a series of cases, including *Enron*, in which tribunals have found the state to have breached the fair and equitable treatment standard, but have not found states measures to be arbitrary. (369) A fourfold cumulative test for arbitrariness has been suggested by one commentator: whether the measures were taken by the proper authority, for the proper purpose, because of relevant circumstances and were not patently unreasonable. (370) To date this has not been reflected in the case law.

A slightly lower threshold for establishing arbitrariness is suggested by the award in *Occidental*, where the tribunal found that confusion and lack of clarity in the Ecuadorian tax system 'resulted in some form of arbitrariness, even if not intended....' (371) This finding appears to equate arbitrariness with the fair and equitable treatment requirement for predictability and clarity in regulatory regimes.

Although some commentators have suggested that there do not appear to be relevant distinctions between the terms 'arbitrary,' 'unjustified' and 'unreasonable' and the terms are used interchangeably, (372) IIA awards predominantly suggest that arbitrary is not to be equated with 'unjustified' or 'unreasonable.' (373) Rather, arbitrariness involves a manifest impropriety, such as the absence of a legitimate purpose, capriciousness, bad faith, or a serious lack of due process.

### §6.37 Unreasonable or unjustifiable measures

There is little IIA jurisprudence on what constitutes an unreasonable or unjustifiable measure. Although it is clear that an arbitrary measure could also be categorized as unreasonable or unjustifiable, it is less clear whether unreasonable or unjustifiable should be ● equated with the same type of conduct that breaches fair and equitable treatment.

In a number of cases, tribunals have equated 'unreasonable' with 'unfair.' In *MTD*, the tribunal, having concluded there was a breach of fair and equitable treatment, proceeded to find that an approval of an investment contrary to predetermined government urban policy was unreasonable. (374) In *CME*, the tribunal found a breach of fair and equitable treatment. It then held that the conduct of the Czech Media Council had also been unreasonable on the basis that it had the intention of depriving the foreign investor of the exclusive use of its television license. (375) In *BG*, the tribunal stated that unreasonableness should be measured against the expectations of the parties to the BIT, rather than as a function of the means chosen by a state to achieve its goals. In the view of the tribunal, the unilateral withdrawal of undertakings and assurances given in good faith to investors as an inducement to their making of investment is 'by definition' unreasonable. (376)

Although the IIA jurisprudence is not clear on this point, where an IIA has a general fair and equitable treatment standard, a separate prohibition on impairment by unreasonable or unjustifiable measures would to some extent appear to be superfluous. Measures that impair investment by unreasonable or unjustifiable measures are likely to breach the fair and equitable treatment standard as they did in *BG*.

### §6.38 Discriminatory measures

IAs commonly prohibit impairment of the investment by discriminatory measures without providing any guidance on the type or types of prohibited discrimination. This leaves the scope of the obligation unclear. An ordinary meaning approach would suggest that the prohibition applies to all forms of discrimination. As discussed above at §6.27, discrimination with respect to the treatment of foreign investors and investment could involve: (i) discrimination contrary to international human rights, such as discrimination based on race or sex; (ii) unjustifiable or arbitrary regulatory distinctions made between things that are like or treating unlike things in the same way; (iii) conduct targeted at specific persons or things motivated by bad faith or with an intent to injure or harass; (iv) discrimination in the application of domestic law; and (v) nationality-based discrimination.

With respect to the first four types of discrimination, discriminatory measures will often overlap with the prohibition on unreasonable, unjustifiable or arbitrary measures. The fifth type overlaps with national and MFN treatment. The overlap is illustrated by the *Lauder* case. In *Lauder*, the tribunal found arbitrary and discriminatory measures as the result of the Czech Media Council's requirement that the foreign investment not hold shares in a Czech company that would hold a television broadcasting license. The Media Council took this position due to local ● concerns with foreign control over television broadcasting. (377) The tribunal found that the Media Council had discriminated against the foreign investment on the basis of nationality. (378)

Tribunals have confirmed that different treatment of similarly situated investments is discriminatory unless the state can establish a reasonable basis for the differential treatment. In *Nykomb Synergetics Technology Holding AB v. Latvia*, the tribunal found the investment was subject to discriminatory measures where higher prices were paid to two other electricity companies but not to the claimant. The tribunal stated:

The *Arbitral Tribunal* accepts that in evaluating whether there is discrimination in the sense of the Treaty one should only 'compare like with like'... all of the information available to the Tribunal suggests that the three companies are comparable, and subject to the same laws and regulations ... In such a situation, and in accordance with established international law, the burden of proof lies with the Respondent to prove that no discrimination has taken or is taking place. (379)

Likewise, in *Saluka*, the tribunal found discrimination where there was dissimilar treatment among four similarly situated banks. The tribunal stated that '[s]tate conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.' (380)

Discrimination has also been an issue in a number of cases against Argentina. In *LG&E*, the tribunal found that although Argentina had treated the gas distribution companies in a discriminatory manner by imposing stricter measures on them than other public-utility sectors, LG&E had not proven that the measures were targeted at foreign investments, even though gas distribution was primarily in foreign hands. (381) Nevertheless, the tribunal found that discrimination 'against gas distribution companies vis-à-vis other companies, such as water supply and electricity companies, is evident.' (382) In contrast, in *Enron*, the tribunal found that there were important differences between the sectors

P 306 and that there was no ‘capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors.’ (383) Similarly, in *CMS*, (384) *Sempra*, (385) and ● *BG* (386) the respective tribunals held there was no discrimination between similarly situated groups.

### §6.39 An effects-based analysis of discrimination

In addressing the meaning of discrimination, at least one tribunal has suggested that discrimination requires proof of intention. (387) The better position is that discrimination is an effects-based analysis. As noted in *LG&E*: ‘a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect.’ (388) As in the case of national treatment and fair and equitable treatment, subjective intention is not a necessary element for breach of an IIA treatment standard. (389)

### §6.40 Overlap with national and MFN treatment clauses

When the discrimination at issue is nationality-based, there may well be overlap with national and MFN treatment clauses. Whether this is the case will depend on the particular IIA in question. Some IIAs, such as Czechoslovakia-Netherlands (1991) considered in *Saluka* and *CME*, do not have separate national and MFN treatment provisions. In this type of IIA, a general reference to discrimination should be interpreted to include nationality-based discrimination. (390)

On the other hand, where an IIA has specific national and MFN treatment provisions, an *effet utile* interpretation might suggest that a reference to ‘discriminatory measures’ should not be interpreted to cover nationality-based discrimination but other forms of discrimination. Some support for this position comes from the decision in *Genin*. In *Genin*, the tribunal discussed Article II(3)(b), Estonia-US (1994), which provided for non-impairment by arbitrary or discriminatory measures. The tribunal noted:

P 307 Customary international law does not, however, require that a state treat all aliens (and alien property) equally, or that it treat aliens as favourably as nationals. Indeed, ‘even unjustifiable differentiation may not be actionable.’ In the present case, of course, any such discriminatory treatment would not ● be permitted by Article II(1) of the BIT, which requires treatment of foreign investment on a basis no less favourable than treatment of nationals. (391)

In *BG*, the tribunal noted that, although the Claimant was relying on national treatment cases, its discrimination claim was based on the prohibition of discriminatory measures of Argentina-UK (1990), (392) rather than the national and MFN treatment provision in Article 3. The tribunal, nevertheless, accepted for the sake of its analysis that a breach of Article 3 would ‘unavoidably also be “discriminatory”’ for the purposes of the discriminatory measures provision. (393) Drawing on national treatment cases, the tribunal concluded, however, that the claimant had not proven that BG, a gas distribution company, was in like circumstances to companies operating in the transmission and distribution of electricity. (394)

As suggested by the tribunal in *BG*, where the discrimination in question is nationality-based there would appear to be overlap between a general prohibition on discriminatory measures and national and MFN treatment provisions. If the claim is framed as a question of nationality-based discrimination, tribunals should follow the approach of the *BG* tribunal and analyze the claim in accordance with national and MFN treatment jurisprudence.

## V Protection and Security Obligations

### §6.41 Background

P 308 The minimum standard of treatment requires the host state to exercise due diligence to protect foreigners and their property from physical harm. (395) Nineteenth century FCN treaties commonly had clauses providing for protection and security. (396) Clauses providing for protection and security are also common in post-WWII investment instruments, including FCN treaties. (397) For example, the Italy-US FCN considered in *ELSI* guarantees foreign nationals ‘the most constant protection and security for their persons and property’ and ‘the full ● protection and security required by international law.’ (398) In *ELSI*, the ICJ stated that the ‘constant protection and security’ guarantee did not provide a ‘warranty that property shall never in any circumstances be occupied or disturbed.’ (399)

Article I, Abs-Shawcross Convention, and Article 1, 1967 Draft OECD Convention, both provide that property is to receive the ‘the most constant protection and security.’ The commentaries on both conventions highlight that the clause is based on the provisions in US FCNs. (400)

### §6.42 IIA practice

Most IIAs provide a guarantee of protection and security to investments. The drafting of the clause varies widely. Typical clauses provide guarantees of ‘protection,’ (401) ‘full

protection,' (402) 'protection and security,' (403) 'full protection and security,' (404) 'full physical security and protection,' (405) 'adequate protection and security,' (406) 'full and constant protection and security,' (407) 'complete and adequate protection and security,' (408) 'constant protection and security,' (409) or 'the most constant protection and security.' (410) A small number of IIAs refer to 'full protection and legal security.' (411)

A number of more recent IIAs clarify that the protection and security obligation is not to be given an autonomous meaning, equating it with the obligation imposed under the minimum standard of treatment. For example, Article 5, US-Uruguay (2005), provides that:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
  - ...
    - (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law.

A few IIAs make no express mention of protection obligations. (412)

### §6.43 Physical protection

Due diligence in the physical protection of aliens and their property is required under the minimum standard of treatment. (413) IIA awards have consistently found that protection and security obligations in IIAs impose on the host state an obligation of due diligence or vigilance with respect to the physical protection of foreign investment. (414) Tribunals have rejected arguments that full protection and security obligations provide a guarantee against injury or impose strict liability. (415) The obligation with respect to physical protection is one of due diligence – the same standard as that under customary international law.

In *AAPL*, the first IIA award, the tribunal interpreted a clause providing that investments shall enjoy 'full protection and security' in the context of the destruction of a shrimp farm during a conflict between Tamil rebels and Sri Lankan forces. (416) The issue before the tribunal was whether the requirement for full protection and security represents a codification of customary international law, or imposes strict liability on the host state. In line with previous authorities, (417) the tribunal held that the term could not be construed as giving rise to strict liability. (418) The majority concluded that there had been a breach of full protection and security ● because of the failure of Sri Lankan authorities to take precautionary measures before launching an armed attack and because the farm was destroyed while under the exclusive control of government forces. (419)

### §6.44 Due diligence, physical protection and the level of host state resources

The relevance of the host state's level of development and resources to the application of physical protection and security obligations is unclear. (420) The standard of due diligence has been expressed by Alwyn Freeman as: 'nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.' (421) The reference to reasonable measures might suggest that host states are required to provide an objective minimum standard of physical protection to foreign investors and investment. International authorities, however, suggest that the applicable standard depends on the situation of the host state. In *British Claims in the Spanish Zone of Morocco*, arbitrator Max Huber, in discussing the diligence required of a state in the protection of aliens, noted that a state is 'obliged to exercise only that degree of vigilance which corresponds to the means at its disposal' and that the 'vigilance which from the point of view of international law a state is obliged to exercise, may be characterized as *diligentia quam in suis*.' (422) *Diligentia quam in suis*, a principle of Roman law, requires a level of care that one applies in one's own affairs. In his work on state responsibility, Ian Brownlie has argued that the *diligentia quam in suis* principle applies to due diligence. The standard calls for an objective national treatment standard that measures conduct based on what could be reasonably expected of the state in question in light of its resources. (423) The extent of due diligence an investor may expect will vary, therefore, according to local conditions. This means that due diligence is limited by a state's capacity to act – a state will not be responsible when action would have been impossible.

Although the host state is required to exercise an objective minimum standard of due

diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as relevant circumstances in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.

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#### 56.45 Regulatory and legal protection

A number of IIAs awards have suggested that protection and security obligations include a guarantee of regulatory and legal security for investments. This issue has arisen in a number of the claims by foreign investors against Argentina. Claimants have argued that protection and security extends beyond physical protection of an investment's officials, employees or facilities, and extends more generally to protections afforded by the legal system. Some tribunals, while not disagreeing in principle that protection and security obligations can extend beyond physical security, have expressed reluctance with this approach and suggested that this interpretation would result in equating the standard with fair and equitable treatment. (424)

In *CME*, the tribunal interpreted the full security and protection guarantee in Article 3(2), Czechoslovakia-Netherlands (1991), as including legal security:

The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued. (425)

The tribunal found a breach of full security and protection due to the actions of the Czech Media Council in undermining the claimant's contractual rights. (426) In contrast, the *Saluka* tribunal, interpreting the same provision, found that it 'applies essentially when the foreign investment has been affected by civil strife and physical violence.' (427) Further, it stated that the 'practice of arbitral tribunals seems to indicate ... that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.' (428) The *Saluka* tribunal appears to have accepted that the guarantee would apply with respect to police searches of premises. (429)

In *Lauder*, although the tribunal did not find a breach of full protection and security, the tribunal suggested that in the context of a dispute between two private parties, the clause prescribes a duty to provide a judicial system in which disputes can be resolved. (430) This suggests that protection and security includes an obligation to provide a judicial system where private rights can be vindicated. Further, support for the position that protection and security obligations extend to judicial ● proceedings can also be found in *ELSI*, in which the US argued that a sixteen month delay of the Italian courts in ruling on the lawfulness of the requisition of a manufacturing plant was a denial of procedural justice that amounted to a breach of the most constant protection and security provision in the Italy-US FCN. (431) The decision of the Chamber of the ICJ holding that the delay in question did not amount to a treaty breach suggests that in principle the clause applies to judicial procedures. (432)

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The reasoning of tribunals on the scope of the protection and security obligation is often unclear because of the tendency to interpret the obligation as part of the fair and equitable treatment guarantee, rather than as an independent treatment standard. Awards, while suggesting that protection and security provisions extend beyond physical protection, often do so in the context of finding that there was an independent breach of fair and equitable treatment. For example, in *Azurix*, the tribunal stated:

The Tribunal is persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security. The cases referred to above show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view. The Tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security. To conclude, the Tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT. (433)

The *Azurix* tribunal suggests that 'full' protection and security goes beyond physical security, and found that since there was a breach of fair and equitable treatment, there was also a breach of full protection and security. But the cases that the *Azurix* tribunal refers to as authority –*Occidental* and *Wena*– do not support the argument that full protection and security go beyond physical protection and security. In *Occidental*, the question of whether the full protection and security clause was breached was moot because the tribunal had found a breach of fair and equitable treatment. (434) In *Wena*, the breach of full protection and security resulted from the failure of the police to take any action relating to the physical seizure of *Wena*'s hotels. (435)

In some cases, the treaty itself expressly subsumes protection and security within fair and equitable treatment. For example, Article 5(1), Argentina-France (1991), guarantees that '... investments ... shall enjoy ... protection and full security in accordance with the principle of fair and equitable treatment referred to in Article 3 of this Agreement.' In *Vivendi II*, the tribunal, in interpreting this provisions, stated that:

In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment. (436)

Some treaties expressly extend the scope of protection and security beyond physical protection. In *Siemens*, the tribunal addressed Argentina-Germany (1991), which includes a requirement for 'legal security.' (437) The tribunal high-lighted that since investment includes tangible and intangible assets, the obligation to provide full protection and security extends beyond physical protection of tangible things. (438) On the other hand, the 2004 Model US BIT adopts a narrower approach, stating that full protection and security only requires each Party to provide the level of police protection required under customary international law.

In *BG*, (439) the tribunal rejected *BG*'s argument that Argentina breached the obligation to ensure that investments 'shall enjoy protection and constant security' (440) and stated that the obligation has traditionally been associated with 'situations where the physical security of the investor or its investment is compromised.' (441) Although the tribunal notes that other tribunals have interpreted the obligation more broadly to provide a secure investment environment, the tribunal found that it was inappropriate to depart from the 'originally understood standard.' (442)

The above discussion illustrates that IIA jurisprudence has adopted conflicting views on the scope of protection and security obligations. As highlighted by the *Azurix* tribunal, the ordinary meaning of a full protection and security obligation arguably extends beyond physical security, particularly since investment is typically defined to include intangible assets. Various forms of legal and judicial protection may therefore be elements of the protection and security obligation. Further, as suggested by the *Vivendi II* tribunal, the obligation may extend to protection against harassment where there is no physical harm. (443)

In practice, since most IIAs already accord fair and equitable treatment, whether protection and security obligations extend to legal security and the stability and predictability of the regulatory framework is unlikely to affect the outcome of a case. Further, since fair and equitable treatment includes treatment in accordance with the minimum standard, it would appear that a general fair and equitable treatment clause includes the protection and security obligation.

#### §6.46 Breach of protection and security in the administration of justice

When there has been a breach of protection or security due to deficiencies in the administration of justice, it is arguable that the delict in question is a denial of justice. IIA tribunals, consistent with international authorities, have stated that local remedies must be exhausted (to a degree of reasonableness) in order to claim a denial of justice. (444) If relief is obtained in the domestic judicial system, then no denial of justice would have occurred. This appears to have been the unstated approach taken by the *Saluka* tribunal. In *Saluka*, the claimant complained that a police search of offices and seizure of documents was illegal, violated privacy rights and breached the Czech Republic's full protection and security obligation. The tribunal rejected the claim on the basis that there had been a successful petition to the Czech Constitutional Court and the claimant could 'no longer be aggrieved.' (445)

One may question whether this is the proper approach. If a police search and seizure were to be found to be a breach of another minimum standard – for example arbitrary, discriminatory, or unfair and inequitable treatment – an investor may well want to seek damages – particularly if the police conduct were malicious. Even if the investor had obtained a local remedy, as in *Saluka*, and subject to double compensation issues, this would not appear to bar it from seeking damages – perhaps moral damages – for the breach of the state's international obligation. The same reasoning arguably applies if

there is a breach of protection and security.

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## VI Compensation for Extraordinary Losses

### §6.47 Extraordinary losses

Host states are not generally responsible for losses attributable to war, armed conflict, state of national emergency, revolution or insurrection where the loss in question is caused by the host state's own armed forces, acting with reasonable necessity in the circumstances. (446) State responsibility arises only if there has been a lack of due diligence, or if the destruction could not be justified by the exigencies of the situation. (447)

IAs usually address compensation for losses in one of two ways. (448) The first type of provision provides an entitlement to compensation in the event of requisition or when losses are suffered that are not justified by the exigencies of the circumstances. Second, IAs often expressly provide for national and MFN treatment in case the host state compensates other investors for extraordinary losses.

An example of the first type of provision appears in Article 4(2), Sri Lanka-UK (1980), which states:

.... nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from

- (a) requisitioning of their property by its forces or authorities, or
- (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

Under Article 4(2), there is a right to compensation for losses resulting from the requisition or destruction of investments by armed forces where the measures were neither caused in combat, nor required by the exigencies of the circumstances. In these situations, IAs usually require restitution or adequate compensation. (449)

Second, even though customary international law and IAs do not generally impose an obligation on the host state to compensate foreign investors for these types of extraordinary losses, a host state might as a matter of domestic law or policy provide compensation for these losses. As a result many IAs have specific ● provisions that require that, in such as case, compensation be granted on a non-discriminatory basis. For example, Article 4, Argentina-UK (1990), provides that:

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Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation of other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable. (450)

This provision clarifies that national and MFN treatment apply to compensation payments for these types of losses. Some provisions only expressly provide for MFN treatment. (451)

Tribunals have rejected the argument that this type of provision establishes an exception to IIA obligations. In *BG*, the tribunal rejected Argentina's argument that Article 4, Argentina-UK (1990), provides that non-discriminatory measures taken in cases of national emergencies do not breach IIA protections. The tribunal stated that Article 4 provides for a 'specific expression of the national treatment and MFN treatment standard in relation to compensation' and not an excuse from liability. (452) Similarly, in *CMS*, in interpreting Article IV(3), Argentina-US (1991), (453) the tribunal noted:

The plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner. (454)

The relationship between extraordinary loss provisions and necessity defences is discussed further at Chapter 10, §10.8, below.

## VII Preservation of Rights/More Favourable Treatment Clauses

### §6.48 More favourable treatment

Some IIAs clarify that the IIA obligations do not prevail over more favourable laws or agreements and that foreign investors or investments are to receive the more favourable treatment provided in other international agreements or in domestic laws. (455) More favourable treatment clauses, also called preservation of rights or non-derogation clauses, appear in early investment instruments including the Abs-Shawcross Draft Convention (456) and the 1967 Draft OECD Convention. (457) As noted by Georg Schwarzenberger in his commentary on the Abs-Shawcross Draft Convention, the purpose of the provision is to clarify that what are intended as minimum standards of treatment are not interpreted as 'constituting an upper ceiling for the treatment of foreign nationals.' (458)

An example of clause entitled 'Preservation of Rights' is Article IX, US-Zaire (1984), considered in AMT: (459)

This Treaty shall not supersede, prejudice, or otherwise derogate from:

- (a) laws and regulations, administrative practices or procedures, or adjudicatory decisions of either Party;
- (b) international legal obligations; or
- (c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

whether extant at the time of entry into force of this Treaty or thereafter, that entitle investments, or associated activities, of nationals or companies of the other Party to treatment more favorable than that accorded by this Treaty in like situations.

Article 3(5), China-Netherlands (2001), provides a typical example of a more favourable treatment clause:

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If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

The clause serves to ensure that the investment is entitled to the more favourable treatment that may exist under domestic or international law, or that may arise in the future. At first glance, the clause might be viewed as a particularly widely worded MFN clause that could apply to extend the scope of IIA protections available under other host state IIAs. This interpretation, however, would overlook the fact that the more favourable treatment in question is that of 'obligations under international law ... between the Contracting Parties.' (460) It does not extend to more favourable treatment accorded by the host state to third-state investments.

Article 16, US-Uruguay (2005), provides a slightly different formulation by framing the rule as one of non-derogation. Under this provision, the BIT does not derogate from more favourable treatment available to an investor or investment.

#### Article 16: Non-Derogation

This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favorable than that accorded by this Treaty:

- 1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;
- 2. international legal obligations of a Party; or
- 3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

In *Siemens*, the claimant relied upon the more favourable treatment clause in Article 7(1), Argentina-Germany (1991), (461) to buttress its argument that host state law may prevail over the provisions of the BIT only to the extent that it provides treatment to the investment more favorable than the BIT. By contrast, those provisions of domestic law that provide less favorable treatment do not derogate from IIA obligations. (462)

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Preservation of rights clauses should not be confused with observance of undertakings clauses (see below Chapter 9, §9.28) and applicable law clauses (see above Chapter 2,

## VIII Exceptions

### §6.49 Exceptions

IIAs typically do not provide specific reservations or exceptions to general minimum standards of treatment. A state may, however, be able to rely on express general reservations, exceptions or defences under customary international law. (463) ●

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## References

- 1) National and MFN treatment prohibit nationality-based discrimination by providing that foreign investors and investment cannot be treated less favourably than host state nationals and their investments and investors and investments from third states. See *infra* Chapter 4, National Treatment; and *infra* Chapter 5, Most-Favoured-Nation Treatment.
- 2) Minimum standards of treatment usually apply only to ‘investments of investors’ and not to ‘investors’ individually. See *infra* §6.18.
- 3) A prohibition on impairment by discriminatory measures, while technically a relative standard because it involves an unreasonable distinction being made between things that should be treated alike, is considered in this chapter as this prohibition typically appears in the same IIA provision as the prohibition on arbitrary measures. In addition, there is overlap between minimum and relative standards as IIA tribunals have interpreted fair and equitable treatment as prohibiting certain forms of discrimination. See *infra* §6.27.
- 4) See A. A. Fatouros, *Government Guarantees to Foreign Investors* (New York; London: Columbia University Press, 1962) at 136.
- 5) *S.D. Myers, Inc. v. Canada* (Partial Award, 13 Nov. 2000) [Myers] at para. 259.
- 6) See *infra* §6.24.
- 7) The customary standard is sometimes referred to as *the* minimum standard of treatment. Confusion sometimes arises between references to *the* minimum standard and references to treaty-based minimum standards of treatment. References in this book to *the* minimum standard of treatment are to the customary international law minimum standard of treatment of aliens and their property.
- 8) See *supra* Chapter 1, §1.2 to §1.13, for an overview of the historical debate.
- 9) See generally, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* [1970] ICJ Rep 3 [Barcelona Traction] at 32; A.H. Roth, *The International Minimum Standard* (Leiden: A.W. Sijthoff's Uitgeversmaatschappij N.V., 1949); E. Borchard, ‘The “Minimum Standard” of the Treatment of Aliens’ (1940) 3 Mich LR 445; I. Brownlie, *Principles of Public International Law*, 6th edn (Oxford: Oxford University Press, 2003) at 502-505 and R. Jennings & A. Watts, eds, *Oppenheim's International Law*, 9th edn (London: Longman, 1992) [Oppenheim's International Law] at 903-939. Also see J.C. Thomas, ‘Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators’ (2002) 17 ICSID Rev 21 for a comprehensive discussion of authorities on the minimum standard of treatment.
- 10) A small number of IIAs have no general minimum standard of treatment provisions. See *Albania-Egypt* (1993).
- 11) See *supra* Chapter 1, §1.3 on diplomatic protection.
- 12) See *infra* §6.21.
- 13) See *infra* §6.22.
- 14) *Neer* (1926) IV RIAA 60 at 61-62. See also Commissioner Nielsen's separate opinion at 65.
- 15) In a number of early NAFTA cases, Canada submitted that *Neer* reflected the international minimum standard. The Czech Republic took a similar position in *Saluka Investments BV v. Czech Republic*. As discussed below, tribunals have, on the whole, rejected this submission. For the discussion of *Neer* as reflecting the minimum standard of treatment, see *Pope & Talbot Inc v. Canada* (Award in Respect of Damages, 31 May 2002) at para. 57; *Mondev International Ltd. v. United States* (Award, 11 Oct. 2002) at para. 114 [Mondev]; *United Parcel Services of America Inc. v. Canada* (Award on Jurisdiction, 22 Nov. 2002) at para. 78; *ADF Group Inc. v. United States* (Award, 9 Jan. 2003) [ADF] at para. 180; *Waste Management, Inc. v. Mexico* (Award, 30 Apr. 2004) [Waste Management II] at para. 93; *GAMI Investments, Inc. v. Mexico* (Final Award, 15 Nov. 2004) at para. 95 [GAMI]; and *Saluka Investments BV v. Czech Republic* (Partial Award, 17 Mar. 2006) [Saluka] at para. 290.
- 16) See *infra* §6.8 on due diligence.

- 17) See also *Harry Roberts* (1926) IV RIAA 77 arising from the physical treatment of a US citizen, Harry Roberts, during his detention by Mexican authorities. The Commission stated, *ibid.*, at 80, that national treatment 'is not the ultimate test of the propriety of the acts of the authorities in the lights of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.' Thus, even where a state has the sovereign right to expel an alien, the minimum standard can be invoked with respect to the manner in which the right is exercised. See also *Boffolo* (1903) X RIAA 528, *Chevreaux* (1931) 27 AJIL 153, *Hopkins* (1926) 21 AJIL 160 at 166-167 and discussion in *Oppenheim's International Law*, *supra* note 9 at 903-948.
- 18) *Supra* note 15. Despite citation in early IIA cases, *Neer* does not appear to have been cited in the voluminous jurisprudence of the Iran-US Claims Tribunal. For a discussion of early references to *Neer*, see Thomas, *supra* note 9 at 31-39.
- 19) In *Pope & Talbot Inc v. Canada* (Award on the Merits of Phase 2, 10 Apr. 2001) [*Pope & Talbot*] Canada suggested that the minimum standard of treatment is breached where the state acts 'egregiously.' See *Pope & Talbot*, *ibid.*, at para. 109.
- 20) At the Hague Codification Conference in 1929, delegates considered the *Draft Convention on Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners* prepared by Professor Edwin Borchard. The draft identifies a number of elements of the minimum standard of treatment including a requirement that redress for injuries to aliens be no less adequate than those afforded to its nationals, responsibility for denial of justice and a requirement for due diligence to prevent injuries. See *supra* Chapter 1, §1.10, regarding the Hague Codification Conference and the draft convention. In 1949, Roth, *supra* note 9 at 185-186, identified the eight following rules that general international law imposes on states with regard to the treatment of aliens: '(1) An alien, whether a natural person or a corporation, is entitled by international law to have his juridical personality and legal capacity recognized by the receiving state. (2) The alien can demand respect for his life and protection for his body. (3) International law protects the alien's personal and spiritual liberty within socially bearable limits. (4) According to general international law, aliens enjoy no political rights in their State of residence, but have to fulfil such public duties as are not incompatible with allegiance to their home state. (5) General international law gives aliens no right to be economically active in foreign States. In cases where national economic policies of foreign States allows aliens to undertake economic activities, however, general international law assures aliens equality of commercial treatment among themselves. (6) According to general international law, the alien's privilege of participation does not go so far as to allow him to acquire private property. The State of residence is free to bar him from ownership of all certain property, whether movables or realty. (7) Where an alien enjoys the privilege of ownership of property, international law protects his rights in so far as his property may not be expropriated under any pretext, except for moral or penal reasons, without adequate compensation. Property rights are to be understood as rights to tangible property which have come into concrete existence according to the municipal law of the alien's State of residence. (8) International law grants the alien procedural rights in his State of residence as primary protection against violation of his substantive rights. These procedural rights amount to freedom of access to court, the right to a fair, non-discriminatory and unbiased hearing, the right to full participation in any form in the procedure, the right to a just decision rendered in full compliance with the laws of the State within a reasonable time.'
- 21) In *Mondev*, *supra* note 15, the tribunal stated at para. 115 that '... there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the *Neer* principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens present on the territory of the State, are confined to the *Neer* standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.'
- 22) *ADF*, *supra* note 15 at para. 179.
- 23) *Mondev*, *supra* note 15 at para. 116; *ADF*, *ibid.*, at para. 179; and *The Loewen Group, Inc. and Raymond L. Loewen v. United States* (Award, 26 Jun. 2003) [*Loewen*] at para. 132.
- 24) *Ibid.*, at para. 117.
- 25) *Waste Management II*, *supra* note 15 at para. 98. The tribunal referred to the 'the minimum standard of treatment of fair and equitable treatment' as it was interpreting Art. 1105, NAFTA. The NAFTA Free Trade Commission in its 31 Jul. 2001 interpretation equated Art. 1105 with the minimum standard of treatment and stated that for the purposes of Art. 1105, 'The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.' On Art. 1105, NAFTA, see *infra* §6.23. See also *Myers*, *supra* note 5 at para. 263 and *Mondev*, *supra* note 15 at para. 127.
- 26) NAFTA Free Trade Commission, *ibid.*

- 27) See, generally, C. Eagleton, 'Denial of Justice in International Law' (1928) 22 AJIL 538; J.W. Garner, 'International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to a Denial of Justice' (1929) 10 BYIL 181; G.G. Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 BYIL 93; C. De Visscher, 'Le deni de justice en droit international' (1935) 52 RDCADI 367; A.V. Freeman, *The International Responsibility of States for Denial of Justice* (London: Longman, Green and Company, 1938); H. W. Spiegel, 'Origin and Development of Denial of Justice' (1938) 32 AJIL 63; E. Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (1940) 3 Mich LR 445; F.V. García-Amador, Louis B. Sohn & R.R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, New York: Oceana Publications, 1974); A. Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims,' (2005) 45 VJIL 809 and J. Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005) [Paulsson].
- 28) See D. Wallace, 'Fair and Equitable Treatment and Denial of Justice: Loewen v. US and Chatten v. Mexico,' in T. Weiler, ed., *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005) 669 at 671-685 for a discussion of the terminological confusion.
- 29) On this point see commentary to Article 9, *The Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners* (1929) 23 AJIL Spec Supp 173 [1929 Harvard Draft] at 174.
- 30) Jan Paulsson's recent treatise *Denial of Justice in International Law* provides the following succinct definition 'a state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.' Paulsson, *supra* note 27 at 4.
- 31) 1929 Harvard Draft, *supra* note 29. See *supra* Chapter 1, §1.10, for historical background on the 1929 Harvard Draft.
- 32) Art. 9, *ibid.* The commentary to the Harvard Draft 1929, *ibid.*, at 175, notes that an 'exact definition seems neither possible nor advisable.' The commentary provides a number of examples based on authorities: 'the failure to apprehend a criminal, denial of free access to the courts, failure to render a decision or undue delay in rendering judgment, corruption in the judicial proceedings, discrimination or ill-will against the alien as such, or as a national of a particular state, the refusal in bad faith to apply the local law, executive interference with the freedom or impartiality of the judicial process, failure to execute judgment, denial of an appeal where local law ordinarily permits it, negligently permitting a prisoner to escape, refusal to prosecute the guilty, or premature pardon of a convicted person, have all been deemed, under particular circumstances, instances of "denial of justice."'
- 33) A small number of IIAs have specific provisions guaranteeing access to courts. See *infra* Chapter 8, §8.30.
- 34) See *Mondev*, *supra* note 15 at para. 136; *Loewen*, *supra* note 23 at para. 189 and *Saluka*, *supra* note 15 at paras 492-493. With respect to procedural irregularities amounting to a denial of justice, see discussion in *Amco Asia Corporation v. Indonesia* (Award, 31 May 1990), 1 ICSID Rep 569 at 597-605.
- 35) *Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico* (Award, 1 Nov. 1999) [Azinian] at para. 102.
- 36) *Azinian*, *ibid.*, at para. 99.
- 37) See *Azinian*, *ibid.*, at paras 97-103. See also *Mondev*, *supra* note 15 at para. 127; *Loewen*, *supra* note 23 at paras 57-58; *Waste Management II*, *supra* note 15 at para. 98; and *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentina* (Award, 21 Nov. 2000) [*Vivendi I*] at para. 80. This award was later annulled on other grounds.
- 38) See Freeman, *supra* note 27 at 326 *et seq.*
- 39) *Mondev*, *supra* note 15 at para. 127. Also see *Loewen*, *supra* note 23 at para. 132.
- 40) For a recent restatement of the distinction between procedural and substantive denial of justice, see Bjorklund, *supra* note 27.
- 41) Paulsson, *supra* note 27, at 82-88.
- 42) *Ibid.*, at 98.
- 43) See *supra* Chapter 5, §5.11 *et seq.*, on the use of MFN clauses to circumvent local remedy requirements as a condition of proceeding to arbitration.
- 44) Some tribunals have, nevertheless, questioned whether this is invariably the case. In *Mondev*, *supra* note 15 at para. 96, the tribunal stated that: 'under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule 'are interlocking and inseparable.' In *Mondev*, the claimant had exhausted local remedies because its petition for *certiorari* to the US Supreme Court was denied (see, *ibid.*, at para. 1).
- 45) The tribunal in *Loewen*, *supra* note 23, after surveying various international authorities at paras 151-155 concluded at para. 156 that: 'The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing, through its legal system, the inchoate breach of international law occasioned by the lower court decision.' See also Paulsson, *supra* note 27 at 36.
- 46) Paulsson, *ibid.*, at 109.

- 47) Paulsson, *ibid.*, at 100.
- 48) For a contrary view, however, see Wallace, *supra* note 28 questioning the requirement for exhaustion in the context of IIAs.
- 49) Loewen, *supra* note 23 at 138. Loewen was sued in Mississippi by O'Keefe for breach of a funeral services contract worth some USD 4 million. The Mississippi jury awarded O'Keefe some USD 500 million in damages. Loewen then sought to appeal the verdict but was required to post an appeal bond for 125% of the judgment as a condition of staying execution. The Mississippi Supreme Court refused to reduce the appeal bond, which effectively foreclosed Loewen's appeal rights because obtaining such a large appeal bond was practically impossible. Loewen eventually settled with O'Keefe for USD 175 million.
- 50) See, Wallace, *supra* note 28 and N. Rubins, 'Loewen v. United States: The Burial of an Investor-State Arbitration Claim' (2005) 21 AI 1.
- 51) See J. Paulsson, 'Continuous Nationality in Loewen' (2004) 20 AI 213.
- 52) In contrast, in *Mondev*, *supra* note 15, local remedies had been exhausted as the US Supreme Court denied certiorari.
- 53) Paulsson, *supra* note 27 at 118.
- 54) *Ibid.*, at 115-119.
- 55) Loewen, *supra* note 23 at 122.
- 56) *Ibid.*, at 123.
- 57) The claim had been brought by The Loewen Group, Inc. and Raymond L. Loewen [Loewen]. See *The Loewen Group, Inc. and Raymond L. Loewen v. United States* (Decision on Respondent's Request for a Supplementary Decision, 6 Sep. 2004).
- 58) Paulsson, *supra* note 27 at 185.
- 59) See Wallace, *supra* note 28 at 692-693, on this point.
- 60) See Wallace, *ibid.*
- 61) C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007) at 7.97.
- 62) Bjorklund, *supra* note 27 at 858.
- 63) A further practical consideration is that in the absence of some genuine attempt to resolve a domestic law dispute at the local level, there may be insufficient evidence that the state has breached the investment standard in question. See *Generation Ukraine, Inc. v. Ukraine* (Award, 16 Sep. 2003) [*Generation Ukraine*] at para. 20.30.
- 64) *Metalclad Corporation v. Mexico* (Award, 30 Aug. 2000) [*Metalclad*] at para. 91.
- 65) *Técnicas Medioambientales Tecmed S.A. v. Mexico* (Award, 29 May 2003) [*Tecmed*] at para. 209 and *Metalclad*, *ibid.*, at paras 92-93.
- 66) *International Thunderbird Gaming Corporation v. Mexico* (Arbitral Award, 26 Jan. 2006) [*Thunderbird*] at para. 200: 'The Tribunal does not exclude that the SEGOB proceedings may have been affected by certain irregularities. Rather, the Tribunal cannot find on the record any administrative irregularities that were grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment. As acknowledged by Thunderbird, the SEGOB proceedings should be tested against the standards of due process and procedural fairness applicable to administrative officials. The administrative due process requirement is lower than that of a judicial process.'
- 67) The tribunal in *Pope & Talbot*, *supra* note 19 at para. 181 stated: 'Against that background, within the context of the verification review process, the treatment of the Investment stands in stark contrast. The relations between the SLD [the Canadian government's Softwood Lumber Division] and the Investment during 1999 were more like combat than co-operative regulation, and the Tribunal finds that the SLD bears the overwhelming responsibility for this state of affairs. It is not for the Tribunal to discern the motivations behind the attitude of the SLD; however, the end result for the Investment was being subjected to threats, denied its reasonable requests for pertinent information, required to incur unnecessary expense and disruption in meeting SLD's requests for information, forced to expend legal fees and probably suffer a loss of reputation in government circles. While administration, like legislation, can be likened to sausage making, this episode goes well beyond the glitches and innocent mistakes that may typify the process. In its totality, the SLD's treatment of the Investment during 1999 in relation to the verification review process is nothing less than a denial of the fair treatment required by NAFTA Article 1105, and the Tribunal finds Canada liable to the Investor for the resultant damages.'
- 68) See *Middle East Cement Shipping and Handling Co. S.A. v. Egypt* (Award, 12 Apr. 2002) [*Middle East Cement*] at para. 143.
- 69) See *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia* (Award, 18 Jun. 2001) [*Genin*] at paras 357-358 and 362. On due process see also *Myers*, *supra* note 5 at para. 134: 'Article 1105 of the NAFTA requires the Parties to treat investors of another Party in accordance with international law, including fair and equitable treatment. Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, obligations of good faith and natural justice.'
- 70) *Waste Management II*, *supra* note 15 at para. 98. See also *Myers*, *supra* note 5 at para. 263 and *Mondev*, *supra* note 15 at para. 127.

- 71) See I. Brownlie, *System of the Law of Nations: State Responsibility Part I* (Oxford: Clarendon Press, 1983) at 159-166 regarding responsibility for the acts of private persons and 167-179 regarding responsibility in case of insurrection and civil war. See also *Oppenheim's International Law*, *supra* note 9 at 549-554. Requirements for due diligence are reflected in the 1929 Harvard Draft, *supra* note 31. Arts 10-12 address cases of state responsibility for the failure of the state to exercise due diligence to prevent injury, including cases of acts of an individual or from mob violence and insurgents. Requirements for due diligence are also reflected in Art. 13 of the 1961 Harvard Draft (1961) 55 AJIL 545. For a recent overview of public international law relating to due diligence, see R.B. Barnidge, 'The Due Diligence Principle Under International Law' (2006) 8 ICLR 81.
- 72) *Youmans* (1926) IV RIAA 110.
- 73) *Janes* (1926) IV RIAA 82.
- 74) See *Oppenheim's International Law*, *supra* note 9 at 549, note 4.
- 75) See B. Cheng, *General Principles of Law* (London: Stevens & Sons, Ltd, 1953) at 121-136 and A.C. Kiss, *L'abus de droit en droit international* (Paris: Librairie générale de droit et de jurisprudence, 1952).
- 76) A. Kiss, 'Abuse of Rights,' in *Encyclopedia of Public International Law*, ed. R. Bernhardt, Vol. 1 (Amsterdam: North-Holland Pub. Co., 1992) at 4-5.
- 77) [1952] ICJ Rep 176 at 212.
- 78) See Memorandum by the International Law Commission Secretariat, *Expulsion of Aliens* (10 Jul. 2006) A/CN.4/565.
- 79) A. Verdross, *Les règles internationales concernant le traitement des étrangers* (1931-III) 37 RDCADI 323 at 358-59.
- 80) *The American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States* (Washington: American Law Institute Publishers, 1987).
- 81) See *supra* note 20. Roth's enumeration of the elements of the minimum standard of treatment in his comprehensive 1949 treatise, *ibid.*, contains no general prohibition on arbitrariness.
- 82) *Elettronica Sicula S.p.A. (ELSI) (US v. Italy)* [1989] ICJ Rep 15 [ELSI]. The decision was made by a Chamber of the ICJ consisting of Judges Ago, Jennings, Oda, Ruda and Schwebel. For further background, see *supra* Chapter 1, §1.27.
- 83) The factory was owned by ELSI, an Italian company, which was in turn wholly owned by two US corporations. The US claimed that Italy had breached the 1948 Italy-US FCN Treaty, a 1951 Supplementary Agreement to the FCN and customary international law. Article I of the Supplementary Agreement provided protection against 'arbitrary or discriminatory measures ... resulting particularly in: (a) preventing ... effective control and management of enterprises ... or, (b) impairing ... other legally acquired rights and interests ...'.
- 84) International Court of Justice Verbatim Record, C 3/CR 89/3 at 51 (15 Feb. 1989) as cited by S.D. Murphy, 'The ELSI Case: An Investment Dispute at the International Court of Justice' (1991) 16 YJIL 391 at note 175.
- 85) International Court of Justice Verbatim Record, C 3/CR 89/7 at 42-43 (22 Feb. 1989) as cited by S.D. Murphy, *ibid.*, at note 177.
- 86) *ELSI*, *supra* note 82 at para. 124.
- 87) *Ibid.*, at para. 128.
- 88) *Ibid.*, at paras 108-121.
- 89) *Ibid.*, at 118.
- 90) Judge Schwebel refers to the then draft Arts 20 and 21 of the ILC's *Draft Articles on State Responsibility* which originally made a distinction between obligations of conduct and obligations of result. Obligations of conduct refer to obligations requiring a state to adopt a particular course of conduct. Obligations of result refer to obligations requiring a state to achieve, by means of its own choice, a specified result. He categorized the prohibition on arbitrary measures as an obligation of result, not of means or conduct. The final version of the ILC's *Articles on State Responsibility* does not include draft Arts 20 and 21. The Articles now provide in Art. 12 that '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.' The commentary to Art. 12 notes that the distinction between obligations of conduct and obligations of result is commonly made and this distinction may be helpful in ascertaining whether a breach has occurred. See International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, *Official Records of the General Assembly*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 at 11; 2001 YBILC, Vol. II, Part Two. The Articles and commentary are reprinted in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002) [ILC's Articles on State Responsibility] at 129.

- 91) *ELSI*, *supra* note 82 at 121: 'the equivalent result was not attained by Italian administrative and judicial processes, however estimable they were.' The majority found that at the time of the requisition, ELSI was technically insolvent and therefore was not entitled under Italian law to control its own liquidation. Since the majority concluded that ELSI had no right to control its liquidation under Italian law, the requisition did not deprive ELSI of any rights or impair ELSI's rights. In other words, ELSI's precarious financial situation – not the requisition – was the cause of its losses. Judge Schwebel dissented on this point. See *ELSI*, *supra* note 82 at 100-108. In his view, since ELSI's original position was characterized by the right to manage its own liquidation, the requisition had resulted in the loss of that right. The success of subsequent appeals did not compensate for this loss.
- 92) See S.D. Murphy, *supra* note 84 at 433-434. Also see K. J. Hamrock, 'The *ELSI* Case: Toward an International Definition of "Arbitrary Conduct"' (1992) TILJ 837.
- 93) *Third Restatement*, §712 and Reporters' Note 11, *supra* note 80.
- 94) See *Waste Management II*, *supra* note 15.
- 95) *CMS Gas Transmission Company v. Argentina* (Award, 12 May 2005) [CMS] at para. 290; *Waste Management II*, *supra* note 15 at para. 98, and Myers, *supra* note 5 at para. 263.
- 96) This view was endorsed in *ADF*, *supra* note 15 at para. 190 with respect to whether domestic illegality was a breach of the minimum standard of treatment: 'The Tribunal would emphasize, too, that even if the U.S. measures were somehow shown or admitted to be *ultra vires* under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in Article 1105(1). An unauthorized or *ultra vires* act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity. But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1).'
- 97) See Oxford English Dictionary, online edition.
- 98) *Waste Management II*, *supra* note 15 at para. 98.
- 99) See *infra* §6.36 on this issue.
- 100) The main instruments in international human rights law consist of the *Universal Declaration of Human Rights*, GA Res. 217 (III) A, U.N. Doc. A/811 (1948), the *International Covenant on Civil and Political Rights*, 16 Dec. 1966, 999 U.N.T.S. 171 [ICCPR] and the *International Covenant on Economic, Social and Cultural Rights*, UNGAOR, 21st Sess., U.N. Doc. A/6316 (1966). These, plus the Optional Protocol to the ICCPR constitute what has been called the 'International Bill of Human Rights.' See, generally, H.J. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3rd edn (Oxford: Oxford University Press, 2007). Other key international human rights treaties include the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), the *International Convention on the Elimination of Discrimination Against Women*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), and the *Convention on the Rights of the Child* (CRC).
- 101) See *supra* Chapter 4, §4.3 and Chapter 5, §5.2.
- 102) See Brownlie, *Principles of Public International Law*, *supra* note 9 at 546-549.
- 103) See *supra* Chapters 4 and 5.
- 104) See *infra* §6.38.
- 105) See *supra* §6.5.
- 106) See *supra* §6.9 above on arbitrariness. Prohibitions in IIAs on arbitrary, unreasonable or discriminatory measures are discussed below in Part V.
- 107) See Brownlie, *Principles of Public International Law*, *supra* note 9 at 537 and *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live*, G.A. Res. 40/144 (13 Dec. 1985). In *Barcelona Traction*, *supra* note 9 the ICJ referred to the 'principles and rules concerning the basic rights of the human person' as obligations *erga omnes* (at 32).
- 108) On the interaction between IIAs and international human rights, see International Institute for Sustainable Development, *International Human Rights in Bilateral Investment Treaties and in Investment Arbitration* (Winnipeg: IISD, 2003); T. Weiler, 'Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order' (2004) BCICLR 429; R. Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization,' in O.D. De Schutter, ed., *Transnational Corporations and Human Rights*, (Oxford: Hart, 2006); and H. Mann, 'International investment agreements, Business and Human Rights: Key Issues and Opportunities' (Feb. 2008). Online: <<http://reports-and-materials.org/IISD-Ruggie-Feb-2008.pdf>>. With respect to human rights protections during the conduct of arbitrations, see G. Petrochilos, *Procedural Law in International Arbitration* (Oxford: Oxford University Press, 2004) and A. Jaksic, *Arbitration and Human Rights*, *Comparative and International Law Studies*, No. 59 (Frankfurt: Peter Lang). See *supra* Chapter 2, §2.25, on the relevance of human rights in interpreting IIAs.

- 109) See *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (Award on Jurisdiction and Liability, 27 Oct. 1989) 95 ILR 184. In *Biloune*, the tribunal stated that while the state conduct in question could constitute a violation of fundamental human rights, the tribunal lacked jurisdiction to address human rights issues because its jurisdiction was limited to commercial disputes (*ibid.*, at 202-203). See *supra* Chapter 2, §2.25.
- 110) The decision on *amicus curiae* in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina* noted that the dispute involved the water distribution and sewage systems of a large metropolitan area which provides basic public services to millions of people, and ‘as a result may raise a variety of complex public and international law questions, including human rights considerations.’ *Ibid.* (Order in Response to a Petition for Transparency and Participation as *Amicus curiae*, 19 May 2005) at para. 19.
- 111) This provision is common in Belgian, Canadian, French, Japanese, Swiss, UK and US BITs.
- 112) In considering the meaning of an IIA clause providing for treatment ‘which conforms to principles of international law,’ the tribunal in *Ronald S. Lauder v. Czech Republic* (Award, 3 Sep. 2001) stated at para. 209 that acts or omissions that fall below the minimum standard or treatment violate the obligation to provide ‘fair and equitable treatment.’ Art. II(2)(a) of the Czechoslovakia-US BIT reads as follows: ‘Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that which conforms to principles of international law.’
- 113) As discussed above at *supra* note 25, the NAFTA Free Trade Commission has issued an interpretive statement equating Art. 1105 with the customary international law minimum standard of treatment. In *Azinian*, in reference to a claim of breach of Art. 1105(1), the tribunal stated that the substantive principle is that a NAFTA investor should not be dealt with in a ‘manner that contravenes international law.’ *Azinian*, *supra* note 35 at para. 92.
- 114) G. Verhoosel, ‘The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law’ (2003) 6 JIEL 493.
- 115) Art. 5, 2003 Canadian Model BIT; Art. 5, 2004 US Model BIT; and Art. 5, 2007 Norwegian Model BIT.
- 116) Art. 5(3), 2003 Canadian Model BIT; and Art. 5(3), 2004 US Model BIT.
- 117) For commentary on fair equitable treatment, see S. Vasciannie, ‘The Fair and Equitable Treatment Standard in International Investment Law and Practice’ (1999) 70 BYIL 99; UNCTAD, ‘*Fair and Equitable Treatment*,’ UNCTAD Series on issues in international investment agreements (New York and Geneva: United Nations, 1999) (UNCTAD/ITE/IIT/11); J.C. Thomas, ‘Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators’ (2002) 17 ICSID Rev 21; C. Yannaca-Small, ‘Fair and Equitable Treatment Standard in International Investment Law,’ in OECD, *International Investment Law: A Changing Landscape* (Paris: OECD, 2005); R. Dolzer, ‘Fair and Equitable Treatment: A Key Standard in Investment Treaties’ (2005) 39 IL 87 [Dolzer]; C. Schreuer, ‘Fair and Equitable Treatment in Arbitral Practice’ (2005) 6 JWIT 357; B. Choudhury, ‘Evolution or Devolution? – Defining Fair and Equitable Treatment in International Investment Law’ (2005) 6 JWIT 297 (2005); S. Schill, ‘Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law,’ Institute for International Law and Justice, New York University School of Law Working Paper 2006/6; T. Westcott, ‘Recent Practice on Fair and Equitable Treatment’ (2007) 8(3) JWIT 409; G. Mayeda, ‘Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties’ (2007) 41 JWT 273; C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007); R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008); L. Paradell, ‘The BIT Experience of the Fair and Equitable Treatment Standard’, in F. Ortino, L. Liberti, A. Sheppard & H. Warner, eds, *Investment Treaty Law, Current Issues II* (London: BIICL, 2007) 117; and I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008).
- 118) By 1996, however, a judge of the International Court of Justice referred to fair and equitable treatment as a term of art. In *Oil Platforms (Iran v. United States)* [1996] ICJ Rep at 858, para. 39, Judge Higgins in her separate opinion stated that “‘fair and equitable treatment to nationals and companies” and “unreasonable and discriminatory measures” are legal terms of art well known in the field of overseas investment protection, which is what is there addressed.’
- 119) Art. 11(2), *Havana Charter for an International Trade Organization*, 24 Mar. 1948, UN Conference on Trade and Employment, UN Doc. E/CONF.2/78, Sales No. 1948.II.D.4.
- 120) See *supra* Chapter 1, §1.15.
- 121) US FCN treaties with Belgium, Luxembourg, Greece, Ireland, Israel, France and Pakistan provided for ‘equitable treatment,’ while treaties with the Federal Republic of Germany, Ethiopia and The Netherlands called for ‘fair and equitable treatment.’ Kenneth Vandeveld, a former US BIT treaty negotiator, argues that the terms ‘fair and equitable treatment’ and ‘equitable treatment’ are synonymous. See K. Vandeveld, ‘The Bilateral Treaty Program of the United States’ (2001) 21 CILQ 201 at 221.

- 122) *Draft Convention on Investments Abroad* (1960) 9 JPL 116 [Abs-Shawcross Draft Convention]. See *supra* Chapter 1, §1.16, for background.
- 123) *OECD Draft Convention on the Protection of Foreign Property* (1963) 2 ILM 241 [1963 Draft Convention] and (1968) 7 ILM 118 [1967 Draft OECD Convention]. See *supra* Chapter 1, §1.30, for background.
- 124) See Art. 12(d), *Convention Establishing the Multilateral Investment Guarantee Agency* (1985) 24 ILM 1605, which provides that the Multilateral Investment Guarantee Agency must be satisfied that the host country provides 'fair and equitable treatment and legal protection for the investment' before it will provide investment guarantees (1988) 27 ILM 1228. See *supra* Chapter 1, §1.29, for background on the MIGA Convention.
- 125) See Art. 258, *Fourth Convention of the African, Caribbean and Pacific Group of States and the European Economic Community (EEC) [Lomé IV]* (1989) 29 ILM 809; Art. IV, *ASEAN Treaty for the Promotion and Protection of Investments* (1987) 27 ILM 612; Art. 3, *Colonia Protocol on Reciprocal Promotion and Protection of Investments*, reprinted in UNCTAD, *International Investment Instruments: A Compendium*, Vol. 2 (New York: United Nations, 1996) at 513 and Art. 159, *Common Market for Eastern and Southern Africa (COMESA)* (1994) 33 ILM 1072.
- 126) *Energy Charter Treaty* [ECT], Art. 10(1), (1995) 34 ILM 373.
- 127) See §6.15 below.
- 128) For an overview of treaty practice, see the three comprehensive studies: United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties* (New York: United Nations, 1988) (Doc. No. ST/CTC/65); UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva: United Nations, 1998) (Doc. No. UNCTAD/ITE/IIT/7) and UNCTAD, *Bilateral Investment Treaties 1995-2006* (New York and Geneva: United Nations, 2007) (Doc. No. UNCTAD/ITE/IIT/2006/5) [together *UNCTAD BIT Studies*]. Also see R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff Publishers, 1995) and Tudor, *supra* note 117, Chapter 1, which reviews in detail various drafting formulations.
- 129) Treaties in French refer to 'juste et équitable' and treaties in Spanish refer to 'justo y equitativo.' While it could be argued that 'just' and 'fair' are different standards, the French and Spanish versions of NAFTA Art. 1105(1) refer to 'fair and equitable treatment' as 'un traitement juste et équitable' and 'un tratamiento justo y equitativo' respectively. See G. Sacerdoti, 'Bilateral Treaties and Multilateral Instruments' (1997) 269 RDCADI 251 [Sacerdoti] at 345.
- 130) See Dolzer, *supra* note 117 at 90.
- 131) See also 3(1), *Cuba-Lebanon* (1995).
- 132) See also Art. 1, *Italy-Korea* (1989).
- 133) *Parkerings-Compagniet AS v. Lithuania* (Award, 11 Sep. 2007) [Parkerings] at para. 198.
- 134) The US and French BITs include references to international law, although with slightly different wording, as do some Japanese, Swedish, Swiss and UK BITs.
- 135) As translated in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina* (Award, 20 Aug. 2007) [Vivendi II] at para. 7.4.1. The French original of Art. 3 provides: Chacune des Parties contractantes s'engage a'assurer, sur son territoire et dans sa zone maritime, un traitement juste et équitable, conformément aux principes du droit international, aux investissements effectués par des investisseurs de l'autre Partie et à faire en sorte que l'exercice du droit ainsi reconnu ne soit entravé ni en droit, ni en fait.
- 136) See *infra* §6.23.
- 137) Recent US FTAs follow this model, including those with Australia, Central America, Chile, Morocco and Singapore. Current treaties and information are available on the website of the US Trade Representative.
- 138) See *infra* §6.21.
- 139) A similar clause appears in Art. 4(1) of the Swiss-Ghana (1991) BIT: 'Chaque Partie Contractante assurera sur son territoire un traitement juste et équitable aux investissements des investisseurs de l'autre Partie Contractante. Ce traitement ne sera pas moins favorable que celui accordé par chaque Partie Contractante à des investissements effectués sur son territoire par ses propres investisseurs ou que celui accordé par chaque Partie Contractante à des investissements effectués sur son territoire par les investisseurs d'un Etat tiers, si ce dernier traitement est plus favorable.' See also Art. 3, *Denmark-Egypt* (1999), and Art. 3 and Protocol, *Netherlands-Venezuela* (1991).
- 140) See, for example, Art. 3, *France-Zimbabwe* (2001): 'En particulier, bien que non exclusivement, sont considérées comme des entraves de droit ou de fait au traitement juste et équitable, toute restriction à l'achat et au transport de matières premières et de matières auxiliaires, d'énergie et de combustibles, ainsi que de moyens de production et d'exploitation de tous genres, toute entrave à la vente et au transport des produits à l'intérieur du pays et à l'étranger, ainsi que toutes autres mesures ayant un effet analogue.' Also see Art. 4, *French Model BIT*; Art. 3, *Bolivia-France* (1989); Art. 3, *Cambodia-France* (2000); Art. 3, *France-Venezuela* (2001); Art. 3, *France-Ukraine* (1994); Art. 3, *France-Zimbabwe* (2001); and Art. 3, *France-Madagascar* (2003).
- 141) Tudor, *supra* note 117 at 23. This practice is most prevalent in Romanian and Japanese BITs. See, *ibid.*, at 246.
- 142) See *supra* Chapter 5 on MFN clauses.

- 143) *Siemens A.G. v. Argentina* (Award, 6 Feb. 2007) [*Siemens*] at para. 85.
- 144) *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentina* (Decision on Jurisdiction, 16 May 2006) at para. 55.
- 145) *Canfor Corporation v. United States and Terminal Forest Products Ltd. v. United States* (Consolidated Proceedings) (Decision on Preliminary Question, 6 Jun. 2006) at para. 150.
- 146) State conduct constituting an international wrong may be either an action or omission: 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.' Art. 2, ILC's Articles on State Responsibility, *supra* note 90.
- 147) See *infra* Chapter 7, §7.9.
- 148) See *infra* Part IV.
- 149) See *infra* §6.28 on transparency and *supra* note 67 with respect to the tribunal's findings.
- 150) There is some variation. For example, Art. 258(1)(b), *Lomé IV*, *supra* note 125, provides 'fair and equitable treatment' to investors. Art. 5, 2007 Model Norwegian BIT, provides: 'Each Party shall accord to *investors of the other Party, and their investments* treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.' [Emphasis added.]
- 151) Vasciannie, *supra* note 117 at 101. While this may have been true in 1999, as discussed below, it is now possible to identify core elements of the standard in the evolving jurisprudence.
- 152) See *infra* Chapter 1, §1.5.
- 153) Sacerdoti, *supra* note 129 at 341.
- 154) G. Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary' (1960) JPL 147 at 152.
- 155) See Brownlie, *Principles of Public International Law*, *supra* note 9 at 7-12 on state practice and *opinio juris et necessitatis* as elements to establish customary international law.
- 156) See *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile* (Award, 25 May 2004) [*MTD*] at paras 110-112; *Occidental Exploration and Production Company v. Ecuador* (Final Award, 1 Jul. 2004) [*Occidental*] at paras 188-190; *CMS*, *supra* note 95 at paras 282-284; *Saluka*, *supra* note 15 at paras 286-295; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentina* (Decision on Liability, 3 Oct. 2006) [*LG&E*] at paras 125-131; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Turkey* (Award, 19 Jan. 2007) at para. 239 and *Siemens*, *supra* note 143 at paras 291-299.
- 157) Dolzer & Stevens, *Bilateral Investment Treaties*, *supra* note 128 at 60; UNCTAD, 'Fair and Equitable Treatment,' *supra* note 117 at 10-16; Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice,' *supra* note 117 at 70; P. Muchlinski, *Multinational Enterprises and the Law*, 2nd edn (Oxford, New York: OUP, 2007) at 635-647; C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007) at 226-247; Dolzer & Schreuer, *Principles of International Investment Law*, *supra* note 117 at 119-149 and Tudor, *supra* note 117 at 53-104.
- 158) *SGS Société Générale de Surveillance S.A. v. Philippines* (Decision of the Tribunal on Objections to Jurisdiction, 29 Jan. 2004) [*SGS v. Philippines*] at para. 116; *Occidental*, *supra* note 156 at para. 183; *MTD*, *supra* note 156 at para. 113; *Siemens A.G. v. Argentina* (Decision on Jurisdiction, 3 Aug. 2004) at para. 81; and *Enron Corporation and Ponderosa Assets, L.P. v. Argentina* (Award, 22 May 2007) [*Enron*] at para. 259. See also O.E. García-Bolivar, 'The Teleology of International Investment Law' (2005) 6 JWIT 751.
- 159) See UNCTAD, 'Fair and Equitable Treatment,' *supra* note 117 at 13.
- 160) F.A. Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 BYIL 241 [Mann] at 244. Despite this widely quoted statement, in a nearly contemporaneous publication (*The Legal Aspects of Money*, 1982), Mann appears to have taken a more restrictive approach: 'In some cases, it is true, treaties merely repeat, perhaps in slightly different language, what in essence is a duty imposed by customary international law; the foremost example is the familiar provision whereby states undertake to accord fair and equitable treatment to each other's nationals and which in law is unlikely to amount to more than a confirmation of the obligation to act in good faith, or to refrain from abuse or arbitrariness.' See the discussion of Mann's views and influence in Thomas, *supra* note 9.
- 161) See *supra* Chapter 2, §2.29 and Chapter §3.5, on the use of IIA preambles in the interpretation of the fair and equitable treatment standard.
- 162) See *supra* Chapter 3, §3.4 and §3.5, on treaty preambles.
- 163) *Siemens A.G. v. Argentina*, *supra* note 158 at para. 81. See also *Vivendi II*, *supra* note 135 at para. 7.4.4: 'As to the object and purpose of the BIT, the Tribunal notes the parties' wish, as stated in the preamble, for the Treaty to create favourable conditions for French investments in Argentina, and *vice versa*, and their conviction that the protection and promotion of such investments is expected to encourage technology and capital transfers between both countries and to promote their economic development. In interpreting the BIT, we are thus mindful of these objectives.'

- 164) *Azurix Corp. v. Argentina* (Award, 14 Jul. 2006) [Azurix] at para. 130.
- 165) The tribunal referred to an Opinion of Judge Stephen Schwebel, who states that fair and equitable treatment is 'a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, non-discrimination, and proportionality.' See *MTD*, *supra* note 156 at para. 109.
- 166) *MTD*, *ibid.*, at para. 113.
- 167) *Ibid.*, at para. 114. See *supra* Chapter 2, §2.23, on the use of IIA awards as precedents.
- 168) *Ibid.*, at para. 166 and 188.
- 169) Stephen Schill refers to this as the semantics of fair and equitable treatment. See S. Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law,' Institute for International Law and Justice, New York University School of Law Working Paper 2006/6.
- 170) *Saluka*, *supra* note 15 at para. 297.
- 171) See *Noble Ventures, Inc. v. Romania* (Award, 12 Oct. 2005) [Noble] at para. 52. See *supra* Chapter 2, §2.29, regarding interpretation and the principle of *in dubio mitius*.
- 172) *Saluka*, *supra* note 15 at para. 300.
- 173) Statement by the Swiss Foreign Office, quoted in (1980) 36 *Annuaire Suisse de droit international* at 178 referring to fair and equitable treatment: 'On se réfère ainsi au principe classique du droit des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du "standard minimum" international, c'est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques.'
- 174) It should be noted that unilateral statements by one state party to a treaty are not 'subsequent practice' under Art. 31(3)(b), *Vienna Convention on the Law of Treaties*. Art. 31(3)(b) provides that that the subsequent practice in question must establish the agreement of the parties regarding the interpretation of the treaty. See *supra* Part VII, Chapter 2 on interpretation.
- 175) See US Department of State Letter of Submittal for BITs, referred to in Thomas, *supra* note 9 at 50. With respect to NAFTA, see Canada's Statement on the Implementation, Canada Gazette, Part I, 1 Jan. 1994 at 149. As noted by Thomas, Canada formally transmitted the Statement of Implementation to the US and Mexico and it has been endorsed by Mexico and the US in later Chapter Eleven proceedings. See Thomas, *supra* note 9 at footnote 98. With respect to NAFTA Art. 1105, see discussion by one of its negotiators: D. Price, 'An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Mechanism' (1993) 27 *ILJ* 727. For commentary on US practice, see P. Gann, 'The U.S. Bilateral Investment Treaty Program' (1985) 21 *SJIL* 373. For UK practice, see E. Denza & S. Brooks, 'Investment Protection Treaties: United Kingdom Experience' (1987) 36 *ICLQ* 908.
- 176) Description of the United States Model Bilateral Investment Treaty (BIT) – Feb. 1992, Submitted by the State Department, 30 Jul. 1992, in Hearing Before the Committee on the Foreign Relations, United States Senate, 102nd Congress, Second Session, 4 Aug. 1992, S. HRG. 102-795 at 62.
- 177) One exception is the position taken in 1992 by European Communities (EC). The EC issued investment protection principles that state that, "fair and equitable treatment" is an "overriding concept" that comprises other investment protection principles including: transparency and stability of investment conditions, full protection and security, MFN treatment, NT and observance of undertakings.' *Community Position on Investment Protection Principles in the ACP States*, Council of the European Communities, ACP-CEE 2172/92. The position was set out in response to the *Lomé IV*, *supra* note 125. Art. 258(1)(b) of *Lomé IV* requires state parties to 'accord fair and equitable treatment to investors.' It should be noted that the document is referred to as 'position' and not a definitive statement of the technical meaning of fair and equitable treatment.
- 178) 1967 Draft OECD Convention, *supra* note 123 at 120. See OECD, Committee on International Investment and Multinational Enterprises, 'Intergovernmental Agreements Relating to Investment in Developing Countries,' Doc. No. 84/14 (27 May 1984), at para. 36 as quoted by Thomas, *supra* note 9 at 48.
- 179) Thomas, *supra* note 9 at 48. See also UNCTC, *Bilateral Investment Treaties*, *supra* note 128 at 30 stating that it is a 'classical international law standard.'
- 180) C.H. Schreuer, 'Fair and Equitable Treatment (FET): Interactions with Other Standards' (2007) 4 *TDM* at 10. See also Vasciannie, *supra* note 117.
- 181) See discussion *supra* at §6.19. Indeed, the underlying political assumption of the 1974 *Charter of Economic Rights and Duties of States* was that there was no minimum standard of treatment with respect to compensation for expropriation. See K. Vandevelde, 'U.S. Bilateral Investment Treaties: The Second Wave' (1993) 14 *MJIL* 621 at 625.
- 182) *Genin*, *supra* note 69.
- 183) In *Genin*, *ibid.*, the tribunal at para. 367 stated: 'Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.' See discussion at *supra* notes 15 and 18 on references to *Neer* in early IIA awards.

- 184) *Saluka*, *supra* note 15. Yves Fortier, the president of the *Genin* tribunal, was also a member of the *Saluka* tribunal.
- 185) *Ibid.*, at para. 295.
- 186) S.M. Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) ASIL Proceedings 27-30 and Tudor, *supra* note 117 at 53-84. See also Brownlie, *Principles of Public International Law*, *supra* note 9 at 520 noting that, in the context of provisions in BITs addressing compensation for expropriation, a pattern of agreement with a consistent standard constitutes evidence of an international standard.
- 187) *Mondev*, *supra* note 15 at para. 117.
- 188) The argument that there is general and consistent state practice is difficult to make. As noted in the review of IIA provisions above, there is a fair degree of variation in IIA provisions. Further, new model IIAs and current state practice demonstrate increasing diversity, not less, including agreements that do not contain a fair and equitable treatment standard. Tudor, *supra* note 117 at 84 suggests that the 'customary' fair and equitable treatment clause could consist of the following elements: 'Each State shall accord, at all times to the foreign investors and their investments in its territory, fair and equitable treatment in accordance with international law.' This formulation, however, cannot be justified in light of IIA provisions that apply almost uniformly to investments but not to investors (see *supra* §6.18).
- 189) For discussion, see B. Kishoiyian, 'The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law' (1994) 14 NJILB 327 and S. Hindelang, 'Bilateral Investment Treaties, Custom and a Healthy Investment Climate? The Question of Whether Bits Influence Customary International Law Revisited' (2004) 5 JWIT 767.
- 190) A. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of BITs,' VJIL 38 (1998): 639 at 686.
- 191) Tudor, *supra* note 117 at 80-85.
- 192) *Ibid.*, at 85-104. Tudor further argues that fair and equitable treatment is a customary standard independent of the minimum standard of treatment (at 68). It would appear, however, quite artificial to postulate that there are two distinct customary standards – fair and equitable treatment and the international minimum standard of treatment. If fair and equitable treatment is a customary standard, the better view is that it forms part of the international minimum standard of treatment of aliens and their property.
- 193) *Occidental*, *supra* note 156 at para. 190.
- 194) *CMS*, *supra* note 95 at para. 294.
- 195) In *Saluka*, *supra* note 15 at para. 291, the tribunal stated: 'Whatever the merits of this controversy between the parties may be, it appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.' In *BG Group Plc. v. Argentina* (Final Award, 24 Dec. 2007) [BG] at paras 289-310 the tribunal found that Argentina's conduct would in any event have breached the minimum standard of conduct.
- 196) Art. 1105 is entitled 'Minimum Standard of Treatment.' It provides that '[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.' For detailed discussion of Art. 1105, see M. Kinneer, A. K. Bjorklund & J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, looseleaf (Kluwer Law International, 2005) at 1102. Also see P. Dumberry, 'The Quest to Define "Fair and Equitable Treatment" for Investors under International Law: The Case of the NAFTA Chapter 11 Pope & Talbot Awards' (2002) 3 JWI 657; P. Foy & R. Deane, 'Foreign Investment Protection under Investment Treaties: Recent Developments Under Chapter 11 of the North American Free Trade Agreement' (2001) 16 ICSID Rev 299; Thomas, *supra* note 9; and I. Laird, 'Betrayal, Shock and Outrage-Recent Developments in NAFTA Article 1105,' in T. Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardslay: Transnational Publishers, 2004).
- 197) The tribunal stated that a breach 'occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.' See *Myers*, *supra* note 5 at para. 263. The majority of the tribunal then went on to find at para. 266 that, in the circumstances, the breach of national treatment also amounted to a breach of fair and equitable treatment.
- 198) *Pope & Talbot*, *supra* note 19 at para. 118.
- 199) *Ibid.*, at para. 116.
- 200) *Ibid.*, at para. 111.
- 201) The Commission consists of cabinet-level representatives of Canada, Mexico and the US. See Art. 2001, NAFTA.

- 202) Art. 1131 of NAFTA provides that the FTC's interpretation of a NAFTA provision is binding on a tribunal established under Chapter 11. The FTC's 'Notes of Interpretation of Certain Chapter 11 Provisions,' issued on 31 Jul. 2001, provide:
1. Art. 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
  2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
  3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Art. 1105(1).
- 203) It also clarified that a breach of another provision of NAFTA or another international treaty does not in-and-of-itself amount to a breach of NAFTA Art. 1105(1).
- 204) *Pope & Talbot, Inc., v. Canada* (Fourth Submission of the United States of America, 1 Nov. 2000). US submissions to NAFTA tribunals are available on the US Department of State website. See also discussion of the NAFTA parties' views on fair and equitable treatment in *Mondev*, *supra* note 15 at paras 100-125.
- 205) See, for example, *Mondev*, *ibid.*, at paras 100-125. In particular, at para. 102 the tribunal states: 'The Claimant professed to be "somewhat bewildered" by the interpretations. It maintained that the Respondent saw fit "to change the meaning of a NAFTA provision in the middle of the case in which that provision plays a major part" and questioned whether it could do so in good faith. It contended that the FTC's decision was "more than a matter of amendment" to the text of NAFTA than an interpretation of it ... .' See also *Methanex Corporation v. United States* (Letter by the Claimant to the Tribunal, 18 Sep. 2001) at 17; and *ADF Group Inc v. United States* (Investor's Reply to the Counter-Memorial of the United States of America on Competence and Liability, 28 Jan. 2002) at paras 213 *et seq.* The objections of Methanex were also echoed in the expert opinion of Sir Robert Jennings. See *Methanex* (Second Opinion of Sir Robert Jennings, 5 Nov. 2002). However, even experts disagree on this matter, as evidenced by the opinion of Christopher Greenwood in the context of the *Loewen* case. See *Loewen v. United States* (Appendix to US Counter Memorial: Opinion of Christopher Greenwood, 30 Mar. 2001). Also see discussion in articles cited at *supra* note 196.
- 206) See, in particular, *Methanex Corporation v. United States* (Final Award, 3 Aug. 2005) [*Methanex*]. The *Methanex* tribunal sidestepped the issue of whether the FTC interpretation was an amendment or not and held that the interpretation was binding either under Art. 39 of the Vienna Convention (providing for amendment by agreement) or Art. 31(3)(a) (providing for subsequent agreement between the parties regarding the interpretation of a treaty to be taken into account). It noted, however, that an interpretation contrary to *jus cogens* would not be binding on it. See *ibid.*, Part IV-Chapter C, paras 20-24.
- 207) See, for example, *Mondev*, *supra* note 15 at para. 125. Also see *United Parcel Service of America Inc. v. Canada* (Award on Jurisdiction, 22 Nov. 2002) at para. 96; *ADF*, *supra* note 15 at paras 176 and 178; *Loewen*, *supra* note 23 at para. 128; *Waste Management II*, *supra* note 15 at paras 90-91; *Methanex*, *supra* note 206, Part IV, Chapter C, paras 17-24; and *Thunderbird*, *supra* note 66 at paras 192-193.
- 208) *Mondev*, *supra* note 15 at paras 116 and 125 and *ADF*, *supra* note 15 at para. 179.
- 209) *Mondev*, *ibid.*, at para. 116. Quoted with approval in *Tecmed*, *supra* note 65 at para. 153.
- 210) *Waste Management II*, *supra* note 15 at para. 98.
- 211) See *supra* notes 194 and 195.
- 212) For general commentary on the fair and equitable treatment standard see references *supra* notes 117 and 157.
- 213) See M. Habicht, *The Power of the International Judge to Give a Decision Ex Aequo Et Bono* (London: Constable & Co., 1935). See also A. Zimmerman, C. Tomuschat & K. Oellers-Frahm, eds, *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006) at 730-735.
- 214) *Saluka*, *supra* note 15 at para. 284.
- 215) In this regard, see *Mondev*, *supra* note 15 at para. 119: 'Article 1105(1) did not give a NAFTA Tribunal an unfettered discretion to decide for itself, on a subjective basis, what was "fair" or "equitable" in the circumstances of each particular case ... It may not simply adopt its own idiosyncratic standard of what is "fair" or "equitable" without reference to established sources of law.' See also *ADF*, *supra* note 15 at para. 184. While this statement was made in the NAFTA context, which directs tribunals to apply the customary minimum standard of treatment, the same considerations apply to fair and equitable treatment provisions in other IIAs.
- 216) See *Lauder*, *supra* note 112 at para. 292: 'In the context of bilateral investment treaties, the "fair and equitable" standard is subjective and depends heavily on a factual context.' This position should either be rejected outright or interpreted as meaning that whether the standard has been breached will necessarily depend on the specific facts of the case.

- 217) Tudor, *supra* note 117 at 144, argues that there are two elements of the fair and equitable treatment standard, an objective element based upon the interpretation of treaty in question and a subjective element where the arbitrator proceeds to the application of the standard to the facts.
- 218) Myers, *supra* note 5 at para. 261. See also *Marvin Feldman v. Mexico* (Award, 16 Dec. 2002) *Feldman* at para. 139: 'not just any denial of due process or of fair and equitable treatment ... constitutes a violation of international law,' and, quoting *Azinian*, *supra* note 35 at para. 103, 'there must be a clear and malicious misinterpretation of the law.'
- 219) *Saluka*, *supra* note 15 at paras 292 and 293.
- 220) See Vandeveld, *supra* note 121.
- 221) *CMS*, *supra* note 95 at para. 280. See also *Azurix*, *supra* note 164 at para. 372. Except for *Genin*, which *might* be read as requiring bad faith (although see *supra* note 184 and discussion in text), IIA jurisprudence suggests there is no requirement for bad faith or malicious intention for a breach of fair and equitable treatment. As stated in *CMS*, *supra* note 95 at para. 280: it is an objective standard 'unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.' Also see *Loewen*, *supra* note 207 at para. 132: 'Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice.' Although the tribunal's statement is made in the context of discussing denial of justice, the principle applies equally to minimum standards of treatment generally. See also *Mondev*, *supra* note 15 at para. 116; *Loewen*, *supra* note 23 at para. 132; *Occidental*, *supra* note 156 at para. 186; *Tecmed* *supra* note 65 at para. 153; *Waste Management, Inc. v. Mexico* (Award, 2 Jun. 2000) at para. 93; *LG&E*, *supra* note 156 at para. 129.
- 222) *Tecmed*, *supra* note 65 at para. 153.
- 223) In *ADF*, the claimant maintained that the US had failed to comply with obligations under NAFTA Art. 1105(1) in good faith, thereby breaching its duty under customary international law. The tribunal stated in this regard that '[a]n assertion of breach of a customary law duty of good faith adds only negligible assistance in the task of determining or giving content to a standard of fair and equitable treatment.' See *ADF*, *supra* note 15 at para. 191.
- 224) See *Sempra Energy International v. Argentina* (Award, 28 Sep. 2007) [*Sempra*] at para. 302.
- 225) For example, treatment that constitutes a denial of justice in international law would *ipso facto* violate a fair and equitable treatment guarantee.
- 226) In *Lauder*, *supra* note 112 the tribunal noted at para. 292 that 'fair and equitable treatment is related to the traditional standard of due diligence.'
- 227) See *supra* §6.18.
- 228) See *infra* §6.26.
- 229) McLachlan, Shore & Weiniger, *International Investment Arbitration: Substantive Principles*, *supra* note 117 at 7.182 suggest that the fair and equitable treatment standard 'is concerned with the *process* of decision-making as it affects the rights of the investor, rather than with the protection of substantive rights (the latter being the function of the protection against expropriation and the guarantee of full protection and security).' In our view, this statement is not supported by IIA jurisprudence.
- 230) *Mondev*, *supra* note 15 at para. 118. *Accord*, *Saluka*, *supra* note 15 at 285.
- 231) *GAMI*, *supra* note 15 at para. 103.
- 232) An example is the majority decision in *Eastern Sugar B.V. v. Czech Republic* (Final Award, 12 Apr. 2007) [*Eastern Sugar*].
- 233) See Schill, *supra* note 117 at 6-7 on this point and *Dolzer*, *supra* note 107 at 93.
- 234) Elements of the minimum standard of treatment are discussed *supra* at §6.4 *et seq.*
- 235) Schill, *supra* note 117.
- 236) See Wälde, Separate Opinion (Dec. 2005), *Thunderbird*, *supra* note 66 at para. 13.
- 237) Tudor, *supra* note 117.
- 238) *Tecmed*, *supra* note 65 at para. 154; *Waste Management II*, *supra* note 15 at para. 98; and *Occidental*, *supra* note 156 at para. 183. See the analysis in Paradell, *supra* note 117.
- 239) *Saluka*, *supra* note 15 at para. 302.
- 240) On unilateral acts, see W.M. Reisman & M.H. Arsanjani, 'The Question of Unilateral Government Statements as Applicable Law in Investment Disputes' (2004) 19 ICSID Rev 32. See *infra* Chapter 10, §10.27, on estoppel.
- 241) *Tecmed*, *supra* note 65 at para. 154. In *EnCana Corporation v. Ecuador* (Award, 3 Feb. 2006), the tribunal noted at para. 158 that '[u]nder standards such as those in Article II [fair and equitable treatment] of the BIT the State must act with reasonable consistency and without arbitrariness in its treatment of investments. One arm of the State cannot finally affirm what another arm denies to the detriment of a foreign investor.'
- 242) *Saluka*, *supra* note 15 at para. 301.

- 243) See E. Zoller, *La bonne foi en droit international public* (Paris, Éditions A. Pedone, 1977). Also see M. Panizzon, *Good Faith in the Jurisprudence of the WTO* (Oxford: Hart Publishing, 2006).
- 244) See *infra* Chapter 10, §10.27, on estoppel.
- 245) *Tecmed*, *supra* note 65 relies, on ECtHR jurisprudence.
- 246) See, generally, Wälde, Separate Opinion (Dec. 2005), *Thunderbird*, *supra* note 66; and E. Snodgrass, 'Protecting Investors' Legitimate Expectations and Recognizing and Delimiting a General Principle' (2006) 21 ICSID Rev 1 at 53. On a comparative review of legitimate expectations as a principle of administrative law, see S. Schönlberg, *Legitimate Expectations in Administrative Law* (Oxford: Oxford University Press, 2000).
- 247) This is the case, for example, in Canadian administrative law.
- 248) See discussion below on the Argentine cases.
- 249) *Southern Pacific Properties (Middle East) Limited v. Egypt* (Award on the Merits, 20 May 1992) [SPP] 3 ICSID Rep 208 at paras 82-83.
- 250) *Waste Management II*, *supra* note 15 at para. 98: '... In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.' In our view, there is no substantive difference between reasonable and legitimate expectations. An unreasonable expectation is not legitimate and vice versa.
- 251) *Thunderbird*, *supra* note 66 at para. 147. While the tribunal refers to 'the reasonable and justifiable expectations on the part of an investor (or investment),' it should be noted that Art. 1105(1) applies to investments only.
- 252) *LG&E*, *supra* note 156 at para. 130. See also, *Enron*, *supra* note 158 at para. 262.
- 253) In *Metalclad*, *supra* note 64, the tribunal noted at para. 148 that the 'assurances received by the investor from the Mexican government in *Metalclad* were definitive, unambiguous and repeated.'
- 254) *Nagel v. Czech Republic* (Award, 2003) at 164.
- 255) *GAMI*, *supra* note 15 at para. 76, noting that the 'Mexican regulatory regime did not contain an unambiguous affirmation to the effect that *the Government shall announce annually individual export quotas for all mills and shall promptly enforce any non-compliance.*'
- 256) *Feldman*, *supra* note 218 at para. 148. Wälde, Separate Opinion (Dec. 2005), *Thunderbird*, *supra* note 66 at para. 30, to the contrary, suggests that the risk of ambiguity should be allocated to the government that made the statement and that a 'government agency can not rely on intentionally inserted obfuscation to extract itself from the key message the investor relied upon and that the drafter and the public authority in a position of superiority over the foreign investor has to be clear, unambiguous and consistent.'
- 257) See discussion in Snodgrass, *supra* note 246 at 53.
- 258) *Ibid.*
- 259) *Thunderbird*, *supra* note 66 at paras 151-155.
- 260) See *SPP*, *supra* note 249. In *MTD*, the tribunal found that there were legitimate expectations as a result of a foreign investment approval despite the fact that the development could not proceed under existing local laws. But see *Thunderbird*, *supra* note 66 at paras 164-166 where the tribunal notes that the claimant knew that certain forms of gaming were illegal and failed to disclose fully information about its planned activities to the regulator. As a result, the tribunal found there were no legitimate expectations created by a government statement, which suggested that the claimant's planned activities would not breach local gaming laws.
- 261) Wälde, Separate Opinion (Dec. 2005), *Thunderbird*, *supra* note 66 at para. 30.
- 262) *Saluka*, *supra* note 15 at para. 305.
- 263) Wälde, Separate Opinion (Dec. 2005), *Thunderbird*, *supra* note 66 at para. 14.
- 264) *MTD*, *supra* note 156 at paras 188-189.
- 265) *Ibid.*, at para. 188.
- 266) *CME Czech Republic B.V. v. Czech Republic* (Partial Award, 13 Sep. 2001) [CME] at paras 505-527.
- 267) Art. 3(1), Czechoslovakia-Netherlands (1991) provides that: 'Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.'
- 268) *CME*, *supra* note 266 at para. 611. At para. 517, the tribunal referred to the D.F. Vagts, 'Coercion and Foreign Investment Rearrangements' (1978) 72 AJIL 17 at 28: 'The threat of cancellation of the right to do business might well be considered coercion ... Such coercion might be found, even where a "clean" waiver of rights is signed.' Also see para. 526.
- 269) See *Tecmed*, *supra* note 65 at paras 158-160.
- 270) Art. 4(1), Mexico-Spain (1995), provides: 'Each Contracting Party will guarantee in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party.'
- 271) *Tecmed*, *supra* note 65 at para. 154.
- 272) *MTD*, *supra* note 156 at para. 514.
- 273) See §6.31.
- 274) *MTD*, *supra* note 156 at para. 164.
- 275) See *supra* §6.18.

- 276) Tribunals sometimes do not make this distinction clear. See *MTD*, *supra* note 156 at para. 166.
- 277) *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador* (Award, 31 Jul. 2007) at para. 279.
- 278) In *Metalclad*, *supra* note 64, the tribunal stated at para. 99: 'Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment.' See also *CMS*, *supra* note 95 at para. 276; *LG&E*, *supra* note 156 at paras 124-125 and 131; *Enron*, *supra* note 158 at para. 259-260; and *Occidental*, *supra* note 156 at para. 183.
- 279) *CMS*, *ibid.*, at para. 276. The tribunal had noted two paragraphs earlier that 'The Treaty Preamble makes it clear, however, that one principal objective of the protection envisaged is that fair and equitable treatment is desirable "to maintain a stable framework for investments and maximum effective use of economic resources." There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.' This echoed the statement of the *Metalclad* tribunal that 'Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.' See *Metalclad*, *supra* note 64 at para. 99. In *CMS*, *ibid.*, the tribunal also stated in *obiter dicta* at para. 284 that 'the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.'
- 280) *LG&E*, *supra* note 156 at para. 133; *Enron*, *supra* note 158 at paras 260-267; and *Sempra*, *supra* note 224 at para. 300. In *BG*, *supra* note 195 at para. 307, the tribunal stated that: 'Argentina, however, entirely altered the legal and business environment by taking a series of radical measures, starting in 1999, as described in Chapter III.D above. Argentina's derogation from the tariff regime, dollar standard and adjustment mechanism was and is in contradiction with the established Regulatory Framework as well as the specific commitments represented by Argentina, on which BG relied when it decided to make the investment. In so doing, Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment.'
- 281) *CMS*, *supra* note 95 at para. 277.
- 282) *Parkerings*, *supra* note 133 at para. 332. Also see para. 334, where the tribunal stated: 'Neither is it contested that the Republic of Lithuania gave no specific assurance or guarantee to Parkerings that no modification of law, with possible incidence on the investment, would occur. The legitimate expectations of the Claimant that the legal regime would remain unchanged are not based on or reinforced by a particular behaviour of the Respondent. In other words, the Republic of Lithuania did not give any explicit or implicit promise that the legal framework of the Agreement would remain unchanged.'
- 283) In *Parkerings*, *ibid.*, at para. 335, the tribunal noted that: 'In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being a part of the Soviet Union to being a candidate for European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate.'
- 284) *Generation Ukraine*, *supra* note 63 at para. 20.37.
- 285) *Saluka*, *supra* note 15 at paras 307-308.
- 286) *CMS*, *supra* note 95 at para. 290.
- 287) See §6.10.
- 288) Where this type of discrimination is alleged, there will be substantial overlap with the prohibition of arbitrary measure. See *infra* §6.33 *et seq.*
- 289) See *infra* §6.29.
- 290) In *Loewen*, *supra* note 23 at para. 135, the tribunal states that a decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.
- 291) See *supra* §6.10.
- 292) Mann, *supra* note 160 at 243 states that: 'it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment ... so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty.'

- 293) *Eureko B. V. v. Poland* (Partial Award, 19 Aug. 2005) at para. 233. Also in *Waste Management II*, *supra* note 25 at para. 98, the tribunal referred to conduct that is discriminatory and exposes the claimant to sectional or racial prejudice.
- 294) *Eastern Sugar*, *supra* note 232 at para. 314.
- 295) See *supra* Chapter 4, §4.28, and Chapter 5, §5.27.
- 296) In *Myers*, the tribunal split on this issue. A majority of the tribunal held that the breach of national treatment with respect to a ban on PCB exports established a breach of fair and equitable treatment. Arbitrator Chiasson disagreed and stated that breach of national treatment did not establish a breach of fair and equitable treatment. See *Myers*, *supra* note 5 at para. 266.
- 297) WTO, Working Group on the Relationship between Trade and Investment, Transparency, Note by Secretariat, WT/WGTI/W/109, 27 Mar. 2002 [WTO Transparency] at 4. On the evolution of the concept of transparency in international economic law, see C.-S. Zoellner, 'Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law' (2006) 27 MJIL 579.
- 298) See WTO Transparency, *ibid.* Various WTO Agreements provide examples of these obligations. Transparency obligations in the WTO system include: (i) publication of laws, regulations and administrative rulings (Art. X, GATT; Art. III, GATS, and Art. 63, TRIPS Agreement). Some agreements require the establishment of 'enquiry points' to respond to questions (Art. 10, TBT Agreement; Art. III(4), GATS; and Art. 63(3), TRIPS Agreement); (ii) the requirement to notify other WTO member of changes to laws and regulations or the application of trade remedies (Arts 2.9-10, TBT Agreement, and Annex B, SPS Agreement); (iii) The WTO Agreements also include provisions on procedural transparency. Art. X, GATT, provides that rules and regulations must be administered in a uniform, impartial and reasonable manner and that there be a right of appeal and review. Also see Art. VI, GATS, and Arts 41-42 and 62, TRIPS Agreement. On WTO obligations, see M. Trebilcock & R. Howse, *The Regulation of International Trade*, 3rd edn (London: Routledge, 2005).
- 299) *Tecmed*, *supra* note 65 at para. 154; *Metalclad*, *supra* note 64 at paras 76 and 88; and *Waste Management II*, *supra* note 15 at para. 98. The review of the *Metalclad* award in the British Columbia Supreme Court (*Mexico v. Metalclad Corp.*, Judgment of the Supreme Court of British Columbia, 2 May 2001) found that the *Metalclad* tribunal's finding of a breach of fair and equitable treatment based on transparency was an excess of jurisdiction because transparency obligations are contained in other NAFTA chapters. Neither the award nor the judicial review, however, expressly addresses the extent to which transparency is an independent element of fair and equitable treatment.
- 300) *Tecmed*, *supra* note 65 at para. 154.
- 301) The discussion within the Working Group on the Relationship between Trade and Investment on Transparency suggests that while there is general agreement between WTO members for the need for transparency in the investment context, there is little agreement on the exact scope of that obligation, particularly for developing members. See WTO, Working Group on the Relationship Between Trade and Investment, Communication from China, Transparency, WT/WGTI/W/160, 15 Apr. 2003. See also the concurring opinion by B. Schwartz in *Myers*, *supra* note 5 at paras 247-255. Professor Schwartz notes that '[i]t is far from obvious, in the absence of evidence, that basic GATT norms like transparency and procedural fairness have been accepted by states throughout the world and so have passed into the body of general (or "customary") international law.'
- 302) Bin Cheng argues that where a state has knowingly led another state to believe that it will pursue a certain policy, the state has a duty to notify the other state of changes in its policy. See B. Cheng, *General Principles of International Law*, *supra* note 75 at 137. Also see Reisman & Arsanjani, *supra* note 240.
- 303) See, for example, *Emilio Agustín Maffezini v. Spain* (Award, 13 Nov. 2000) [Maffezini] at para. 83: 'the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment ...' See also *Waste Management II*, *supra* note 15 at para. 98.
- 304) *Pope & Talbot*, *supra* note 19 at paras 177-179.
- 305) *Petrobart Ltd. v. Kyrgyz Republic* (Award, 29 Mar. 2005) at 25 and *Tecmed*, *supra* note 65 at paras 162 and 164.
- 306) *Metalclad*, *supra* note 64 at para. 99. This part of the *Metalclad* award was eventually set aside by the Supreme Court of British Columbia because the court concluded that the tribunal had exceeded its jurisdiction in finding that Art. 1105 of NAFTA included a duty of transparency. *Mexico v. Metalclad Corp.* (Judgment of the Supreme Court of British Columbia, 2 May 2001). In addressing the question of whether lack of transparency breaches Art. 1105 of NAFTA, the *Feldman* tribunal found the court's decision 'instructive.' *Feldman*, *supra* note 218 at para. 133.
- 307) See also *Maffezini* *supra* note 303 at para. 83 where the tribunal refers to the lack of transparency in a loan transaction, where the core issue was that the state failed to obtain the investor's consent to transfer funds from its bank account.
- 308) *Tecmed*, *supra* note 65 at para. 154. While the unofficial English translation uses 'totally transparently,' the original Spanish version refers simply to 'transparente.'

- 309) It has been argued that where the ambiguity arises as a result of a government representation, the risk falls on the government (*Thunderbird*, the Separate Opinion, *supra* note 256). While this may be appropriate in some circumstances, a hard and fast rule or presumption should not apply in this area. The tribunal will have to assess whether the investor's reliance was reasonable based on all of the circumstances and whether the risk of the ambiguity should fall on the investor or host state.
- 310) *Feldman*, *supra* note 218 at paras 132-133.
- 311) In *Parkerings*, the tribunal stated that non-disclosure of a legal opinion did not breach the fair and equitable treatment standard. *Parkerings*, *supra* note 133 at para. 307.
- 312) The classic article is Vagts, *supra* note 268.
- 313) See Pope & Talbot, *supra* note 19 at paras 177-179.
- 314) *Tecmed*, *supra* note 65 at para. 163.
- 315) *Vivendi II*, *supra* note 135 at para. 7.4.24.
- 316) *Vivendi II*, *ibid.*, at para. 7.4.39.
- 317) See generally, Vagts, *supra* note 268, referred to in *Tecmed* at para. 163 and *CME*, *supra* note 266 at paras 517-538. Whether the conduct of the Czech Media council was coercive or not was at the heart of the *Lauder* and *CME* cases. The *Lauder* tribunal characterized the Czech Media Council's conduct as that of requiring clarification of the relationship between the parties, not enforcing changes. In addition, since the investor acquiesced to this process, the *Lauder* Tribunal held that it was barred from arguing that the change was coerced (*Lauder*, *supra* note 112 at para. 272). In contrast, the *CME* tribunal found the Czech Media Council's actions were coercive.
- 318) *Desert Line Projects LLC v. Yemen* (Award, 6 Feb. 2008).
- 319) *Ibid.*, at para. 179.
- 320) *SGS v. Philippines*, *supra* note 158 at para. 162.
- 321) See *infra* Chapter 7, §7.21, regarding the issue of whether non-payment of debts is expropriatory.
- 322) *CMS*, *supra* note 95 at para. 274. See *supra* Chapter 2, §2.29, Chapter 3, §3.5, and Chapter 6, §6.20, on IIA preambles.
- 323) *MTD*, *supra* note 156 at para. 113.
- 324) *Ibid.*, at para. 117.
- 325) *Ibid.*
- 326) *GAMI*, *supra* note 15 at para. 110.
- 327) Snodgrass, *supra* note 246 at 56.
- 328) See generally P. Muchlinski, "'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 ICLQ 567. Also see I. Brownlie, 'Treatment of Aliens: Assumption of Risk and The International Standard,' in W. Flume, H.J. Hahn, G. Kegel & K.R. Simmonds, eds, *International Law and Economic Order: Essays in Honour of F.A. Mann* (Munich: Verlag C.H. Beck, 1977) at 309.
- 329) W.M. Reisman & R.D. Sloane, 'Indirect Expropriation and Its Valuation in the BIT Generation' (2003) 74 BYIL 115 at 121 using these categories with respect to state conduct.
- 330) In *Feldman*, *supra* note 218, the tribunal found a breach of national treatment on the basis that the foreign investor had not, like a national, received tax rebates, even though the tax rebates were not authorized under Mexican law. The dissenting member of the tribunal, stated that the investor's business was based on illegal rebates and would not have found a breach of national treatment absent 'extremely clear and convincing evidence' of discrimination.
- 331) See *Azinian*, *supra* note 35 at paras 104-105.
- 332) See *SPP*, *supra* note 249 at 219 and dissenting opinion of Dr El Mahdiat at 305. Generally see H. Raeschke-Kessler, 'Corrupt Practice in the Foreign Investment Context: Contractual and Procedural Aspects,' in N. Horn & S. Kröll, eds, *Arbitrating Foreign Investment Disputes* (The Hague: Kluwer, 2004); R.H. Kreindler, 'Aspects of Illegality in the Formation and Performance of Contracts', in ICCA Congress Series No. 11 (The Hague: Kluwer, 2003) 209; A. Court de Fontmichel, *L'arbitre, le juge et les pratiques illicites du commerce international* (Paris: Éditions Panthéon Assas, 2004); International Chamber of Commerce, Institute of World Business Law, *Arbitration – Money Laundering, Corruption and Fraud* (Paris: ICC, 2003); and M. Scherer, 'Circumstantial Evidence in Corruption Cases Before International Arbitral Tribunals' (2002) 5 IALR 29.
- 333) See *Inceysa Vallisoletana, S.L. v. El Salvador* (Award, 2 Aug. 2006) and *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (Award, 16 Aug. 2007). See *supra* Chapter 2, §2.11 and §2.12.
- 334) *MTD*, *supra* note 156 at para. 117. The tribunal stated at para. 164 that 'it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment.' In *MTD*, the Tribunal found that MTD incurred costs as a result of bad business judgment irrespective of the breach of fair and equitable treatment. In particular, they did not obtain appropriate legal protection for a land purchase, the price of which was based on the assumption that all applicable development permits would be obtained (*ibid.*, at para. 242).

- 335) *MTD*, *ibid.*, at 164.
- 336) *ADF*, *supra* note 15 at para. 189.
- 337) *Genin*, *supra* note 69 at para. 345.
- 338) *Ibid.*, at para. 362.
- 339) *Generation Ukraine*, *supra* note 63 at para. 20.30.
- 340) *MTD*, *supra* note 156 at para. 178: 'BITs are not an insurance against business risk'. *Maffezini*, *supra* note 303 at para. 69: 'the Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments.' See also, *LG&E*, *supra* note 156 at para. 130.
- 341) As was the case in *MTD*. See discussion *supra* at §6.26.
- 342) In *ELSI*, *supra* note 82, a Chamber of the ICJ considered Art I of the Supplementary Agreement to the 1948 Italy-US FCN Treaty (404 UNTS 326). Art. I provides: 'The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: (a) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, (b) impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise. Each High Contracting Party undertakes not to discriminate against nationals, corporations and associations of the other High Contracting Party as to their obtaining under normal terms the capital, manufacturing processes, skills and technology which may be needed for economic development.' See also Art. V(3), Germany-US FCN, *reprinted in* R. Wilson, *United States Commercial Treaties and International Law* (New Orleans: Hauser Press, 1960) at 397.
- 343) Art. 1 provides: 'the management, use and enjoyment [of the property] shall not in any way be impaired by unreasonable or discriminatory measures.' UNCTAD, *International Investment Instruments: A Compendium*, Vol. 5 (New York: United Nations, 1996) at 395. The Draft was first published in (1960) 9 JPL 116 (now Emory Law Journal). See *supra*, Chapter 1, §1.16, for an overview of the historical background.
- 344) Art. 1 provides: 'Each Party ... shall not in any way impair the management, maintenance, use, enjoyment or disposal ... by unreasonable or discriminatory measures.' (1968) 7 ILM 117. See *supra*, Chapter 1, §1.22, for an overview of the historical background.
- 345) See also Art. 3(3), Germany-Nigeria (2000), and Art. 2(3), Argentina-Germany (1991).
- 346) The model BITs of Austria, Denmark, Egypt, Indonesia, The Netherlands and the UK use this formulation.
- 347) The model BITs of the Belgo-Luxembourg Economic Union (BLEU) and Italy use this formulation.
- 348) See also Art. II(3)(b), Albania-US (1995); Art. 3(1), Croatia-Zimbabwe (2000), and Art. 2(3), Korea-Trinidad and Tobago (2002).
- 349) See *Lauder*, *supra* note 112 at para. 219.
- 350) *Azurix*, *supra* note 164 at para. 391.
- 351) See *supra* §6.18.
- 352) See *supra* §6.16 on the term treatment and Chapter 7, §7.9 on the term measures.

353) Note 6 to Art. 1 in Commentary on 1967 Draft OECD Convention, *supra* note 123 at 121 reads:

(a) ... Article 1 provides that “management, maintenance, use, enjoyment or disposal” of property of nationals of other Parties shall not “in any way” be impaired by unreasonable or discriminatory measures. “Maintenance” is probably implicit in the concept of “management” and, moreover, as a precondition, in “use” and “enjoyment.” The term is added for the sake of clarity. It is more doubtful whether ‘disposal’ is implicit in these notions. Yet knowledge alone of measures taken that prevent or limit the “disposal” of the property reduces its value and interferes with its “enjoyment.” The term indicates therefore with greater precision the limits to which, under the Convention, the exercise of rights arising out of property is protected. It cannot, on the other hand, be assumed that the rights to “enjoyment” of property implies for the Party concerned that obligation to permit automatically transfers in connection with that property.

(b) Exercise of the rights quoted in the preceding paragraph shall not in any way be “impaired” by unreasonable or discriminatory measures. This means that a breach of the obligation is established if it can be shown that a certain measure:

- (i) is “unreasonable” or “discriminatory”...;
- (ii) may be attributed to the Party against whom complaint is made—see Article 5; and that it
- (iii) impairs the exercise of any of the rights quoted. Thus it is insufficient to prove— as in the case of “fair and equitable treatment”... that the measure complained of is contrary to a standard set by international law; it must also be established that, as its consequence, actual possibilities for the exercise of the right in question are reduced.

354) *CMS*, *supra* note 95 at para. 292. See also, *Occidental*, *supra* note 156 at para. 161 on the requirement for impairment.

355) See discussion of *ELSI* at Chapter 1, §1.27, and §6.9, above.

356) *ELSI*, *supra* note 82 at paras 108-121.

357) See *supra* §6.5-6 discussing denial of justice and exhaustion of local remedies, and §6.46 in the context of other protection and guarantee standards.

358) *CMS*, *supra* note 95 at para. 290. See also *MTD*, *supra* note 156 at para. 196.

359) See *supra* §6.36-§6.38.

360) See *supra* §6.38.

361) In *Neer*, *supra* note 14, the Mexico-US General Claims Commission referred to the standard as: ‘an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.’ See discussion *supra* at §6.4.

362) *ELSI*, *supra* note 82.

363) *Azurix*, *supra* note 164 at para. 392.

364) *Enron*, *supra* note 158 at para. 281.

365) See also *Siemens*, *supra* note 143 at para. 318; *LG&E*, *supra* note 156 at para. 157; *Sempra*, *supra* note 224 at para. 318; *Lauder*, *supra* note 112 at para. 221; *Noble*, *supra* note 171 at paras 176-177.

366) *LG&E*, *supra* note 156 at para. 158.

367) *Lauder*, *supra* note 112 at paras 222-232. In *Lauder*, the tribunal found arbitrary and discriminatory measures as the result of the Czech Media Council’s requirement that the foreign investment not hold shares in a Czech company that would hold a television broadcasting licence. The Media Council took this position due to local concerns with foreign control over television broadcasting. The tribunal referred to the Black’s *Law Dictionary* definition of ‘arbitrary’ as ‘depending on individual discretion; ... founded on prejudice or preference rather than on reason or fact.’ (at para. 221) It held that the measure in question was indeed ‘arbitrary,’ because it was neither founded on reason, fact, nor law, but rather on ‘mere fear reflecting national preference.’ (at para. 232).

368) *Siemens*, *supra* note 143 at para. 319.

369) See *LG&E*, *supra* note 156 at para. 162: ‘though unfair and inequitable, were the result of reasoned judgment rather than simple disregard of the rule of law.’; *Sempra*, *supra* note 224 at para. 318; *CMS*, *supra* note 95 at para. 292.

370) This four part test for assessing whether a measure is arbitrary is set out in *Hamrock*, *supra* note 92.

371) *Occidental*, *supra* note 156 at para. 163.

372) See C. Schreuer, ‘Protection against Arbitrary or Discriminatory Measures’ in R.P. Alford & C.A. Rogers, eds, *The Future of Investment Arbitration* (Oxford: University Press, forthcoming).

373) In *BG*, *supra* note 195 at para. 341, the tribunal stated that it would be inappropriate to equate unreasonableness and arbitrariness.

- 374) *MTD*, *supra* note 156 at para. 196.
- 375) *CME*, *supra* note 266 at para. 612.
- 376) *BG*, *supra* note 195 at paras 342-343.
- 377) *Lauder*, *supra* note 112 at para. 227-231 (although those measures were held not to have caused the alleged destruction of the investment). It is unclear why this claim was not made expressly on the basis of a breach of national treatment, since the national treatment obligation in Czechoslovakia-US (1991) extends to establishment.
- 378) *Lauder*, *supra* note 112 at para. 231.
- 379) *Nykomb Synergetics Technology Holding AB v. Latvia* (Award 16 Dec. 2003) at 64.
- 380) *Saluka*, *supra* note 15 at para. 313.
- 381) *LG&E*, *supra* note 156 at para. 147.
- 382) *Ibid.*, at para. 148.
- 383) *Emron*, *supra* note 158 at para. 282.
- 384) *CMS*, *supra* note 95, at para. 293.
- 385) *Sempra*, *supra* note 224 at para. 319.
- 386) *BG*, *supra* note 195 at paras 354-359.
- 387) *Genin*, *supra* note 69 at para. 370. In support of this finding, the tribunal referred to I. Brownlie, *Principles of Public International Law*, 5th edn (Oxford: Clarendon Press, 1998) at 541, footnote 96: 'The test of discrimination is the intention of the government.'
- 388) *LG&E*, *supra* note 156 at para. 146. See also *Siemens*, where the tribunal stated that: 'intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.' See also *Siemens*, *supra* note 143 at para. 321 and *Eastern Sugar*, *supra* note 232 at para. 338.
- 389) See *supra* §6.24 and Chapter 4, §4.17.
- 390) In the cases of Czechoslovakia-Netherlands (1991), this would appear to be the case because Art. 3(3) provides exclusions for MFN treatment, suggesting that the reference in Art. 3(1) to 'discriminatory' includes more favourable treatment of investments from third states. Further, see *supra* §6.21 on the commentary to the 1967 Draft OECD Convention, suggesting that the reference to discrimination indicates nationality-based discrimination.
- 391) *Genin*, *supra* note 69 at para. 368.
- 392) Art. 2(2), second sentence, provides: '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 investors of the other Contracting Party.'
- 393) *BG*, *supra* note 195 at para. 355.
- 394) *Ibid.*, at para. 357 and 358.
- 395) See *supra* §6.8 on due diligence as an element of the minimum standard of treatment. On protection obligations, see *Sambiaggio* (1903) X RIAA at 499 and Judge Huber's statement in *British Claims in the Spanish Zone of Morocco* (1925) II RIAA 615 at 642 *et seq.* For commentary, see A.V. Freeman, 'Responsibility of States for Unlawful Acts of their Armed Forces' (1955-II) 88 RDCADI 263. With respect to state enterprises, see A. Cohen Smutney, 'State Responsibility for the Acts of State Enterprises? *Emilio Agustín Maffezini v. The Kingdom of Spain*' in T. Weiler, ed., *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005).
- 396) For example, Art. 4 of the 1861 Treaty between Italy and Venezuela cited in *Sambiaggio*, *ibid.*, provided for 'the fullest measure of protection and security of person and property.'
- 397) *Wilson*, *supra* note 342.
- 398) Art. V, para. 1, *supra* note 83. The US alleged a breach of this standard as a result of the occupation of the plant by ELSI's employees and also a sixteen-month delay in obtaining a ruling on an appeal. See *supra* Chapter 1, §1.27, and §6.9 for discussion of ELSI.
- 399) *ELSI*, *supra* note 82 at para. 108.
- 400) On the Abs-Shawcross Convention, see 'Comment on the Draft Convention by Its Authors' (1960) 9 JPL 119 at 119. On the 1967 Draft OECD Convention, see *supra* note 123 at 120.
- 401) Art. III, Lithuania-Norway (1992). See also Art. 2(1), Bulgaria-Croatia (1996); Art. 3(1), Cuba-Spain (1994); and Art. 3(1), Jordan-Poland (1997).
- 402) Art. 3(1), Marshall Islands-Taiwan (1999).
- 403) Art. II(4), US-Zaire BIT (1984).
- 404) Art. 2(2), Sri Lanka-UK (1980), and Art. 2(2) Egypt-UK (1975), considered respectively in *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka* (Final Award, 27 Jun. 1990) [AAPL] and *Wena Hotels Limited v. Egypt* (Award, 8 Dec. 2000) [Wena]. This is the most widely used formulation.
- 405) Art. 3(1), Eritrea-Netherlands (2003); and Art. 3(2), Hungary-Netherlands (1987).
- 406) Art. 2(2), Indonesia-Syria (1997).
- 407) Art. 2(2), China-Djibouti (2003); and Art. 10(1), Japan-Korea (2002).
- 408) Art. 2(2), Jordan-Yemen (1996).
- 409) Early US FCN treaties refer to 'the most constant protection.' Later FCN treaties refer to 'the most constant protection and security.' Thomas, *supra* note 9 at 39-40.

- 410) Art. 3(2), Thailand-Vietnam (1991); Art. 5(1), Bangladesh-Japan (1998); and Art. 3(2), Hungary-Thailand (1991).
- 411) See Art. 4(1), Argentina-Germany (1991), considered in *Siemens*, *supra* note 143.
- 412) Estonia-Sweden (1992); Egypt-Kazakhstan (1993); India-Kazakhstan (1996); Argentina-New Zealand (1999); and Iran-Kazakhstan (1996).
- 413) See §6.8 above.
- 414) See AAPL, *supra* note 404 at paras 72-86; *American Manufacturing and Trading, Inc. v. Zaire* (Award, 21 Feb. 1997) [AMT] at paras 6.05-6.19; *Wena*, *supra* note 404 at paras 84-95 and *Lauder*, *supra* note 112 at para. 308. Certain portions of the AMT award suggest that the tribunal was applying a strict liability standard. For example, at paras 6.05 and 6.06, the tribunal states that Zaire had the obligation to take 'all measures' to protect the investment. Further, at para. 6.14, it states that Zaire had an obligation to 'prevent the occurrence of any act of violence.' These excerpts should, however, be read in the context of the overall obligation of 'vigilance,' which suggest an obligation of conduct, not of result.
- 415) *Tecmed*, *supra* note 65 at para. 177.
- 416) For commentary on AAPL, *supra* note 404, see S. Vasciannie, 'Bilateral Investment Treaties and Civil Strife: The AAPL/Sri Lanka Arbitration' (1992) 39 NILR 332.
- 417) See *Sambiaggio* (1903) X RIAA at 499 and *ELSI*, *supra* note 82, discussed in AAPL, *supra* note 403 at paras 47-50 and other authorities discussed at paras 72-78.
- 418) AAPL, *supra* note 404 at para. 49.
- 419) *Ibid.*, at para. 85.
- 420) N. Gallus, 'The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection' (2005) 6 JWIT 711.
- 421) Freeman, *supra* note 395 at 277-278.
- 422) (1925) II UNRIAA 639 at 644 (as translated by B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, *supra* note 75 at 220).
- 423) See Brownlie, *Principles of Public International Law*, *supra* note 9 at 504.
- 424) *Enron*, *supra* note 158 at para. 286, and *Sempra*, *supra* note 224 at para. 323.
- 425) *CME*, *supra* note 266 at para. 613. This sentence was quoted with approval in *Vivendi II*, *supra* note 135 at para. 7.4.16.
- 426) See *Československá Obchodní Banka, A.S. v. Slovak Republic* (Award, 29 Dec. 2004) at para. 170.
- 427) *Saluka*, *supra* note 15 at para. 484.
- 428) *Saluka*, *ibid.*
- 429) *Saluka*, *ibid.*, at para. 494-496. The tribunal also applied the guarantee to a Czech Securities Commission's suspension in trading of shares and a police order prohibiting transfer of shares, finding that the Czech conduct did not breach the guarantee. However, the tribunal had assumed for the sake of argument that the State conduct was within the scope of the 'full security and protection' clause (see paras 486-493).
- 430) *Lauder*, *supra* note 112 at para. 314.
- 431) See *ELSI*, *supra* note 82 at paras 111-112.
- 432) *Vivendi II*, *supra* note 135 at para. 7.4.16.
- 433) *Azurix*, *supra* note 164 at para. 408. In contrast to the *Azurix* tribunal's suggestion that the reference to 'full' is meaningful, another tribunal has suggested there is no substantive difference between 'protection' and 'full protection and security.' *Parkerings*, *supra* note 133 at para. 354.
- 434) *Occidental*, *supra* 156 at para. 187.
- 435) *Wena*, *supra* note 404 at paras 84-95.
- 436) *Vivendi II*, *supra* note 135 at para. 7.4.15.
- 437) See *supra* §6.42.
- 438) *Siemens*, *supra* note 143 at para. 303.
- 439) *BG*, *supra* note 195.
- 440) Art. 2(2), Argentina-UK (1990).
- 441) *BG*, *supra* note 195 at para. 324.
- 442) *Ibid.*, at para. 326.
- 443) *Vivendi II*, *supra* note 135 at para. 7.4.17 citing *Rankin v. Iran*, Award No. 326-10913-2, Award of 3 Nov. 1987, 17 Iran-US CTR 135 at para. 30 (c), where the Iran-US Claims Tribunal found that statements that could 'have reasonably been expected to initiate or prompt' harassment suffered by a foreigner were inconsistent with the requirement to accord protection and security.
- 444) See *supra* §6.5.
- 445) *Saluka*, *supra* note 15 at para. 475.
- 446) See AAPL, *supra* note 404 at para. 63. See generally Freeman, *supra* note 395.
- 447) In this case, a tribunal must assess whether persons in the circumstances of the commanding officers in question would have reasonably believed the impugned action to be necessary. In these situations, international tribunals are likely to provide a margin of appreciation to the decision-maker given the realities of armed conflict.
- 448) For an overview of treaty practice, see UNCTAD BIT Studies, *supra* note 128. Also see Dolzer & Stevens, *Bilateral Investment Treaties*, *supra* note 128 at 83 and K.J. Vandevelde, *US Investment Treaties: Policy and Practice* (Boston: Kluwer Law and Taxation, 1992) at 212.

- 449) See Art 4(2), Sri Lanka-UK (1980) and Art. IV(2), US-Zaire (1984).
- 450) Other examples include Art. 6(1), Austria-Bosnia (2000); Art. 6(1), Bosnia-Spain (2002); Art. 7, Bosnia-Netherlands (1998); Art. 6(1), Austria-Macedonia (2001); Art. 5, China-Cote d'Ivoire; Art. 4(1), Haiti-UK (1985); Art. 4(1), Sri Lanka-UK (1980); Art. 6, Chile-Nicaragua (1996); Art. 4(1), Estonia-Israel (1994); and Art. 3(3), South Africa-Turkey (2000).
- 451) Art. 4, Ethiopia-Malaysia (1998).
- 452) *BG*, *supra* note 195 at para. 382.
- 453) Art. IV(3) provides: 'Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.'
- 454) *CMS*, *supra* note 95 at para. 375. See also *LG&E*, *supra* note 156 at paras 243 and 261.
- 455) For an overview of treaty practice, see *UNCTAD BIT Studies*, *supra* note 128. Also see Dolzer & Stevens, *Bilateral Investment Treaties*, *supra* note 128.
- 456) Art. VI provides: 'The provisions of this Convention shall not prejudice the application of any present or future treaty or municipal law under which more favourable treatment is accorded to nationals of any of the Parties.'
- 457) Art. 8 entitled 'Other International Agreements' provides: 'Where a matter is covered both by the provisions of this Convention and any other international agreement nothing in this Convention shall prevent a national of one Party who holds property in the territory of another Party from benefiting by the provisions that are most favourable to him.'
- 458) G. Schwarzenberger, *supra* note 154 at 161.
- 459) See *AMT* *supra* note 414 at paras 5.33-5.37.
- 460) For the interpretation of a similar clause, see *Vladimir Berschader and Moïse Berschader v. Russia* (Award, 21 Apr. 2006) at para. 190 interpreting Art. 8(1), BLEU-USSR (1989), which provides: 'The present Treaty shall not prevent investors from benefiting from more favourable terms provided by the laws applicable to them in the country in which the investments are made, or by international treaties concluded by the Contracting Parties at present or in the future.'
- 461) Art. 7(1) provides: 'If the laws and regulations of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favorable than is provided for by the Treaty, such regulation shall to the extent that it is more favorable prevail over this Treaty.'
- 462) *Siemens*, *supra* note 143 at para. 71.
- 463) See *infra* Chapter 10.

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