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3. Dispute Resolution Provisions

A. Introduction

3.01 This chapter covers the following topics:

(1)Typical dispute settlement provisions contained in bilateral investment treaties (BITs).

(2)Treaty arbitration under the ICSID Convention.

(3)Transparency in investment treaty arbitrations.

(4)The nature of the legal rights at issue in investment treaty arbitrations.

(5)Interpreting BITs.

It addresses the aspects of dispute resolution provisions commonly found in BITs, to the extent that they are not addressed elsewhere in this book. The protection offered to investors by the dispute resolution provisions of treaties is sufficiently important for it to rise to the level of a substantive principle in its own right. In addition, the number of arbitral decisions interpreting these provisions makes necessary their inclusion in a text dealing with
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investment treaties. However, this chapter will not deal with the internal procedure of investment treaty arbitrations. [(1)] In this regard, such arbitrations closely resemble international commercial arbitrations. No book yet exists dealing with the internal procedural rules and processes of investment treaty arbitrations but the standard commercial arbitration textbooks provide guidance. [(2)]

B. Typical Dispute Settlement Provisions Contained in BITs

Standard BITs

3.02 The following paragraphs consider the typical dispute resolution provisions contained in BITs.

3.03 The majority of BITs contain no specific provisions that either indicate the precise nature of disputes between investors and States amenable to arbitration, or prescribe a priority between alternative means of dispute settlement. Thus, for example, the Sri Lanka model BIT simply provides:

1.Any dispute between a Contracting Party and an investor of the other Contracting Party shall be notified in writing including a detailed information by the investor to the host party of the investment, and shall, if possible, be settled amicably.

2.If the dispute cannot be settled in this way within six months from the date of the written notification mentioned in paragraph 1 above, it may be submitted upon request of the investor either to:

(a)the competent tribunal of the Contracting Party in whose territory the investment was made; or

(b)the International Centre for the Settlement of Investment Disputes (ICSID) established by the convention [on] the settlement of investment disputes between States and Nationals of the other states opened for signature in Washington D.C. on 18th March 1965; or

(c)the Regional Centre for International Commercial Arbitration in Cairo;

(d)the Regional Centre for Arbitration—Kuala Lumpur;

(e)the International Arbitration Institute of Stockholm Chamber of Commerce; or

(f)the Ad-hoc Court of Arbitration established under the arbitration rules of procedures of the United Nations Commission for International Trade Law. [(3)]

3.04 This type of dispute settlement clause may thus be described as a 'cafeteria style' approach. It gives the investor a choice between a range of different dispute settlement fora, including the courts of the host State, and a number of arbitral tribunals. Such a clause does not deal expressly with either:

(1)whether the expression 'any dispute' is narrowly confined to the vindication of rights under the treaty, or with whether it operates as a general dispute settlement clause,

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7. Treatment of Investors

1. Basis and Character of Treatment Obligations

A. The Rule of Law in International Investment Protection

7.01 Of all the catalogue of rights vouchsafed to investors under bilateral investment treaties (BITs), none has proved more elusive, or occasioned as much recent controversy as the guarantee of 'fair and equitable treatment'. (1) The provision lies at the centre of a set of interlocking treatment obligations that will form the subject of this chapter: the non-contingent standards of fair and equitable treatment, full protection and security; and the contingent standards of national treatment, most-favoured-nation treatment (MFN), and non-discrimination. (2)

7.02 The assurance of fair and equitable treatment simply provides, with Delphic economy of language, that investments shall 'at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory [of the reciprocating host State]'. (3)

7.03 No doubt the beguiling simplicity of the phrase secured its easy passage into treaty practice. What State seeking to attract foreign investment could fail to agree to make such provision? Indeed, what State would concede that its legal system might fail to provide such an elementary protection? Yet, despite having been included almost universally in the modern investment treaty lexicon, this guarantee has until the recent development of investment treaty arbitration received scant attention or analysis. The extent of the neglect was such that one commentator concluded an exhaustive survey of the practice in 1999 by observing 'the paucity of jurisprudence'. (4) BITs, he observed 'are yet to generate a substantial flow of international litigation, and, even where litigation has occurred, the fair and equitable standard has not been decisive in the proceedings.' (5) The most that could be said on the meaning of the standard was the tentative conclusion that it barred 'host countries from treating foreign investors unfairly and inequitably'. (6)

7.04 The investment arbitration experience has turned a drought into a flood. It has produced an important stream of jurisprudence, in which the fair and equitable standard has often emerged as the outcome-decisive right, such that it has been described as 'the most important and frequently adjudicated question in international investment law.' (7) National treatment and MFN treatment have also figured in recent awards. But a determination of their content has, on the whole, proved less controversial, (8) even if their application has on occasion produced results that may not have been anticipated by host State or investor. (9) By
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contrast, fair and equitable treatment has emerged from the shadows of investment law to become a potent tool in the assessment of the adequacy of the judicial and administrative systems of host States. For that very reason, its dangers have also become apparent, perhaps especially when the legal systems placed under the microscope of the international arbitral process are those of developed Western States.

7.05 In the course of this process, arbitral tribunals have had to determine for themselves the content of the concept and its application to the many and various contexts of the State regulation of the modern globalised economy. Hazardous waste disposal in Mexico; (10) populist television channels in the Czech Republic; (11) the building of a new town in Chile; (12) and the conduct of a jury trial in Mississippi (13) have all provoked international investment disputes. These cases of the early twenty-first century are a far cry from the mistreatment of aliens in jail, or the failures in the investigation of crimes against the person, which populate the early twentieth-century reports of arbitral awards.

7.06 The transformation of the standard in the theatre of rights and duties that is international arbitration has exposed the relative poverty of the interpretation process when applied to the open-textured language of an investment treaty. Tribunals have turned to dictionaries for definitions of the concepts of 'fair' and 'equitable'. But, because these terms are general descriptors of the qualities of a system of justice, it is essential first to ask: by reference to what system of law are these concepts to derive their meaning? One can look in vain for guidance from *travaux préparatoires*. The bilateral process does not typically produce informative guidance on the public record as to the parties' intentions, and when such information does become available, (14) the results are often inconclusive.

7.07 The process of the adjudication of these rights has also exposed considerable divergencies in

approach, both between arbitrators, and between arbitrators and contracting States. Some of these differences have had serious consequences for litigants, as well as for the future development of the law in this area. In *Metalclad v Mexico*, the Tribunal's finding that Mexico had failed to provide such treatment because its administrative procedures were not transparent [(15)] was reversed in a challenge to the award in the Canadian courts on the ground that the requirement of transparency was outside the arbitrators' jurisdiction. [(16)] The Tribunal in *Pope*
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& Talbot Inc v Canada decided that it was not limited in its interpretation of the standard in the North American Free Trade Agreement (NAFTA) by the minimum standard of treatment at customary international law. [(17)] The Free Trade Commission of the three State Parties responded, while the arbitration was still on foot, by issuing an Interpretation of the treaty provision in which it confirmed that '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'. [(18)]

7.08 Thus, the appearance of virtual unanimity in State practice, which is gleaned from a comparison of the language of the multitude of treaties, masks an absence of settled agreement over content. Although the decisions of the decade since the first edition of this work have brought greater clarity to some aspects of the standard, it cannot yet be said that a *jurisprudence constante* has been achieved. Much of the controversy has focused on whether, as FA Mann once contended, the terms 'are to be understood and applied independently and autonomously' [(19)] and 'envisage conduct which goes far beyond the minimum standard' [(20)] of the treatment of aliens at customary international law. Even where the treaty language expressly refers to 'fair and equitable treatment *in conformity* with the principles of international law,' one tribunal has found it possible to maintain that this merely sets a floor and not a ceiling on the applicable treaty standard. [(21)] The alternative view, espoused not just by the NAFTA Free Trade Commission but also in the interpretation of other BITs that do not have an express reference to an external international law standard [(22)] is that fair and equitable treatment is synonymous with a customary concept of the minimum standard.

7.09 This latter approach, specifically required by the NAFTA Free Trade Commission and expressly called for by the language of other agreements, has not however quelled the controversy. It has served only to expose a different set of methodological issues. It converts the tribunal's enquiry from one of treaty interpretation to ascertainment of the content of custom. Such a task poses particular challenges in this controversial field. The Tribunal in *Glamis Gold* [(23)] took as its point
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of departure a well-known formulation of the customary standard offered in a 1926 arbitral award, *Neer,* [(24)] and held that the claimant bears the burden of proof to establish by reference to evidence of concordant state practice and *opinio juris* that the customary standard has changed. [(25)] Yet, as the Tribunal pointed out in *RDC v Guatemala,* '[i]t is ironic that the decision considered reflecting the expression of the minimum standard of treatment in customary international law is based on the opinions of commentators and, on its own admission, went further than their views without an analysis of State practice followed because of a sense of obligation. By the strict standards of proof of customary international law applied in *Glamis Gold, Neer* would fail to prove its famous statement …'. [(26)]

7.10 By contrast, other tribunals have argued that the minimum standard has evolved since 1926. In *Merrill & Ring*, [(27)] the Tribunal suggested *obiter* that the standard as encapsulated in *Neer* was simply a 'first track' in the development of the minimum standard. *Neer* had been rendered largely obsolete by the subsequent emergence of the international law of human rights, applicable to aliens and nationals alike. There is, the Tribunal proposed, a discernable second track in the development of the standard so far as concerns investment: 'This other standard, which was much more liberal, is evidenced by the tendency of states to support the claims of their citizens in the ambit of diplomatic protection with an open mind, and without requiring a showing of “outrageous” treatment before doing so.' [(28)]

7.11 This controversy is misguided and the dichotomy presented by the opposing views is a false one on a number of levels. It takes an overly simplistic view of differences in formulation of the right in different treaties. It suggests that the only choice open to a tribunal is between a complete discretion to determine whether particular conduct is 'unfair and inequitable' on the one hand, and the application of a conception of customary international law 'frozen in amber' [(29)] at some time in the past. Most seriously of all, it falsely presents the minimum standard of treatment of aliens in customary international law as having a well-settled content. In so doing, it ignores the level of dissent among States throughout much of the twentieth century not only over the content of such a standard, but even over whether it existed at all. [(30)]

7.12 Indeed, for much of the twentieth century, the international minimum standard of treatment was

vigorously opposed by many States, which saw the limit of the obligation upon them as being to accord national treatment to alien investors. (31) In current BIT practice these
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two standards, traditionally placed in opposition, are almost universally placed alongside one another without any attempt at reconciliation.

7.13 It is both possible and necessary to reconcile the particular treaty language with requirements of general international law. Indeed, as it was put in the important *Saluka* Award, 'the difference between the Treaty standard … and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real'. (32) In any event, the legal protection afforded by the guarantee of fair and equitable treatment cannot be understood without a conception of the proper function of international law in assessing the standards of justice achieved by national systems of law and administration.

7.14 Elihu Root, speaking on the appropriate treatment to be accorded to aliens in 1910, concluded that: 'There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard.' (33) Root here makes four points that continue to be of fundamental relevance in understanding the function of fair and equitable treatment today. First, he posits the *source* of the standard as being a principle of 'general acceptance by all civilized countries'. Secondly, he sees the *concern* of the standard as being that of justice. Thirdly, the *subject matter* of the enquiry is a country's system of law and administration. Fourthly, he saw the *rationale* for a standard which was absolute, and not merely an assurance of national treatment, as being a means of ensuring that that basic standard of justice to which the citizens of all countries ought to be entitled is at least available to the alien, who might otherwise lack the claim of a national on his own legal system. Thus, for Root, the standard was not a matter of establishing two systems of law. Rather the action mandated by the standard 'is always action which would be equally required in case a native citizen were placed under the same circumstances of exigency'. (34)

7.15 Seen in this light, the fair and equitable standard gives modern expression to a *general principle of due process* in its application to the treatment of investors. (35) The foundation of this principle is that, by agreeing to extend such treatment to nationals of a reciprocating country, States have accepted that there is an objective standard of treatment by which their own legal and administrative system may be judged. The standard thus encapsulates the minimum requirements of the rule of law. (36) A Chamber of the International Court of Justice (ICJ) expressed this idea by contrasting due process with arbitrariness: '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 …' (37)
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7.16 The rule of law is properly to be understood as the principle underlying and animating the concept of fair and equitable treatment. It does not of itself provide a prescriptive set of rules that may be mechanically applied in the same way in all contexts in which the principle is invoked. Procedural rights that are essential to a fair judicial process may not be required as due process in administrative decision-making. As the *Apotex* Tribunal observed: 'whatever process may be due depends upon the particular context or circumstances of the claim'. (38)

7.17 Another consequence of the fact that what is being applied is an international law standard, is that international adjudication is not 'the continuation of domestic politics and litigation by other means.' (39) A finding that the host State is in breach of its own law will not breach the standard. (40) This is a basic principle of the law of State Responsibility, since 'an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law.' (41) A Chamber of the International Court elaborated on the significance of this point in the context of arbitrary conduct in the following way:

> [T]he fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. 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 to be classed as arbitrary in international law, though the qualification given to the impugned act

7.198 The standard will not be breached simply because the host State's administrative procedures did not comply with its internal law. In the same way that legality under national law does not determine legality under international law, so too illegality under national law does not *ipso facto* lead to a breach of international law. (321) This is the principal difficulty with the controversial award in *Bilcon.* (322) The Tribunal had to assess the decision of a Joint Review Panel constituted to conduct an environmental assessment of Claimants' application to open a quarry in Nova Scotia. It accepted that 'international responsibility and dispute resolution, in the investor context, is not supposed to be the continuation of domestic politics and litigation by other means.' (323) Despite this, as McRae found in his dissenting opinion, the Tribunal's finding of breach of the treaty standard is essentially premised on the sufficiency for that purpose of a breach of internal law. (324) The NAFTA Contracting States have also pointed to this fallacy in the Tribunal's approach. The United States, for example, has stated in its capacity as a non-disputing party in a subsequent proceeding that: 'International tribunals … do not sit as appellate courts with authority to review the legality of domestic
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measures under a Party's own domestic law. A failure to satisfy requirements of national law, moreover, does not necessarily violate international law.' (325)

7.199 The tribunal should assess the fairness of the administrative process in its totality, since instances of serious administrative negligence, abuse or excess of power, inconsistency and constant amendments of the regulatory requirements may in the aggregate amount to an actionable breach of the standard. (326)

7.200 *Use of powers for improper purposes.* A particular factor that has weighed with tribunals in the application of this standard has been whether the powers exercised by the host State administrative body have been misused for improper purposes. Thus, in *Metalclad* the municipality had denied a construction permit for the operation of the landfill on the grounds of an environmental impact assessment that it was for the federal authorities to conduct under Mexican law. The Tribunal regarded this as improper, and as contributing to the breach of treaty. (327) *Tecmed* was also concerned with the licensing of a hazardous waste landfill in Mexico, but the impugned conduct in that case was that of the Mexican environmental agency. The Tribunal held that the investor had a fair expectation that the powers of the agency would be used for the proper purposes of the laws. (328) Instead, the agency had used its powers in order to deal with political problems arising from public opposition to the landfill.

7.201 *Inconsistency.* Another relevant factor in assessing the fairness of a State's administrative treatment of an investor is inconsistency of conduct vis-à-vis the investor between State agencies. This was critical to the Tribunal's decision in *MTD v Chile*: (329) encouragement and approval of the investment by the Foreign Investment Commission on the one hand, and denial of the necessary zoning permits on the other. This factor, which is closely linked to the idea of transparency, was also treated as important in *Occidental v Ecuador.* (330) The Tribunal there found that the State tax agency had materially changed the framework in which Occidental's investment had been made on the basis of an incorrect interpretation of the investment contract. The subsequent clarifications sought by the investor 'received a wholly unsatisfactory and thoroughly vague answer. The tax law was changed without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes.' (331)

7.202 *Transparency.* The idea that a failure on the part of the administrative agencies to act in a transparent and candid manner could amount to a breach of the fair and equitable treatment standard has figured in the arbitral jurisprudence from the outset of the modern period. It was the dominant factor in the Separate Opinion of Schwartz in *Myers.* (332) *Tecmed* suggests
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that there is a requirement on the part of the host State to act 'totally transparently in its relations with the foreign investor.' (333) A failure in transparency was also a principal element in the *ratio* of the decision in *Metalclad.* (334) The US investor had been denied a municipal construction permit to operate a hazardous waste transfer station and landfill in Mexico. The Tribunal relied in particular upon the reference to transparency in NAFTA's introductory statement of principles. (335) It opined that: 'The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party.' (336) A 'complete lack of transparency and candour in an administrative process' is also singled out as part of the general formulation of the standard in *Waste Management II.* (337)

7.203 On occasion, transparency is also mentioned as an express element in the treaty standard. The ECT creates an obligation on Contracting States to 'create stable, equitable, favourable *and transparent* conditions.' (338) CETA includes in its definition 'a fundamental breach of transparency.' (339)