

WHAT IS THE DISTINCTION BETWEEN THE FAIR AND EQUITABLE TREATMENT STANDARD AND THE MINIMUM STANDARD OF TREATMENT UNDER CUSTOMARY INTERNATIONAL LAW



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ABSTRACT: *The Fair and Equitable Treatment standard is one which is crucial in the Host State – Investor relationship. Provisions requiring that foreign investments be treated accorded with ‘fair and equitable treatment’ are found in almost, if not all investment treaties, and the majority of disputes arising from these treaties consist of a claim alleging violations of the fair and equitable standard. Yet there is still an element of vagueness surrounding the meaning of the phrase ‘fair and equitable treatment’. There are those who assert that the standard is higher than the international minimum standard, while others interpret to be an example of the international minimum standard. Whatever the case may be, it is certain that there is a great deal of overlap between these two investment standards. This paper aims to examine what the distinction between the fair and equitable standard, and the customary international law is, while establishing whether such a distinction has any relevance in the settlement of investment disputes.*

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TABLE OF CONTENTS

ABBREVIATIONS

INTRODUCTION	4
1. FAIR AND EQUITABLE TREATMENT: AN OVERVIEW	6
1.1 Elements of the FET Standard.	9
1.1.1 Protection of Investors Legitimate Expectations	10
1.1.2 Denial of Justice and Due Process	11
1.1.3 Obligation of Vigilance and Protection	11
1.1.4 Transparency and Stability	11
1.1.5 Proportionality	12
2. THE DISTINCTION BETWEEN THE MINIMUM STANDARD OF TREATMENT AND FAIR AND EQUITABLE STANDARD OF TREATMENT	12
2.1 Relevance of the Distinction	12
2.2 The Customary International Law Minimum Standard of Treatment	13
3. FAIR AND EQUITABLE TREATMENT: AN AUTONOMOUS STANDARD OR AN ELEMENT OF INTERNATIONAL MINIMUM STANDARD?	15
3.1 FET as an element of the international minimum standard	15
3.2 FET as an autonomous standard.	19
CONCLUSION	20
BIBLIOGRAPHY	

LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
EU	European Union
FCN	Friendship Commerce and Navigation Treaties
FET	Fair and Equitable Treatment
FTC	NAFTA Free Trade Commission
MFN	Most Favoured Nation Treatment
MST	Minimum Standard of Treatment
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation on Economic Co-operation and Development
VCLT	Vienna Convention on The Law of Treaties

INTRODUCTION

The concept of Fair and Equitable Treatment (FET) has acquired increasing prominence in the international investment scene. Provisions requiring that foreign investments be treated with a fair and equitable standard are common features of Bilateral Investment Treaties (BITs), the reason being that inclusion of such provisions is indicative of host states' willingness to deal with foreign investors on standards set by the international community. The concept of fair and equitable treatment of foreign investments dates back to as early as 1926 in the Havana Charter, and today is a firm principle of international investment law.¹ In this area of international law which was once dominated by expropriation claims, recent jurisprudence shows that claims involving breaches of the FET standard now take the centre stage. According to August Reinisch, "investor claims involving breaches of FET standards have taken the pivotal position once occupied by claims for expropriation with approximately 62% of successful awards since 2006"².

However despite its increasing prominence in investment arbitrations, there is still a lack of clarity as to what the Fair and Equitable standard entails. The difficulty in ascertaining the exact meaning of the FET standard can be deduced from the varying interpretations given by arbitral tribunals in the myriad of cases in which the standard was examined. Two main approaches have generally been applied in the interpretation of the meaning of fair and equitable treatment, namely:

- the literal meaning approach and;

¹ See Draft OECD Convention on the Protection of Foreign Property, 2 ILM (1963) 241.

² Reinisch A., Standards of Investment Protection (Oxford: Oxford University Press, 2008) p 2

- Equating FET with the international minimum standard³.

An issue which is constantly debated in these cases is the relationship between FET, and the international minimum standard of treatment of aliens under customary international law. This debate centres on the question whether the FET standard is an element of the customary international law minimum standard (MST), or an autonomous standard which requires an additional standard above the minimum standard of customary international law. It is apparent that the view of the tribunals is generally dependent on the construction of the FET provision and the treaty they are called on to interpret. Although it can be concluded that the interpretation given by tribunals is mainly based on the notions of what the tribunal think is fair and equitable. The possibility of such an occurrence was illustrated by NAFTA Tribunals in the *Metalclad*⁴ and *Pope & Talbot*⁵ cases, in which the tribunals gave different interpretations of the FET requirement under Article 1105 of the agreement. Following this, the NAFTA Free Trade Commission (FTC) issued a binding note to clarify the meaning of the FET standard, and current position of NAFTA Tribunals based on the FTC's note is that the FET concept does not require more than the customary international law MST. On the other hand other tribunals dealing with disputes under BITs, have at times interpreted FET standard as a free-standing requirement using general rules of treaty interpretation.

This objective of this paper is to analyse the relationship between these two standards of investment protection. To begin with a brief overview will be given of the Fair and Equitable Standard in investment treaties and what it entails, followed by a discussion of the requirements of the customary international law minimum standard. The paper then proceeds with an analysis of what relationship exists between both standards by examining the case law on MST and FET, and finally concludes.

³ UNCTAD, Fair and Equitable Treatment <http://www.unctad.org/en/docs/psiteiitd11v3.en.pdf>

⁴ *Metalclad Corporation v Mexico* ICSID Case No ARB (AF)/97/1, 30 August 2000.

⁵ *Pope & Talbot Inc. v The Government of Canada* 7 ICSID Reports 102, 10 April 2001

1. FAIR AND EQUITABLE TREATMENT: AN OVERVIEW

The words ‘Fair and Equitable Treatment’ describe the standard of treatment which is expected under international investment law, to be accorded to foreign investors by host governments. Provisions requiring host governments to treat investments fairly and equitably are found in the majority of bilateral investment treaties, and in those containing investment provisions. The development of the standard has led to its use as an alternative means of providing investment protection in cases where there are no clear grounds for expropriation. The FET standard is fast becoming “the most invoked treaty standard in investor-State arbitration”⁶. In the words of Judge Higgins, “*the key terms fair and equitable treatment to nationals and companies....are legal terms of art of art well known in the field of overseas investment protection....*”⁷

The development of the standard is rooted in the desire of capital exporting states to ensure that their nationals investing in foreign countries are treated with equity and justice. The FET standard can be traced as far back as the Havana Charter of 1948 in which its article 11(2) prescribed that foreign investments should be assured ‘just and equitable treatment’⁸. This served as a precedent for the inclusion of the standard in various subsequent FCN treaties, and in the OECD Draft Convention on the Protection of Foreign Investments. The standard is also included in the failed Multilateral Agreement on Investment (MAI), the UN Draft Code of Conduct on Transnational Corporations, NAFTA and the Energy Charter Treaty⁹. The FET standard is also recognised by capital importing states as illustrated by its incorporation into

⁶ Supra fn 2, p111

⁷ Separate opinion of Judge Higgins, Oil Platforms case (Iran v US) 1996 ICJ 803, 853

⁸ OECD Working Papers on International Investment: Fair and Equitable Treatment Standard in International Investment Law at <http://www.oecd.org/dataoecd/22/53/33776498.pdf> (last visited on 20/01/09).

⁹ Article 1105 NAFTA, Article 10 ECT.

the Lome IV convention (an agreement on trade and aid signed between the EU, African, Caribbean and Pacific Countries)¹⁰.

The Fair and equitable treatment is an absolute standard, which ensures that a minimum level of protection is accorded to the foreign investor regardless whether nationals of the host state are treated the same way. The independence of FET from national treatment and most favoured nation which was highlighted in *Genin v Estonia*¹¹ means that an investor may be treated unfairly and inequitably even though it is unable to benefit from a NT or MFN clause. The FET standard is usually included in investment treaties to cover governmental actions which do not fall within the scope of other provisions. In essence the provision is there to ensure that a minimum standard of investment protection exists even in situations not contemplated by the specific treaty provisions. This objective was acknowledged in the preamble of the US-Argentina BIT which states that “*fair and equitable treatment is desirable in order to maintain a stable framework*”¹².

An examination of various BITs shows that there is no uniform way of drafting the FET clause. The typical formulations are:

- A plain prescription of FET. This is illustrated by the German Model BIT which provides: *Each Contracting Party....shall in any case accord such investments fair and equitable treatment*¹³.
- Prescription of FET with a reference to international law. An example is Article 4(1) of the 1996 BIT between Spain and Mexico which provided that *Each Contracting Party will guarantee in its territory fair and equitable treatment, according to*

¹⁰ See 1995 Lome IV Convention at http://archive.idea.int/lome/bgr_docs/lomeiv.html (last visited on 20/01/09)

¹¹ Alex Genin et al v Estonia, ICSID Case No ARB/99/2, Final Award, 25 June 2001

¹² US-Argentina Treaty Concerning The Reciprocal Encouragement and Protection of Investment, 1991 U.S.T. LEXIS 176

¹³ Supra fn 2, see fn 12 on page 113.

*international law, for the investments made by investors of the other Contracting Party*¹⁴

- Prescription of FET combined with other standards of treatment such as Full Protection and Security, NT and MFN treatment. For example the US Model BIT provides in Article 5: *Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security*¹⁵.

The significance of the way the clause is phrased, lies in the interpretation of what the standard entails when a dispute arises. In the absence of a link to international law, tribunals may adopt a literal interpretation in the determination of the unfairness of a governmental action. This often leads to diverse results as awards can be based on the arbitrators' notions of fairness and equity. Even where there is a link to international law tribunals usually adopt two views in interpretation namely (i) that the FET standard does not require any addition to the customary international law MST or (ii) the FET standard is an expansion of the customary international law minimum standard. As the interpretation of tribunals on the normative contents of the standard continues to expand, and tribunals continue to create 'new' elements of the standard in 'new' situations of unfair treatment, it is safe to say that the FET standard has acquired a certain amount of elasticity. At times this elasticity appears to be limited when there is a link of the standard to international law in the formulation of the clause. In essence the FET standard is broad and its meaning will depend on the circumstances of the case. As

¹⁴ See Tecmed v Mexico Award, 29 May 2003, 43 ILM (2004) 133

¹⁵ US Model BIT at

http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (last visited on 20/01/09)

stated in the *Mondev* award ..., “*judgment of what is fair and equitable cannot be reached in abstract; it must depend on the facts of the particular case*”.¹⁶

Due to this apparent inexhaustibility of the substantive contents of the standard it is difficult to firmly establish what the standard precisely encompasses. An examination of the jurisprudence of arbitral tribunals highlights some main elements which singly or together form the normative content of the FET standard.

1.1 Elements of the FET Standard.

The FET concept has been described as ‘an embodiment of a rule of law standard which the legal systems of host States have to accept in their dealings with foreign investors’¹⁷. In making this analogy, Schill points out that the FET standard is similar to the rule of law in national systems based on the facts that (i) the contents and requirements of the rule of law under municipal law are often debated, and (ii) the rule of law can be traced to certain common principles which can be transferred to the international level¹⁸. Support for this analogy lies in the jurisprudence of investment tribunals over the years, from which certain recurrent principles which are similar to municipal rule of law principles, have been accepted as elements of the FET standard. Some of the most prominent elements are:

- The protection of the investor’s legitimate expectations
- Due process and denial of justice
- Obligation of vigilance and protection
- Transparency and Stability
- Lack of arbitrariness and non discrimination
- Proportionality

¹⁶ *Mondev v USA*, Award 11 October 2002, 42 ILM (2003) 85, para 118

¹⁷ Schill S., *Fair and Equitable Treatment under Investment Treaties as an Embodiment of The Rule of Law*, 3(5) TDM 2006

¹⁸ *Ibid*

➤ Abuse of Authority.

These elements are referred to in the very comprehensive definition given by the *Tecmed*¹⁹ tribunal, in which it was stated that the fair and equitable treatment provision in the Spain-Mexico BIT:

“.....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 transparently in its relations with the foreign investor, so that it may know before-hand any and all 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.....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 Stat that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments and not to deprive the investor of its investments without the required compensation²⁰

1.1.1 Protection of Investors Legitimate Expectations

An investor's legitimate expectations are derived from the legal framework, representations and undertakings, made explicitly or implicitly by the host state's government at the time of acquiring the investment²¹. Any reversal of such assurances or contractual undertakings by the host state will be considered to be a breach of the FET standard. For example in the *Tecmed*²² case, the revocation of a license granted to the investor was considered as unfair

¹⁹ Supra fn 14.

²⁰ Ibid see para 154, p 173

²¹ Dolzer R., and Schreuer C., Principles of International Investment Law (Oxford: Oxford University Press 2008) p 134.

²² Supra fn 14

and inequitable. The protection of legitimate interests is said to be the dominant element of the FET standard²³.

1.1.2 Denial of Justice and Due Process

This is a fundamental rule of law as well as a vital element of the FET standard. Denial of justice and due process is usually concerned with the improper administration of civil and criminal justice to the investor. The US Model BIT's definition of FET includes the obligation not to deny justice or due process²⁴. Justice and due process can be denied as denial of access to courts, and the subjection of the investor to inadequate and unjust procedures. For example in *Loewen v United States*,²⁵ a trial which had grossly failed in affording due process in the protection of the investor from prejudice on account of his nationality, was said to be a breach of FET.

1.1.3 Obligation of Vigilance and Protection

This principle has arisen in cases where the FET standard was used in conjunction with the full protection and security obligation. It is a duty to exercise due diligence in protecting a foreign investor. In *Occidental v Ecuador*²⁶, the tribunal was of the view that a treatment which is not fair and equitable automatically entails an absence of full protection and security.

1.1.4 Transparency and Stability

Transparency as an element of FET was raised in the *Metalclad* case. The principle centres on the idea that all the requirements for investing should be made known to investors and

²³ Saluka v Czech Republic at

[http://www.mfcr.cz/cps/rde/xbcr/mfcr/Partial_Award_Final_17032006_Saluka_vs_CR_\(Rozhodci_nalez\).pdf](http://www.mfcr.cz/cps/rde/xbcr/mfcr/Partial_Award_Final_17032006_Saluka_vs_CR_(Rozhodci_nalez).pdf)
(last visited on 20/01/09)

²⁴ Supra fn 15

²⁵ *The Loewen Group Inc and Raymond L. Loewen v United States*, Final Award, 26 January 2006.

²⁶ *Occidental exploration and Production Company v Republic of Ecuador*, LCIA No UN 3467, Award, 1 July 2004.

host states should be totally transparent in all dealings with the investor, so that the investor can plan its investments accordingly.

1.1.5 Proportionality

The proportionality principle exists as a measure of the extent of the host state's interference with foreign investments. The principle allows for the balancing of state and investor interest as it helps to reconcile investor interests with the states right to regulate²⁷

2. THE DISTINCTION BETWEEN THE MINIMUM STANDARD OF TREATMENT AND FAIR AND EQUITABLE STANDARD OF TREATMENT

2.1 Relevance of the Distinction

Before embarking on an analysis on whether there is a distinction between the two standards of treatment it is important to understand the relevance of such a distinction, if any. Two main reasons can be advanced as to the importance of this distinction:

- The controversy between developed and developing countries regarding what constitutes the international minimum standard. Most developing countries (for example Latin American countries) have often raised reservations as to whether there is a minimum standard of treatment, and whether it forms part of customary international law²⁸. For this reason and perhaps also out of a lack of clarity in what the minimum standard entails, some capital importing countries may be of the view that the FET standard is to be distinguished from the international MST. This could lead to an intentional exclusion of any link between both when drafting the FET clause in investment agreements.

²⁷ Supra fn 15. P 28

²⁸ Supra fn 3

- The need to impose a threshold on the flexibility in interpretation of the FET standard. It has been established that the legal interpretation of ‘fair and equitable’ is dependent on the circumstances and facts of each case²⁹. Despite the objectivity of the terms fair and equitable, it is necessary to impose limits and a threshold on how far tribunals can go in interpreting this standard. This will prevent a situation whereby practically any discriminatory governmental action taken against a foreign investor stands the chance of being considered unfair and inequitable.

Based on these reasons, tribunals usually determine whether a government’s action is in breach of the FET standard by interpreting it within the limits of:

- the international minimum standard under customary international law
- international law including all sources, or
- the standard itself as an autonomous self contained treaty standard to be interpreted according to Article 31 of the 1961 VCLT³⁰.

2.2 The Customary International Law Minimum Standard of Treatment

The classic definition of the International law minimum standard given by A.H Roth states that ...*‘the international standard is nothing else but a set of rules, correlated to each other and deriving from one particular norm of general international law namely, namely that the treatment of an alien is regulated by the law of nations’*³¹. The MST is a norm of customary law which governs relations between host state and foreign investors, which host states must adhere to regardless of their own domestic laws. The development of the standard as an

²⁹ *Mondev Case*, supra fn 16

³⁰ Vienna Convention on the Law of Treaties, see <http://www.ilsa.org/jessup/jessup06/basicmats/vclt.doc> (last visited on 20/01/09)

³¹ Roth A.H., *The Minimum Standard of International Law Applied to Aliens Leiden (1949)* 127. See OECD Working Papers supra fn 8.

absolute minimum came about as a result of the dissatisfaction of foreign investors and their home states the national treatment given to locals which they considered to be uncivilized, arbitrary or unable to ensure the rule of law³². Violation of this standard attracts international responsibility of the host state, and upon the exhaustion of local remedies, may lead to action by the home state on behalf of the investor through diplomatic protection. The development of the standard was not without opposition notably from Latin America, where the view (based on the Calvo doctrine) was that foreigners are to be given the same rights and treatment as locals, and are subject to domestic legislation and local courts for the settlement of investment disputes.

The precise content of the minimum standard is difficult to identify (as is the case with FET). Early cases concerning the standard dealt with the protection of the physical person. In the *Neer*³³ claim where the claimant alleged that Mexican authorities had exhibited a lack of diligence in the investigation of US national, the claims commission stated that in order to fail the MST test the governmental action must amount to “bad faith, 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..” The test was also applied in the *Roberts*³⁴ case in which Mexico was found in breach of the MST standard by locking up a US in a cell with other men under cruel and inhumane conditions. The commission stated that the test for mistreatment of an alien was not equality but whether the alien was treated in accordance with the ordinary standards of civilization.

Today the concept has been extended to investment protection, and the standard has been incorporated into various investment treaties. For example Article 1105 of NAFTA provides

³² Orellana M., International Law on Investment: the Minimum Standard of Treatment (MST) Vol 1(3) TDM 2004

³³ Neer Claim 9(1926) 4 UNRIAA 60

³⁴ Roberts Claim (1926) 4 UNRIAA 77

“each party to treat all investors of another party in accordance with international law, including fair and equitable treatment and full protection and security”³⁵.

However the inclusion of the MST standard into various BITs and other investment agreements has not led to the clarification of the contents of the standard, as none of these treaties has given a comprehensive definition of what the standard entails. This is an ironic result as one of the reasons for entering into BITs is to clarify vagueness on customary international law as it applies to investment protection.

Common areas in which the international minimum standard has been found to apply include:

- The administration of justice to aliens (particularly denial of justice cases)
- Treatment of foreigners under detention
- Full Protection and Security
- The manner of expulsion of foreigners from host states³⁶.

3. FAIR AND EQUITABLE TREATMENT: AN AUTONOMOUS STANDARD OR AN ELEMENT OF INTERNATIONAL MINIMUM STANDARD?

As previously mentioned, the meaning of the FET standard is an issue which has raised constant debates. Arbitral tribunals that have found themselves faced with this dilemma have generally interpreted the standard in three ways depending on the drafting of the FET clause.

3.1 FET as an element of the international minimum standard

The view that the FET standard refers to the minimum international law standard was articulated by the OECD in the commentary to the Draft Convention on the Protection of

³⁵ North American Free Trade Agreement, at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (last visited 20/01/09).

³⁶ Supra fn 8.

Foreign Property. The commentary states that the “FET standard required conforms in effect to the minimum standard which forms part of customary international law”³⁷. This was considered to be the view of capital exporting countries.

With regards to NAFTA, Article 1105 states that “each party shall accord to investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security”³⁸. However the drafting of Article 1105 must have been unclear, as NAFTA tribunals gave differing interpretations of the FET standard, leading to confusion as to what exactly the standard entails.

In the *Metalclad* case the tribunal found breaches of MST and expropriation based on the refusal by a Mexican municipality to grant the company a license to operate a hazardous waste opportunity. The tribunal based its opinion on the fact that Mexico did not provide a transparent and predictable framework for Metalclad’s investment. More light was thrown on MST in a judicial review initiated by the Mexican government, in which the Supreme Court of British Columbia (the place of arbitration) found that the tribunal had erred in its consideration of the FET standard as there are no transparency obligations contained in Chapter XI of NAFTA. Most importantly the court stated that the FET and full protection and security are examples of MST and do not stand on their own as independent standards³⁹. It is submitted that the British Court of Columbia was of the view that the interpretation of the FET standard should be restricted within the limits of a pre-existing rule of customary international law. This judgment was clearly an attempt at curbing tribunals from adopting an expansionary view in the interpretation of what is fair and equitable. However the absence of a system of precedence in international arbitration means that this judgment is not binding on

³⁷ Commentary on Draft OECD Convention on the Protection of Foreign Property, Notes and comments to Article 1, 2 ILM (1963) 241

³⁸ North American Free Trade Agreement at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=160 (last visited on 24/01/09)

³⁹ Supra fn 4

future tribunals, and indeed subsequent cases on the meaning of FET have been decided differently by the NAFTA tribunal.

A different meaning of the FET standard was adopted by the Tribunal in *Pope v Talbot*⁴⁰. The claimant a U.S company alleged that subsidization measures employed by Canada in its softwood timber sector amounted to a breach of NAFTA provisions on MST amongst other claims. The tribunal in finding a breach of the minimum standard interpreted the fair and equitable treatment standard as an additional standard beyond the customary international law standard. The danger of this interpretation lies in the open-ended nature it accords to the FET by implying that it is not to be interpreted within the confines of customary international law. However it is submitted that the tribunal may have taken this view because it found the customary international law requirement that the conduct has to be ‘egregious and outrageous’ was inadequate to deal with the situation as it was the time.

In a bid to clarify provide clarification and curtail further expansions in the interpretation of the standard, the NAFTA Free trade Commission (pursuant to its power under Article 1131(2)) issued a binding note of interpretation of Article 1105 (1). It stated that the concepts of “fair and equitable treatment” and full protection and security *do not* require treatment in addition to or beyond customary international law, nor does a breach of other NAFTA provisions or separate international agreements establish a breach of article 1105”. Consequently this approach has been followed by subsequent NAFTA tribunals.

The US also holds the same view as the NAFTA FTC. The 2004 Model BIT where expressly states that the concept of fair and equitable does not require treatment in addition to or

⁴⁰ Pope v Talbot v Canada 4 1 ILM 1347

beyond that required by the international minimum standard of treatment, and does not create additional substantive rights⁴¹

However tribunals have not been content with applying the *Neer* standard to interpretation of fairness and equity presumably for the following two reasons: first the *Neer* standard was applied to protection of the physical person, and secondly in the present context of international investments and business, an act can be considered inequitable or fair without necessarily being considered as outrageous. Hence the *Neer* standard was abandoned in the *Mondev* case in which the tribunal opined that there has been considerable development to both substantive and procedural rights under customary international law, and what is unfair and inequitable need not be equated with the outrageous or egregious. The tribunal further stated that the customary law referred to in the FTC's interpretation is the *current* international law which has been shaped by various BITs and FCNs that have been entered into by states. It also stated that a State may treat a foreign investment unfairly or inequitably without necessarily acting in bad faith⁴².

This view was echoed in the *ADF v USA* award. The tribunal stated that customary international law minimum standard is not a "static photograph" of the law as it stood in 1927 when the *Neer* case was rendered, and that both customary international law and the minimum standard of treatment are constantly in a process of development⁴³.

It can therefore be concluded that the general view of the OECD States and under NAFTA is that the 'fair and equitable treatment' standard is an element of the *current* customary international law minimum standard of treatment, and no additional treatment above the minimum standard is required to satisfy the FET standard. The difficulty in this view lies in

⁴¹ Supra fn 15

⁴² Supra fn 15 para 116-117

⁴³ *ADF Group Inc. v United States (NAFTA Arbitration)*, ICSID Case No ARB (AF)/00/1, Final Award, 9 January 2003.

the fact that it is still impossible to identify all the normative contents of the MST standard and therefore the possibility exists that tribunals will still adopt a broad approach in deciding what is unfair and inequitable.

3.2 FET as an autonomous standard.

Outside the NAFTA context, other tribunals have tended to interpret the FET standard as an autonomous, free standing standard based on the rules on treaty interpretation and general principles of international law. This is usually the case when the BIT in question makes no reference to international law, and the tribunals often give a broad interpretation.

For example in the *Saluka* case, the tribunal interpreted the FET provision in the BIT as an autonomous treaty standard in accordance with the rules of interpretation laid down in Article 31(1) of the 1969 VCLT, of interpreting in good faith by looking at the ordinary meaning of the words in light with the object and purpose of the Netherlands-Czech Republic BIT⁴⁴. The tribunal decided that in treating IPB bank (which Saluka had invested in) differently by excluding it from the state assistance given to its three competitors without any reasonable justification, the government acted in a discriminatory manner which led to a loss of Saluka's investment. The tribunal decided that the Czech government had acted unfairly and inequitably by failing to deal with IPB and Saluka in an unbiased, even-handed, transparent and consistent manner, and also in failing to communicate with in an adequate manner.

In some cases where reference was made to international law, tribunals using the autonomous approach have held that there is no basis for restricting the FET standard to customary international law. This was the view of the *Vivendi v Argentina*⁴⁵ tribunal that the reference to international law in the Argentina-France BIT is to be considered to mean a wider range of

⁴⁴ Supra fn 22, para 309

⁴⁵ *Vivendi v Argentina* Republic ICSID Case No. ARB/97/3, Award, 20 August 2007.

international law principles, which set a floor and not a ceiling in the interpretation of the FET standard.

CONCLUSION

The objective of this paper is to establish whether there is a difference between the fair and equitable standard and the minimum standard of treatment under customary international law, and what the difference entails. It can be concluded that the current position on the relationship between these two standards is divided, and is very much dependent on the manner in which the fair and equitable treatment standard is formulated in the investment agreement. Arbitration tribunals called upon to interpret the standard usually do so based on if the standard is linked to the international minimum standard in the investment treaty.

The view favoured by NAFTA tribunals and the OECD is that the fair and equitable standard is a constituent of the international minimum standard, and does not require treatment in addition to or beyond customary international law. The customary international law minimum standard referred to is the evolving customary law as it stands currently, and not as it was in the *Neer* case. However the fair and equitable standard is viewed by other tribunals as an autonomous standard which is not limited to the customary international law minimum standard

Whatever the case may be, it is clear from the jurisprudence of tribunals that there is a great overlap between the substantive contents of the two standards, and perhaps the possibility of convergence. In this light one might question what the significance of a difference between the two standards is, as the difference “may be more apparent than real”⁴⁶. In the words of the Azure tribunal,*the question whether or not fair and equitable treatment is or is not*

⁴⁶ Supra fn 22, para 291.

*additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment and whichever side of the argument one takes, the answer to the question may in substance be the same.*⁴⁷

⁴⁷ Azurix v Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006, para 361.

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