REVISITING THE FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT LAW

Nitish Monebhurrun[1]

Summary: 1 Introduction. 2 Searching For a Definition of the Fair and Equitable Treatment in International Investment Agreements. 2.1 The imprecision of international investment agreements on the fair and equitable treatment. 2.2 The insufficiency of the minimum standard to define the fair and equitable treatment. 3 Looking For a Definition of the Fair and Equitable Treatment in the Arbitral Awards. 3.1 The Main Characteristics of the Fair and Equitable Treatment in the Arbitral Awards. 3.2 The Adjustments Brought to the Application of the Fair and Equitable Treatment Standard. 4 Conclusion.

1 INTRODUCTION

Even if the fair and equitable treatment has been characterised as the *grundnorm* of international investment law[2] and even if it is widely invoked in the arbitration practice, its definite normative content has always been subject to many debates[3]. It is undisputed that the fair and equitable principle has gained considerable importance in international investment law[4]. Indeed, the violation of the fair and equitable treatment is invoked in most cases submitted to arbitral tribunals[5]. Most bilateral and multilateral agreements on investment protection

---

1 The author is a Doctor in International Law (School of Law of Sorbonne, Paris) and an Associate Professor at the University Center of Brasília. He also acts as a United Nations Consultant for the Brazilian Competition Authority.

2 *Suez, Sociedad General de Aguas de Barcelona, S.A. And Vivendi Universal S.A. v. Argentina*, ICSID no.ARB/03/19, Decision on liability, 30 July 2010, §188.

3 SCHILL (S.), " "Fair and Equitable Treatment" as an Embodiment of the Rule of Law", *in* HOFMANN (R.) / CHRISTIAN (T.J.), (eds), *The International Convention on the Settlement of Investment Disputes, Taking Stock after 40 years*, Germany, NOMOS, Schriften zur Europäischen Integration und internationalen Wirtschaftsordnung 2007, p.33.

4 UNCTAD, *Fair and Equitable treatment*, New York/Geneva : UNCTAD Series on issues in international investment agreements, UNCTAD/ITE/IIT.11 (Vol. III)U.N. Publications, 1999, p. 1; S. Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice", Oxford, *BYIL*, 70th Year of issue, 1999, p.99; S.Schill, " "Fair and Equitable Treatment" as an Embodiment of the Rule of Law", *in* Hofmann, Rainer / Tams, Christian J. (eds), *The International Convention on the Settlement of Investment Disputes, Taking Stock after 40 years*, Germany, NOMOS, Schriften zur Europäischen Integration und internationalen Wirtschaftsordnung 2007, p.32.

5 DOLZER (R.), SCHREUER (C.), *Principles of International Investment Law*, Oxford, Oxford University Press, 2008, p.119; SCHREUER (C.), « Fair and Equitable Treatment in Arbitral Practice », *JWIT*, Vol. 6, No. 3, June 2005, p.357 ; UNCTAD, *Fair and Equitable treatment*, New York/Geneva : UNCTAD Series on issues in international investment agreements, UNCTAD/ITE/IIT.11 (Vol. III)U.N. Publications, 1999, p. 1; VASCIANNIE (S.), « The Fair and Equitable Treatment Standard in International Investment Law and Practice », Oxford, *BYIL*, 70th Year of issue, 1999, p.99; SCHILL (S.), « "Fair and Equitable Treatment" as an Embodiment of the Rule of Law », *in* HOFMANN (R.) / CHRISTIAN (T.J.), *The International Convention on the Settlement of Investment Disputes, Taking*

contain a specific provision whereby the host State binds itself to confer a fair and equitable treatment to foreign investors and their investments[6]. The aim is to guarantee foreign investors that their investment will be treated in a just manner. In the *Barcelona Traction* case, for example, the International Court of Justice stated that "[w]*hen a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them.*[7]".

This was necessary, especially during the decolonisation period, where the deep atmosphere of nationalism, the unstable economical and political background shredded away the confidence of foreign investor in the decolonised States' economy which were and are for many of them the recipient of considerable investments. Having a fair and equitable treatment clause in an international investment agreement helps to boost or at least to stabilise the investors' level of confidence. Consequently, this is supposed to potentially attract foreign investors, which is line with the policy of the promotion of investment through its protection. This being said, the international investment agreements do not, as such, define what is a fair and equitable treatment[8].

On one hand, many principles or standards anchored in international investment law are not extensively defined in legal texts[9] and on the other hand, the

---

Stock after 40 years, Germany, NOMOS, Schriften zur Europäischen Integration und internationalen Wirtschaftsordnung 2007, p.32; SALACUSE (J.W.), *The Law of Investment Treaties*, Oxford, Oxford University Press, 2010, p.218; MANCIAUX (S.), « Chronique des sentences arbitrales », *Journal du droit international*, no.2, April 2011, p.33.

6 CARREAU (D.), JUILLARD (P.), *Droit international* économique, Paris, Dalloz, 4th ed., 2010, p.486; KILL (T.), "Don't Cross the Stream: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations", *Michigan Law Review*, Vol.106, p.854; SALACUSE (J.W.), *The Law of Investment Treaties*, Oxford, Oxford University Press, 2010, p.218; C. Schreuer, « Fair and Equitable Treatment in Arbitral Practice », *JWIT*, Vol. 6, No. 3, June 2005, p.357; OECD/OCDE, *Fair and Equitable Standard in International Investment Law*, Working Paper on International Investment, Number 2004/3, September 2004, p.5 (*available on*: http://www.oecd.org/dataoecd/22/53/33776498.pdf) ; UNCTAD, *Fair and Equitable treatment*, New York/Geneva : UNCTAD Series on issues in international investment agreements, UNCTAD/ITE/IIT.11 (Vol. III)U.N. Publications, 1999, p. 21.

7 Case concerning *The Barcelona Traction Light and Power Company Limited* (Belgium v. Spain), International Court of Justice, Judgement of 5th February 1970, §33 (*available on*: http://www3.icj-cij.org/docket/files/50/5387.pdf).

8 SALACUSE (J.W.), *The Law of Investment Treaties*, Oxford, Oxford University Press, 2010, p.218.

9 SCHILL (S.), " "Fair and Equitable Treatment" as an Embodiment of the Rule of Law", *in* HOFMANN (R.) / Tams, CHRISTIAN (J.) (eds), *The International Convention on the Settlement of Investment Disputes, Taking Stock after 40 years*, Germany, NOMOS, Schriften zur Europäischen Integration und internationalen Wirtschaftsordnung 2007, p.32.

main actors concerned by this law field must know the exact meanings and contents of their rights and obligations. This might appear as a paradox. Still, it remains that many legal principles are dipped into abstraction and noting the abstraction and the generality of a norm is the first step of its analysis, of its interpretation and application[10]. In any case, the judges or arbitrators have an obligation to rule despite the laconic configuration of the law[11]. If not, they could be denying justice.

The same logic applies to the fair and equitable treatment. Its definition and content cannot be deduced on a sole face value basis. And what is fair and equitable can, in absolute terms, refer more to moral than to law. Consequently, of the standard is not or very poorly defined in investment-related agreements (2), the arbitral tribunals have given it a content in their various awards (3).

2 SEARCHING FOR A DEFINITION OF THE FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT AGREEMENTS

The interest cast on the fair and equitable treatment is mainly due to its increasing invocation before arbitral tribunals[12]. Years of arbitration have helped to approach this standard and have forged and brought forward some elements to identify it. The international investment agreements, however, do not provide much information for a complete understanding of the fair and equitable treatment standard (2.1) and there has been much debate as to whether this standard is similar to what is known as the minimum standard required by international law[13] (2.2).

2.1 The imprecision of international investment agreements on the fair and equitable treatment

It seems that one of the first provisions mentioning the fair and equitable treatment is the article 11(2) of the Havana Charter which should have instituted an International Trade Organisation[14]. This article stated that the Organisation could make necessary recommendations for

10 See for example: Aristote, *Ethique de Nicomaque*, (Livre V, Chapitre X), Paris, Flammarion, 1965, p.162.

11 In international investment law, article 42(2) of the Washington Convention of the 18th March 1965 instituting the ICSID states that: "*The Tribunal may not bring in a finding of* non liquet *on the ground of silence or obscurity of the law.*". The Convention is available on: www.icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

12 OECD/OCDE, *Fair and Equitable Standard in International Investment Law*, Working Paper on International Investment, Number 2004/3, September 2004, p.2.

13 UNCTAD, *Bilateral Investment Treaties, 1995-2006: Trends in Investment Rule-Making*, New York/Geneva, 2007, p.28 (*available on*: http://www.unctad.org/en/docs/iteiia20065_en.pdf); OECD/OCDE, *Fair and Equitable Standard in International Investment Law*, Working Paper on International Investment, Number 2004/3, September 2004, p.2.

14 VASCIANNE (S.), "The Fair and Equitable Treatment Standard in International Investment Law and Practice", Oxford, *BYIL*, 70th Year of issue, 1999, p.107; SCHREUER (C.), " Fair and Equitable Treatment in Arbitral Practice", *JWIT*, Vol. 6, No. 3, June 2005, p.357; UNCTAD, *Fair and Equitable treatment*, *op. cit.*, p.7; OECD/OCDE, *Fair and Equitable Standard in International Investment*

the adoption of bilateral or multilateral treaties aiming "*to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another* (...)[15].". It should, first, be noted that the Charter never came into force and second, that the provision is not, in itself, self-explanatory. It does not explain what is just and what is equitable. This absence of definition or explanation can also be noticed in other agreements on the multilateral level[16]. The Seoul Convention of the 11th October 1985 on the Multilateral Investment Guarantee Agency states, without giving many details, in its article 12(e) (iv) that one of the conditions for the guarantee of the investment activity is the availability of a fair and equitable treatment in and by the host State[17]. In a similar sense, the NAFTA[18], the Energy Charter[19], the Colonia Protocol on the promotion and the reciprocal protection of investments in the MERCOSUR[20] contain a provision on this standard.

The requirement of a fair and equitable treatment is also found in bilateral relations. Just after the second World War, a series of treaties entitled '*Friendship, Navigation and Commerce*' (FNC) were signed by the United States with States like Ireland, Greece, Israel, Nicaragua, France, Pakistan, Belgium, Luxembourg, Germany, Ethiopia or the Netherlands[21]. Many of these contained provided for 'equitable treatment'. If we refer to the position of Kenneth Vandevelde who represented the United States in the negotiations of bilateral investment agreements, no differences must be established between 'fair and equitable treatment' and 'equitable treatment'[22]. The importance of these treaties diminished after the birth and then the rapid development of bilateral investment treaties[23]. The platform of international investment law is now in great part built up on such bilateral

---

Law, Working Paper on International Investment, Number 2004/3, September 2004, p.3.

15 The Charter is available on: http://www.worldtradelaw.net/misc/havana.pdf

16 The fair and equitable treatment standard also appears in the so-called *soft law* sphere. Mention can be made of the Abs-Shawcross convention project on the protection of foreign private investments (1959), of the OECD project on the protection of foreign property (1967), the Code of conduct of the United nations for transnational companies (1986), the World Bank guidelines for the treatment of foreign direct investment (1992).

17 The Convention is availble on: http://www.miga.org/documents/miga_convention_november_2010.pdf

18 Article 1105(1), *available on*: http://www.worldtradelaw.net/fta/agreements/nafta.pdf

19 Article 10(1), *available on*: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf

20 Article 3 (the Colonia Protocol has not entered into force), *available on*: http://www.cvm.gov.br/ingl/inter/mercosul/coloni-e.asp

21 See: VASCIANNIE (S.), "The Fair and Equitable Treatment Standard in International Investment Law and Practice", Oxford, *BYIL*, 70th Year of issue, 1999, pp.110-111.

22 *Ibid*., p.111.

23 The first bilateral investment treaty was signed between Germany and Pakistan in 1959.

investment treaties and they might in the future be governed by the uprising wave of free-trade agreements. These contain, in majority, a provision related to fair and equitable treatment. Exceptions exist[24]. The aim here is not to provide a full catalogue of all existing BITs. Only a few of these will be mentioned for the purpose of illustration. What must be noted is the laconic language of their provisions which reflects the one used in the FNC treaties. The BIT signed between Finland and Argentina on the 5th of November 1993 states in its article 2:

"*Each Contracting Party shall at all times ensure fair and equitable treatment of investments by investors of the other Contracting Party* (...)[25]".

Article 3(1) of the BIT between China and Chile of the 23rd of March 1994 reads:

"*Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.*[26]".

It is known that Brazil has not ratified any bilateral investment treaty even if it has signed some of these. Article 3 of the investment protection agreement between Brazil and Denmark will only be mentioned to highlight that the Brazilian State had some concerns about the fair and equitable treatment standard while negotiating with other States:

"*Em seu território, cada parte Contratante concederá um tratamento justo e equitativo aos investimentos efetuados por investidores da outra Parte Contratante* (...).[27]".

Other agreements contain a very specific formulation of the fair and equitable treatment. For instance, article 5 of the 2004 US BIT model informs that:

> *1. Each party shall accord to covered investments treatment* ***in accordance with customary international law****, including fair and equitable treatment* (...).
> *2.* (...) *The obligation in paragraph one to provide:*
> *(a) "Fair and Equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings*

24 See for example, the bilateral investment treaties between: Germany and Singapore (3/10/1973); Pakistan and Azerbaijan (9/10/1995); Pakistan and Japan (10/031998); Pakistan and Philippines (23/04/1999); Pakistan and Romania (21/01/1978); Pakistan and Sri Lanka (20/12/1997). These treaties are available on : www.unctadxi.org/templates/docsearch_____779.aspx
25 The BIT is available on: www.unctad.org/sections/dite/iia/docs/bits/argentina_finland.pdf
26 The BIT is available on: http://www.unctad.org/sections/dite/iia/docs/bits/chile_china.pdf
27 The BIT is available on: http://www.unctad.org/sections/dite/iia/docs/bits/brazil_denmark_por.PDF

> *in accordance with the principle of due process embodied in the principal legal systems of the world;* (...).[28]

First, the latter provision somehow enlightens the fair and equitable treatment' standard. It can be read that a denial of justice might be a violation of that standard. In this treaty, one element of fair and equitable treatment therefore appears. This being said, this standard is not and cannot be reduced to denial of justice. The provision does not present or represent a tangible definition. The wording is paramount and the word "*includes*" clearly shows that fair and equitable treatment has a broader sense than denial of justice. It includes denial of justice but not only denial of justice. Second and most importantly, the precision, "*in accordance with customary international law*", must be noted. It can be found in various other investment agreements. In general, the agreements concluded by Canada, France and the United States make a specific reference to customary international law as far as the provision on fair and equitable treatment is concerned[29]. Some Japanese agreements also follow the same sense. Article 5 of the BIT between Japan and Peru[30] on fair and equitable treatment is entitled 'Minimum Standard of Treatment' and it states:

> *1. Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party treatment in accordance with customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.*
> *2. For the purpose of paragraph 1, the concept 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.*

These provisions actually refer to the minimum standard of treatment to which the fair and equitable treatment standard has sometimes been linked, even if this is practically subtler.

---

28 *Available at*: http://italaw.com/documents/USmodelbitnov04.pdf (Emphasis added). Some Japanese BITs also contain similar provisions. See for example, article 5 of the agreement on the protection, promotion and liberalisation of investment signed between Japan and Peru on the 21st of November, *available on*, http://www.unctad.org/sections/dite/iia/docs/bits/japan_peru.pdf

29 OECD/OCDE, *Fair and Equitable Standard in International Investment Law*, Working Paper on International Investment, Number 2004/3, September 2004, p.2.

Article 1105 of the NAFTA also refers to these principles of international law: "*Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment*."

30 The BIT is available on: http://www.unctad.org/sections/dite/iia/docs/bits/japan_peru.pdf

2.2 The insufficiency of the minimum standard to define the fair and equitable treatment

The minimum standard is related to the minimum protection which a States owes to aliens on its territory. Some States affirm that this protection is part of customary international law and this appears in the international investment agreements they sign. They consider that the same protection is due to foreign investors and they relate it to the fair and equitable treatment. This position has obtained a positive response before arbitral tribunals[31]. The customary law to which they refer is considered as existing customary law which is, nevertheless, prone to evolve[32]. The landmark *Neer* case of the United States-Mexico Claims Commission (15 October 1926) is considered to have underscored this customary law by affirming that "*treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect or duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its* sufficiency".[33] The tribunal in the *Mondev* case, however, whilst applying the minimum standard[34] has highlighted that the *Neer* context of the 1920s cannot be considered as reflecting the current state of international law without being anachronistic[35]. If there exists a minimum standard, it should it should be in line with the ongoing reality.

Some States, on the other hand, do not consider that there exists a minimum standard of treatment. Indeed, there are many BITs which do not refer to the minimum standard. They merely mention the fair and equitable treatment

31 For example: *Mondev International Ltd v. United States*, 11 October 2002, ICSID Case No. ARB(AF)/99/2, §§100-125; *ADF Group Inc. v. United States of America,* 9 January 2003, ICSID Case No. ARB (AF)/00/1, §§175-178; *The Loewen Group Inc. and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB(AF)/98/3, Award, 26th June 2003, §§124-128; *Waste Management Inc. v. United Mexican States*, 30 April 2004, ICSID Case No. ARB (AF)/00/3, Award, §§90 *et seq.* ; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL Rules, Final Award, 26 January 2006, §192 *et seq.*

32 *Mondev International Ltd v. United States*, 11 October 2002, ICSID Case No. ARB(AF)/99/2, 9 October 2002, §124.

33 See: United Nations Reports of International Arbitral Awards, 1926, IV, pp. 61-62.

34 *Mondev International Ltd v. United States*, 11 October 2002, ICSID Case No. ARB(AF)/99/2, 9 October 2002, §125: " (...) *there can be no doubt that, by interpreting Article 1105(1) to prescribe 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 under NAFTA, the term "customary international law" refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant.*

35 *Mondev International Ltd v. United States*, 11 October 2002, ICSID Case No. ARB(AF)/99/2, §123.

without any further reference to international law[36]. This is supported by some arbitral tribunals[37]. One author observed that the "*terms 'fair and equitable' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all 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*".[38]

Once this distinction has been established between agreements containing the minimum standard of treatment and those which do not, the quest towards the definition of fair and equitable treatment is not fulfilled. This distinction has been subject to much doctrinal debate. A pragmatic stance would be the following. If the agreement applicable to a given case mentions the minimum standard, then the tribunal may refer to it and interpret the concerned provision accordingly. If no mention is made in the agreement, then, it follows that the latter corresponds to the parties' will[39]. Had they wanted to specify the minimum standard of treatment in the agreement, they could have done it[40]. There might therefore be no need to scrutinise their intention too sharply[41].

---

36 For example, the BIT between Argentina and Sweden (22/11/1991) reads: "*Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services and the sale of their production, through unjustified or discriminatory measures.*" (*available on*: http://www.unctad.org/sections/dite/iia/docs/bits/argentina_sweden.pdf).

37 *Suez, Sociedad General de Aguas de Barcelona, S.A. And Vivendi Universal S.A. v. Argentina*, ICSID no.ARB/03/19, Decision on liability, 30 July 2010, §180-186.

38 MANN (F.A.), "British Treaties for the Promotion and Protection of Investments", BYIL, Vol.52, 1981, p.244.

39 On this point see: DOLZER (R.) and STEVENS (M.), *Bilateral Investment* Treaties, The Hague, M.Nijhoff, 1995, p.60; MANN (F.A.), "British Treaties for the Promotion and Protection of Investments", BYIL, Vol.52, 1981, p.244; C. Schreuer, " Fair and Equitable Treatment in Arbitral Practice", *JWIT,* Vol. 6, No. 3, June 2005, p.360; UNCTAD, *Fair and Equitable treatment*, *op. cit.*, p.7; OECD/OCDE, *Fair and Equitable Standard in International Investment Law*, Working Paper on International Investment, Number 2004/3, September 2004, p.40; S. Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice", Oxford, *BYIL*, 70th Year of issue, 1999, pp.139-144.

40 DOLZER (R.), SCHREUER (C.), *Principles of International Investment Law*, Oxford, Oxford University Press, 2008, p.124.

41 For a study on this issue, see: KILL (T.), "Don't Cross the Stream: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations", *Michigan Law Review*, Vol.106, p.853-880.

Despite its importance, this debate does not clearly and objectively bring to light the characteristics of the fair and equitable treatment. This task has been assumed by arbitral tribunals which have, through their awards, explained this standard.

3 Looking For a Definition of the Fair and Equitable Treatment in the Arbitral Awards

It must, first of all, be noted that there is no *stare decisis* in international law and this obviously applied to international investment law[42]. The arbitral tribunals nevertheless normally refer to past awards in order to support their own argumentation[43]. The fair and equitable treatment is subsequently anchored in this configuration and instead of affirming that there are definite elements characterising the standard, it is preferable to assert that there is a tendency followed by arbitral tribunals in the choice and in the use of elements helping in the definition. Indeed, the fair and equitable treatment appears as an evolving standard[44] to which various characteristics have been given. Hence, the interpretation and the application of the fair and equitable standard has to be studied through these characteristics (3.1) before examining how some adjustments might be sometimes be necessary (3.2).

3.1 The Main Characteristics of the Fair and Equitable Treatment in the Arbitral Awards

As mentioned, the fair and equitable treatment standard is not necessarily self-explanatory[45]. On one hand, it can seem incongruous to use an imprecise principle. On the other other hand, it can be argued that such imprecision is not always despised by practitioners who can turn and mould it in the way they like. The

42 SCHREUER (C.), WEINIGER (M.), "A Doctrine of Precedent?", *in*, MUCHLINSKI (P.), ORTINO (F.), SCHREUER (C.) [eds.], *The Oxford Handbook of International Investment Law*, Oxford, Oxford University Press, 2008, p.1189.

43 For example: *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, §67; *Mondev International Ltd v. United States*, 11 October 2002, ICSID Case No. ARB(AF)/99/2, §189; See also, KAUFFMANN-KOHLER (G.), "Arbitral Precedent : Dream, Necessity or Excuse ?", The 2006 Freshfields Lectures, *Arbitration International*, Vol. 23 Issue 3, 2007, p.368.

44 *Mondev International Ltd v. United States*, 11 October 2002, ICSID Case No. ARB(AF)/99/2, §§114-116; *ADF Group Inc. v. United States of America,* 9 January 2003 (Award), ICSID Case No. ARB (AF)/00/1, §§179-181.

45 See for instance: *Suez, Sociedad General de Aguas de Barcelona, S.A. And Vivendi Universal, S.A. v. Argentine,* ICSID No.. ARB/03/19, Decision on Liability, 30 July 2010, §187; SALACUSE (J.W.), *The Law of Investment Treaties*, Oxford, Oxford University Press, 2010, p.221.

legal methodology imposes to interpret treaty provisions as per the Vienna Convention on the Law of Treaties (1969). On the basis of article 31 of this Convention, it remains difficult to attribute an ordinary meaning to what is fair and equitable[46]. Such an interpretation would lead to words like "*just*", "*even-handed*", "*unbiased*" or "*legitimate*"[47], which is rather tautological[48]. Hence, the obscure standard was explored by arbitrators who "*through their interpretative or declaratory functions greatly contribute to the determination and development of international law* (…) [and whose] *decisions and pronouncements constitute the repository of legal wisdom which has traditionally proven to be a highly useful source of international law*[49].". In so doing, it came out that fair and equitable treatment could only be defined as per the facts of each case[50] and practice has characterised it by the requirements of (1) stability, predictability, transparency and consistency[51], (2) due process[52], (3) protection against arbitrariness and discrimination[53], (4) proportionality[54] and (5) legitimate expectations[55].

---

46 S.Schill, " "Fair and Equitable Treatment" as an Embodiment of the Rule of Law", *in* Hofmann, Rainer / Tams, Christian J. (eds), *The International Convention on the Settlement of Investment Disputes, Taking Stock after 40 years*, Germany, NOMOS, Schriften zur Europäischen Integration und internationalen Wirtschaftsordnung 2007, p.36.

47 *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, 25/05/2004, Award, §113.

48 *Suez, Sociedad General de Aguas de Barcelona, S.A. And Vivendi Universal, S.A. v. Argentine,* ICSID No.. ARB/03/19, Decision on Liability, 30 July 2010, §221.

49 SINHA (B.P.), *Unilateral denunciation of treaty because of prior violations of obligations by other party*, Netherlands, Nijhoff, 1966, p.35.

50 *Suez, Sociedad General de Aguas de Barcelona, S.A. And Vivendi Universal, S.A. v. Argentine,* ICSID No.. ARB/03/19, Decision on Liability, 30 July 2010, §188; *Mondev International Ltd v. United States*, 11 October 2002, ICSID Case No. ARB(AF)/99/2, §118.

51 For example: *CMS Gas Transmission Company v. Argentina,* Final Award, 25 May 2005, ICSID Case No. ARB/01/08, §274; *Occidental Exploration and Production Company (OEPC) v. Ecudor*, UNCITRAL Rules, Final Award, 1st July 2004, §183; *Metalclad Corporation v. The United Mexican States*, 30 August 2000, ICSID Case No. ARB (AF)/97/1, §99.

52 For example: *Waste Management Inc. v. United Mexican States*, 30 April 2004, ICSID Case No. ARB (AF)/00/3, §98; *S.D Myers, Inc v. Government of Canada,* UNCITRAL/NAFTA, Partial Award, 13th November 2000, §134.

53 For example: *The Loewen Group Inc. and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB(AF)/98/3, Award, 26th June 2003, §135; *Waste Management Inc. v. United Mexican States*, *op. cit.* 70, §98.

54 For example: *Saluka Investments v. The Czech Republic,* UNCITRAL Rules, Partial Award, 17 March 2006, §304.

55 For example: *Metalclad Corporation v. The United Mexican States*, 30 August 2000, ICSID Case No. ARB (AF)/97/1; *Nagel v. Czech Republic,* Final Award, 2003, SCC Case 49/2002, Stockholm Arb. Rep. 141 (2004); *ADF Group Inc. v. United States of America,* ICSID Case No. ARB/(AF)/00/1, Award, 9th January 2003; *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, 30 April 2004; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, 25 May 2004; *GAMI Investments Inc. v. The United Mexican States,* UNCITRAL Rules, Final Award, 15th November 2004;*CMS Gas Transmission Company v. Argentina,* Final Award, 25 May 2005, ICSID Case No. ARB/01/08; *Occidental Exploration and Production Company (OEPC) v. Ecuador*, UNCITRAL Rules, Final Award, 1st July 2004; *Eureko B.V. v. Republic of Poland,*

(1) ***The requirements of stability, predictability, transparency and consistency.***

The investment must be made within a framework which is stable, predictable, transparent and consistent. The various cases held against Argentina have confirmed the importance of these requirements. The stability of the business and investment environment is of utmost importance for the investor to be able to plan his activities. Frustrating such stability is considered as contrary to a fair and equitable treatment[56]. In the same sense, the host State has the obligation to guarantee the predictability of the legal framework. A predictable and stable legal framework[57] is a "*recognized goal of international investment law*[58]". These two requirements are very close to the obligation for the State to be consistent and transparent in its relation with the foreign investors. To be fair and equitable also means to be consistent and transparent[59] in one's action. The State cannot blow hot and cold concerning a similar relation with an investor. Its position must be coherent

---

Partial Award, 19 August 2005; *Noble Ventures c. Romania,* ICSID Case No. ARB/01/11, 17th October 2005; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL Rules, Final Award, 26 January 2006; *Saluka Investments v. The Czech Republic,* UNCITRAL Rules, Partial Award, 17 March 2006; *Azurix Corp. v. The Argentine Republic*, 14 July 2006, ICSID Case No. ARB/01/12; *LG&E Energy Corp. v. The Argentine Republic,* Decision on Liability, 3rd October 2006, ICSID Case No. ARB/02/1; *PSEG Global Inc. and konya Ilgin Elektrik Uterim ve Limited Sirketi v.* Turkey, ICSID Case No. ARB/02/5, Award, 19th January 2007; ENRON *Corp. Ponderosa Assetsn L.P. v. The Argentine Republic,* ICSID Case No. ARB/01/3, Award, 22 May 2007; *M. CI Power Group LC and New Turbine, Inc.* v. *Republic of* Ecuador, ICSID Case No. ARB/03/6, Award, 31st July 2007; SEMPRA *Energy International v. The Argentine Republic,* ICSID Case No. ARB/02/16, 28 September 2007; *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Final Award 24 December 2007; *Suez, Sociedad General de Aguas de Barcelona, S.A. And Vivendi Universal, S.A. v. Argentine,* ICSID No.. ARB/03/19, Decision on Liability, 30 July 2010; *Ioannis Kardassopoulos v. Georgie,* ICSID No. ARB/05/18, Award, 3 March 2010; *AES Summit Generation Ltd et AES-Tisza Eromu Kft. v. Hongrie*, ICSID No. ARB/07/22, Award, 23 September 2010; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine, ICSID* No. ARB/01/3, Decision on Annulation, 30 July 2010; *Alpha Projekholding GmbH v. Ukraine,* ICSID No.ARB/07/16, Sentence, 8 November 2010; *Walter Bau v. Thailand*, UNCITRAL, Award, 1 July 2009.

56 *Suez, Sociedad General de Aguas de Barcelona, S.A. And Vivendi Universal, S.A. v. Argentine,* ICSID No.. ARB/03/19, Decision on Liability, 30 July 2010, §173, §230; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador,* ICSID Case NoARB/04/19, Award,18 August 2008, §340; CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Award of 12 May 2005, §274; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, §185.

57 *AES Summit Generation Ltd et AES-Tisza Eromu Kft. v. Hongrie*, ICSID No. ARB/07/22, Award, 23 September 2010, §9.1.5; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, 125; *Metalclad Corporation v. The United Mexican States*, 30 August 2000, ICSID Case No. ARB (AF)/97/1, §99.

See also: BRONFMAN (M.K.), "Fair and Equitable Treatment: An Evolving Standard", *Max Planck Yearbook of United Nations Law,* Volume 10, 2006, p.642.

58 *Suez, Sociedad General de Aguas de Barcelona, S.A. And Vivendi Universal, S.A. v. Argentine,* ICSID No.. ARB/03/19, Decision on Liability, 30 July 2010, §173, §189.

59 SALACUSE (J.W.), *The Law of Investment Treaties*, Oxford, Oxford University Press, 2010, p.237.

and without ambiguity[60]. As put by the Tribunal in the *TECMED* case, the host State has to act in a consistent way[61]. Indeed,

"*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 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 thereunder, 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 preexisting 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*[62]."

Besides, the State must make sure that it guarantees a due to process to the investors.

(2) ***The Requirement of Due Process.***

As per this requirement, it is expected that the State abides to its own laws and regulations *vis-à-vis* the investor. All administrative procedures must be followed, all legal proceedings must be respected. This principle is anchored in the basic rule of law and in the fair and equitable treatment standard[63]. The State's behaviour must not "*involve*(...) *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*.[64]". The host State must be ready to prove that such a requirement has been fulfilled. If not, it will be in breach of the fair and equitable

60 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, §584; *Saluka Investments v. The Czech Republic,* UNCITRAL Rules, Partial Award, 17 March 2006, §309.
61 *Tecnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, 29 May 2003, §154; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, 25 May 2004, §114.
62 *Ibid.*
63 DOLZER (R.), SCHREUER (C.), *Principles of International Investment Law*, Oxford, Oxford University Press, 2008, p.142; SALACUSE (J.W.), *The Law of Investment Treaties*, Oxford, Oxford University Press, 2010, p.241.
64 *Waste Management Inc. v. United Mexican States,* ICSID Case No. ARB (AF)/00/3, 30 April 2004, §98.

treatment standard[65]. The State's administration must therefore make easily available all legal means and procedures. In the *Biwater Gauff* case for example, the way in which a contract between the investor and Tanzania was terminated was considered as conflicting with the principles of due process. The tribunal noted that "[t]*he Minister* (...) *did not act in good faith and in accordance with due process, as he would have been expected to do in accordance with the Republic's international law commitments*.[66]".

(3) ***The protection against arbitrariness and discrimination.***

Any action from the State which is arbitrary or discriminatory violates the fair and equitable treatment standard[67]. The International Court of Justice had already stated in the *ELSI* case that "[a]*rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law* [and] [i]*t is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety*.[68]". It will, of course, belong to the investor to show that the State's conduct was adopted in gross disrespect of reason and law. In the *Waste Water* case, the tribunal found that "*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*.[69]". A similar position was, for example, adopted by the *Loewen* tribunal on the discrimination aspect[70].

(4) ***The requirement of Proportionality.***

What is considered here is the proportionality between a given measure adopted by the State and the intrusion into the investor's rights and interests. A State has and maintains its right to regulate. In so doing, it can formulate rules which have an impact on the investment. This impact must be measured and it is in this sense that the right of the State to regulate its activities must be balanced with the rights of

65 *Metalclad Corporation v. The United Mexican States*, 30 August 2000, ICSID Case No. ARB (AF)/97/1, §§93-99.
66 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, §544..
67 SALACUSE (J.W.), *The Law of Investment Treaties*, Oxford, Oxford University Press, 2010, p.238.
68 Case concerning *Elettronica Sicula S.p.A.* (United States of America v. Italy), ICJ, Judgement of the 20 July 1989, §128 (*available on*: http://www3.icj-cij.org/docket/files/76/6707.pdf).
69 *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, 30 April 2004, §98.
70 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, §135; see also, *Saluka Investments v. The Czech Republic,* UNCITRAL Rules, Partial Award, 17 March 2006, §309.

investors[71]. There must indeed "*be a reasonable relationship of proportionality*" between the State's measures and the investor's capacity to conduct his investment[72]. The requirement of proportionality allows the State's interest some place in the arbitration procedure and brings some flexibility to the fair and equitable treatment standard.

(5) ***The legitimate expectations of the investor.***

It seems that [t]*he standard of « fair and equitable treatment » is* (…) *closely tied to the notion of legitimate expectations which is the dominant element of that standard.73*". This element is becoming capital in understanding the standard. Since the *TECMED* case74, the invocation of the violation fair and equitable treatment standard is almost automatically grounded on the frustration of legitimate expectations[75]. Legitimate expectation which seems to be becoming a principle is explained as follows. Some States' representation aim at attracting foreign investors. An example would be the promise of a permit or of some fiscal advantages. The investment decision will be based on such representations. The investor expects that such promises will be executed. It is the frustration of this belief or of this expectation

---

71 See for example: *Saluka Investments v. The Czech Republic,* UNCITRAL Rules, Partial Award, 17 March 2006, §306;

72 *Tecnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, 29 May 2003, §122.

73 *Saluka Investments v. The Czech Republic,* UNCITRAL Rules, Partial Award, 17 March 2006, §-302; also, *EDF (Services) Limited v. Romania,* ICSID Case No.ARB/05/13, Award, 8 October 2009, §216.

74 If most tribunals refer to *TECMED* for having highlighted the legitimate expectation requirement, this case has, in fact, been an auxiliary for its renaissance. Indeed, on the 26th of June 1905, one case, Louis Aboilard *c. Haiti* an arbitral commission had had recourse to legitimate expectations to conclude that Haiti had not respected its contractual engagements. [Award of the Arbitral Commission ruling on the claims of the French citizen Louis Aboilard against the Haitien Government, 26th of July 1905 (*in*, *Recueil des Sentences arbitrales,* 26 juillet 1905, Vol.XI, pp.71-82): "*…il y a eu faute grave de la part du gouvernement haïtien d'alors à faire un contrat dans de semblables conditions, à créer des attentes légitimes qui, ayant été trompées par le fait du gouvernement lui-même, ont entraîné un préjudice dont la réparation est due* (…).".]

There seem to have been other cases on this issue. For example, the *Portendick* case (1843) or the *Schufeldt* case (1930). On this, see, KOLB (R.), *La Bonne Foi en Droit International public, Contribution à l'étude des principes généraux de droit*, Paris, PUF, 2000, pp.151-152.

75 CAZALA (J.), "Le Traitement Juste et Equitable: Transparence et Protection des Attentes légitimes de l'investisseur", *Gazette du Palais*, 15 December 2007, No.349, §6; See for example: *Suez, Sociedad General de Aguas de Barcelona, S.A. And Vivendi Universal, S.A. v. Argentine,* ICSID No.. ARB/03/19, Decision on Liability, 30 July 2010, §§222-238; *Ioannis Kardassopoulos v. Georgie,* ICSID No. ARB/05/18, Award, 3 March 2010, §§434-452; *AES Summit Generation Ltd et AES-Tisza Eromu Kft. v. Hongrie*, ICSID No. ARB/07/22, Award, 23 September 2010, §§9.3.6-9.3.26; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine, ICSID* No. ARB/01/3, Decision on Annulation, 30 July 2010, §309; *Alpha Projekholding GmbH v. Ukraine,* ICSID No.ARB/07/16, Sentence, 8 November 2010, §§420-422; *EDF (Services) Limited v. Romania,* ICSID Case No.ARB/05/13, Award, 8 October 2009, §216, §219, §245/6, §298.

which is considered as violating the fair and equitable treatment[76] and it is this expectation which is protected. As one tribunal puts it, there cannot be an "*inconsistency of action between the two arms of the same Government vis-à-vis the same investor*.77". In the *TECMED* case, le Mexican government had refused the renewal to a Spanish company for the exploitation of a waste facility. The investor had agreed to relocate its factory under the condition of such a renewal and deemed that the Mexican measure was in contradiction with its expectations and hence violated the fair and equitable treatment standard. In a now well-known paragraph, the tribunal stated:

"*The Arbitral Tribunal considers that this provision of the Agreement78, in the 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 transparently 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 investments, and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to guidelines, directives or requirements issued, or the resolutions approves thereunder, 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.*79".

76 DOLZER (R.), SCHREUER (C.), *Principles of International Investment Law*, Oxford, Oxford University Press, 2008, p.134; See also: *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, §296: "*...as illustrated by Revere Copper and Brass, Inc. v. Overseas Private-Investment Corp., the importance of assurances given to investors predates the BIT generation:We regard these principles as particularly applicable where the question is, as here, whether actions taken by a government contrary to and damaging to the economic interests of aliens are in conflict with undertakings and assurances given in good faith to such aliens as an inducement to their making the investment affected by the action.*"

77 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, §41.

78 Article 4(1) of the BIT between Mexico and Spain.

79 *Tecnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, §154.

The tribunal considered that Mexico had not been in line with these principles and had consequently frustrated the investor's legitimate expectations[80]. The basis of this configuration can be established as such: representation-reliance-expectations. The investor relies on the State's representations to build his expectations[81]. Any misrepresentation can potentially frustrate these expectations. An award rendered in 2007 has bring about more details concerning the legitimate expectation and its invocation. The tribunal in a case *Parkerings v. Lithuania* affirmed that legitimate expectations arise from explicit promises or implicit representations made by the State to the investor and that the circumstances of such representations as well as the general conduct of the State must all be considered so as to dissociate what is legitimate and what is not82. This position might be subject to some criticism : it is preferable that a criterion be objective for it to serve its purpose efficiently and effectively ; in this vein, an implicit representation deemed to have been formulated by a given State appears as a very subjective element because every State conduct may, in this sense, be deemed to offer a hidden promise. This might lead to an abuse of the legitimate expectation principle -, considering that there is no defined method enabling to dissociate between admissible and non-admissible implicit representations. In such a context, it is more reasonable to remain on know grounds so as to avoid extending the reading grid of a criterion which is, in itself, already very flexible.

Another critic can be formulated on this major criterion enabling to understand the fair and equitable treatment. In practice, the investor has legitimate expectations that the treatment to which he is entitled obeys to the principles of transparency, stability, non-discrimination, predictability and consistency[83]. Investors, for instance, argue that they expect the host State to maintain a stable and

80 *Ibid*., §173.
81 See for example: *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL/NAFTA, Arbitral Award, 26th January 2006, §147: "*the concept of « legitimiate expectations » relates* (…) *to a situation where a contracting Party's conduct created 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*.".
82 *Parkerings Companiet A.S. v.Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11th September 2007, §331.
83 For example: *Tecnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, §154: " *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 beforehand any and all rules and regulations that will govern its investments* (…).".

predictable legal and economical framework and that it acted in a consistent, unambiguous and transparent manner[84]. This however seems to boil down to a circular logic and a doubt can be cast on its use. Indeed, legitimate expectations are considered as the dominant feature of the fair and equitable treatment principle but these expectations are explained by referring to the other elements[85] of this standard. For instance, in the *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* case, the tribunal explained that the investor had a « *legitimate expectation that Georgia would conduct itself vis-à-vis his investment in a manner that was reasonably justifiable and did not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination*.[86] ». Many tribunals follow this logic[87]. Such a detour is questionable[88]. It would be sufficient either to refer directly to the requirements of stability, consistency, transparency or predictability with more precision[89] or to refer only to the legitimate expectations of the investors. However, in the latter case, there would be no real difference between fair and equitable treatment and legitimate expectations. There would be a confusion between the two principles. However, another logic can be used to enlighten the situation. Considering that legitimate expectations are already well-rooted in the fair and equitable treatment and that it is very unlikely that a tribunal decides to write it off, it is possible to consider that this principle has become the barometer of the fair and equitable treatment standard. It actually structures and determines the fair and

84 *Parkerings Companiet A.S. v.Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11th September 2007, §322; BG Group Plc v. The Republic of Argentina, UNCITRAL, Final Award 24 December 2007, §278 & §310; *LG&E Energy Corp. v. The Argentine Republic,* Decision on Liability, 3rd October 2006, ICSID Case No. ARB/02/1, §102; *Saluka Investments v. The Czech Republic,* UNCITRAL Rules, Partial Award, 17 March 2006, §329; *CMS Gas Transmission Company v. Argentina,* Final Award, 25 May 2005, ICSID Case No. ARB/01/08, §267; *PSEG Global Inc. and konya Ilgin Elektrik Uterim ve Limited Sirketi v*. Turkey, ICSID Case No. ARB/02/5, Award, 19th January 2007, §225.

85 Mentioned *supra*.

86 *Ioannis Kardassopoulos et Ron Fuchs v. Republic of Georgia*, ICSID n° ARB/05/18 & ARB/07/15, Award (03/03/2010), §441.

87 For example : *Parkerings Companiet A.S. c. Lithanie*, ICSID No. ARB/05/8, Award (11/09/2007), §322; *BG Group Plc v. Argentina*, UNCITRAL, Award (24/12/2007), §278 & §310; *LG&E Energy Corp. v. Argentina,* ICSID No. ARB/02/1, Decision on liability (03/10/2006), §102; *Saluka Investments v. Czech Republic,* UNCITRAL, Partial Award (17/03/2006), §329; *CMS Gas Transmission Company v. Argentina,* Award (25/05/2005), ICSID No. ARB/01/08, §267; *PSEG Global Inc. and konya Ilgin Elektrik Uterim ve Limited Sirketi v. Turquie*, ICSID Case No. ARB/02/5, Award (19/01/2007), §225.

88 For an opposite opinion, see: DUPUY (F.), *La protection de l'attente légitime des parties au contrat – Étude de droit international des investissements à la lumière du droit comparé*, Thesis, Paris II, 2007, pp.204-205.

89 GAILLARD (E.), "Chronique de sentences arbitrales du Centre International pour le Règlement des différends relatifs aux investissements", *JDI*, Janvier-Février-Mars 2008, p.333.

equitable treatment by enabling to measure the expected stability, the expected transparency, the expected consistency and so on. This is a means to provide effectiveness to the legitimate expectations principle.

Having presented how the fair and equitable standard is applied, it is now, useful to mention in a few words how some adjustments are brought during this application.

3.2 The Adjustments Brought to the Application of the Fair and Equitable Treatment Standard

These adjustments are namely, the due diligence of the investor, the existence of exceptional circumstances and the level of development of the host State which have to be considered in applying the fair and equitable treatment standard.

First, the investor is expected to be diligent and to act with clean hands[90]. If he has himself made some misrepresentation to the host State, he will be in a fragile position to invoke the violation of the fair and equitable treatment. If for example the investor has not provided all the required information about his activity and competences to the State, he will not be in a good position when it comes to justify the violation of his rights. In the *Azinian*[91] case, the investor had guaranteed that he was very experienced and competent in the field of waste disposal and that he had enough resources to conduct the investment. This proved to be false and this quasi-fraudulous conduct of the investor blocked him from arguing that he was not accorded a fair and equitable treatment[92].

Second, certain exceptional circumstances might lead to a more flexible application of the standard. In the case *Starret Housing Corp. v. Iran*, the Iran-US Claims Tribunal observed that "[i]*nvestors in Iran, like Investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of economic and politial system and even revolution.93*". Exceptional circumstances like a state of necessity[94] or a case of *force majeure*[95] are

90 See on this: MUCHLINSKI (P.), « Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard", *ICLQ*, Vol.55, 2006, pp. 527-558; SALACUSE (J.W.), *The Law of Investment Treaties*, Oxford, Oxford University Press, 2010, p.234.
91 *Azinian, Davitian, & Baca v. Mexico* , ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999 (*available on*: http://italaw.com/documents/Azinian-English.pdf).
92 *Ibid.*, §92; see in a similar sense: *nternational Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL/NAFTA, Arbitral Award, 26th January 2006.
93 *Starret Housing Corp. v. Iran*, 19 December 1983, 4 Iran-US CTR, 122.
94 See on this, article 23 of the Draft articles on State Responsibility of the International Law

rooted in customary international law and may, in certain cases, exonerate the State from an unlawful conduct. Recently, the cases brought against Argentina illustrated the issue. In the *LG&E* case, the tribunal considered that in case of a state of emergency, the State was exonerated of its responsibility and that ""*accordingly, the Claimants should bear the consequences of the measures taken by the host State*[96].". In such a case, the fair and equitable treatment knows an exceptional application.

Third, the state of development of the Host State can also lead to a different application of the standard. In a *Generation Ukraine* case, the tribunal considered that the economic reality of the State had to be taken into account to assess the fair and equitable treatment through the investor's legitimate expectations[97]. The arbitrators said that the investor had established himself in Ukraine in full knowledge of its economy[98] and that he should consequently assume all the risks related to his choice. Bilateral investment treaties are not "*insurance policies against bad business judgements*.99". They do not fully insulate the investor. He is supposed and expected, as a professional, to be aware of the investment's environment100. His level of expectations cannot, as a matter of fact, be the same is a well-industrialised economy and in a "*renascent independent State, coming rapidly to grips with the reality of modern, financial, commercial and banking practices and the emergence of State institutions responsible for overseeing and regulating areas of activity perhaps previously unknown*.101".

Commission (*available on*: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

95 See, article 25 *ibid*.

96 *LG&E Energy Corp. v. The Argentine Republic,* Decision on Liability, 3rd October 2006, ICSID Case No. ARB/02/1, §266.

97 *GenerationUkraine v. Ukraine,* ICSID Case No. ARB/00/9, Award 16th September 2003, §20.37. In the same sense : *Joseph Charles Lemire v. Ukraine*, ICSID Case n°. ARB/06/18, Award (28/03/2011), §303 ; *Parkerings-Compagniet AS v. Lithuania*, ICSID Case n°. ARB/05/8, Award (11/09/07), §§355-356 ; *William Nagel v. Czech Republic*, Chamber of Commerce of Stockholm, Case n°. 049/2002, Award (09/09/2003), §29 ; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia,* ICSID Case n°. ARB/99/2, Award (25/06/2001), §348 ; See also: See on this: GALLUS (N.), « The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection », *The Journal of World Trade and Investment*, vol.6, no.5, 2005, pp.711-712 ; MUCHLINSKI (P.), « Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard", *ICLQ*, Vol.55, 2006, p.545.

98 *GenerationUkraine v. Ukraine,* ICSID Case No. ARB/00/9, Award 16th September 2003, §20.37.

99 *Emilio Augustin Maffezzini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, 13th November 2000, §64; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, 25 May 2004, ICSID Case No. ARB/01/7, §178.

100 *A. Olguin v. Republic of Paraguay,* ICSID Case No. ARB/98/5, Award, 26/07/2011, §65b; *Methanex v. United States of America,* UNCITRAL , Final Award, 3,/08/2005, §9-10; *Alex Genin and others v. Republic of Estonia,* ICSID Case No. ARB/99/2, Award 25/06/2001, §348.

101 *Genin and others v. Estonia,* ICSID Case No. ARB/99/2, Award 21st June 2001, §348; see

4 CONCLUSION

Even if it lacks a textual definition, the fair and equitable treatment principle has been identified over the years by a method which now reaches a general consensus : the use of the legitimate expectations principle. Even if this method can be criticised for several reasons, it remains reasonable to consider that this principle does exist, and that it will be frequently and further used in the future. Therefore, leaving aside the critics, it is more convenient to examine how the legitimate expectation principles can be enlightened to gain in effectiveness. In this sense, it has been proposed to confer to this principle the function of a barometer whereby it would act complementarily with the other criteria of the fair and equitable treatment standard by measuring their respective legitimacy. All in all, these other criteria will be useful to identify a fair and equitable treatment once they have been measured by the legitimate expectation principle. In the same vein, this principle widens the scope of the fair and equitable treatment standard in that it enables to take into account the general behaviour of the investor before calculating the intrinsic expectations he could legitimately have if, for example, he has himself been acting with bad faith or if his investment was knowingly made in a poorly developed State with limited means to provide the same level of protection as a highly industrialised State.

---

also: *Nagel v. Czech Republic,* Final Award, 2003, SCC Case 49/2002, Stockholm Arbitration Report 2004:1, p.156.