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Free and equitable treatment principle: The mischievous principle of international investment law

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Abstract
As the recent case laws shows, the fair and equitable treatment standard (FET) represents potentially the most important and most baffling obligation which is imposed on sates by international investment treaties. The standard has also been the subject of controversy, most importantly in relation to whether it reflects the customary law minimum standard of treatment of aliens or a higher level of protection. The determination of what is fair and equitable and who's fair and equitable leaves a large measure of discretion to arbitral tribunal which has used it to gradually build the content of the standard by applying it to the circumstances of specific cases. Thus, in this article the author aims to explain the growth of FET which has been constantly shaped in order to respond to the needs of actor engaged in aiming investment relationship. The recent history of the standard and the wide interpretation of doctrine works on the subject convinced me to discuss FET by going directly to its resources which concerned to the case law.

Keywords: Free and Equitable Treatment (FET), Minimum Standard of Treatment (MST), International Investment Agreements (IIAs), Bilateral Investment Treaty (BITs), Multilateral Investment Treaty (MITs)

1. Introduction
The removal of barriers to trade and non-tariff barriers has facilitated the opening up of markets for purposes of trade in goods and trade in services. During the past fifteen years one of the most remarkable phenomena in international trade law has been the surprising increase in the number of agreements concluded relating to the protection or liberalization of foreign investment.

The International Investment Agreements (IIAs) has become an incentive and signal by the capital exporting countries of them being capital receptive [1]. Further the capital exporting countries also seek for protection and guarantee from the recipient state that the capital emerging from its country be protected and for this purpose it favours a destination where it has a favourable legal regimes through IIAs and BITs.

Today, the rules relating to international investment are contained in a number of international instruments. They may be traced to bilateral investment treaties, regional trade agreements, multilateral investment treaties like Multilateral Agreement on Investment and Agreements annexed to the WTO Agreement' like GATS, TRIMS Agreement, TRIPS Agreement, etc [2]. The number of agreements has accelerated remarkably in recent years, as more than 2500 (approx) international agreements relating to investment now exist [3].

The fair and equitable treatment (FET) standard is a key element in contemporary international investment agreements (IIAs) [4]. The origin of Free and Equitable Treatment (FET) standard can be traced from Multilateral as well as Bilateral Level [5]. Among the IIA protection elements, the FET standard has gained particular prominence, as it has been regularly invoked by claimants in Investor-State dispute settlement (ISDS) proceedings, with a considerable rate of success.

The vagueness of the FET standard is at the core of the problem. This we will see later that often a general statement to the effect that the parties will accord fair and equitable treatment to the investments of investors from the other contracting party. There is no attempt to define what this means. As Schill explains:

"*Fair and equitable treatment does not have a consolidated and conventional core meaning as such nor is there a definition of the standard that can be applied easily.*

So far it is only settled that fair and equitable treatment constitutes a standard that is independent from national legal order and is not limited to restricting bad faith conduct of host States. Apart from this very minimal concept, however, its exact normative content is contested, hardly substantiated by State practice, and impossible to narrow down by traditional means of interpretative syllogism." (Schill, 2009, p 263).

The issue before the investors in the arena of uncertainty is to put forth a clear picture of what constitutes to be breaching of FET Principle or in another way around what is the violation of IIA principles. The author in this paper seeks to review the status of FET obligation from Customary International Law to the IIAs to the arbitral Interpretation. The vagueness of FET is an established hypothesis. However, the researcher here tends to analyse as to why the FET principle is so much prevalent in every IIAs despite of its unsatisfactory result. In order to come with a conclusion the researcher with its limitations proceeds in following way. So, I begin my work where all lawyers are meant to start, that is from the question of legal basis.

The impression that states must conform to a broad international standard of treatment in their dealings with foreign investors is usually found to publicists writing in the early 1900s. Noteworthy among these authors are Eagleton [6], Borchard [7], Freeman [8], Root [9], and Roth [10], whose works are most frequently cited. The principle of "fair and equitable treatment" is both a common concept found in many trade-related treaties and an equally misunderstood term that has plagued academics, governments and investors [11]. It is one of the commonly used standard by claimants in investment arbitrations and therefore worthy of further review. However, the objective nature of the standard means there is no exact definition of fair and equitable treatment and judicial practice continues to shape the content of the standard.

1.1 History

The concept of fair and equitable treatment is not new but has appeared in international documents from long time. Some of these documents have remained drafts; others are non-binding documents; yet others have entered into force as multilateral or bilateral treaties [12].

The introduction of FET standard under international agreements does not consider its appearance in case laws. However, the origin of the clause seems date back to the treaty practice of the United States in the period of treaties on friendship, commerce and navigation (FCN) [13]. The first reference to FET in control version frame work goes back to 1948, Havana Charter for an International Trade Organisation. Its Article 11(2) contemplated that foreign investments should be assured "just and equitable treatment" [14].

The Abs-Shawcross Draft Convention on Investment Abroad of 1959 [15] contained the following Article I: "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the management, use, and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures."

The Draft Convention on the Protection of Foreign Property developed by the Organisation for Economic Co-operation and Development (OECD) in 1967 [16] contained a provision in its Article 1, entitled "Treatment of Foreign Property", that contained similar language as that of the Abs-Shawcross draft [17]: "(a) Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the otter Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures."

Also, the draft for a United Nations Code of Conduct on Transnational Corporations in its 1983 version provided that transnational corporations should receive fair and equitable treatment [18]. The Guidelines on the Treatment of Foreign Direct Investment, adopted by the Development Committee of the Board of Governors of the International Monetary Fund and the World Bank in 1992, in their Section in dealing with "Treatment", provide for fair and equitable treatment linked to the other standards provided by the Guidelines: "2. Each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines [19]."

The OECD Draft Negotiating Text for a Multilateral Agreement on Investment of 1998 provided for fair and equitable treatment together with the standard of constant protection and security. At the same time, international law was preserved as a residual standard: 1.1. Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. In no case shall a Contracting Party accord treatment less favourable than that required by international law [20].

The principle of fair and equitable treatment has also set up entry into a number of multilateral treaties in force. For instance, the Convention Establishing the Multilateral Investment Agency of 1985 (the MIGA Convention) requires the availability of fair and equitable treatment as a precondition for extending insurance cover. For example Article 12 dealing with "Eligible Investments" provides in part: "(d) in guaranteeing an investment, the Agency shall satisfy itself as to: (iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment."

The concept of FET has also crept into a number of multilateral treaties currently in force. For instance, the Convention Establishing the Multilateral Investment Agency of 1985 (the MIGA Convention) [21], the North American Free Trade Agreement (NAFTA) of 1992 [22] and the Energy Charter Treaty of 1994 [23] requires the availability of fair and equitable treatment as a precondition for extending insurance cover.

With the advent of bilateral investment treaties (BITs), the requirement of fair and equitable treatment became a regular feature. The vast majority of BITs currently in force contain this standard. These BIT provisions, although nearly all of them seem to use the formula "fair and equitable treatment", are not uniform. In particular, there are variations as to the linkage of this standard to customary international law [24].

The recently concluded new generation agreements, the Free Trade Agreements between the United States and Australia [25], Central America (CAFTA) [26], Chile [27], Morocco [28], and Singapore [29], in their Investment Chapters, provide with greater specificity that each Party has the obligation to

"accord to the covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security [30]".

In the multilateral context, the Draft United Nations Code of Conduct on Transnational Corporations, in its Article 48, 24 stated that: *"Transnational corporations should receive [fair and] equitable [and non-discriminatory] treatment [under] [in accordance with] the laws, regulations and administrative practices of the countries in which they operate [as well as intergovernmental obligations to which the Governments of these countries have freely subscribed] [consistent with their international obligations] [consistent with international law]"*.

Since, most of the above issues had not reached consensus in the last version of the text (i.e. OECD Working Papers) (1986), the negotiating States agreed that the Code should provide for "equitable" treatment of transnational corporations [31]. Also the Legal Framework for the Treatment of Foreign Investment [32] issued by the World Bank in 1992 provides FET consistent with the guidelines.

Contemporary BITs contains numerous expressions of FET standard. In survey of current practice, UNCTAD identifies seven basic models of the FET obligation. The basic models are:

1. A simple reference to fair and equitable treatment;
2. A reference to FET explicitly linked to treatment no less favourable than national treatment or most favoured nation treatment;
3. An obligation to accord FET paired with duty not to impair the investment through unfair or discriminatory measures;
4. An obligation to provide FET in accordance with international law;
5. A reference to FET in accordance with the international law coupled with broad definition of international law (beyond customary international law)
6. A guarantee of FET subject to domestic law in host state; and
7. The MST Standard found in NAFTA 2003 Canadian and 2004 US Model BITs [33].

Under the plethora of FET formulas, it is not surprising that numerous tribunals have analysed the extent to which the precise wording of the FET obligation selected by the treaty drafter affects the scope of obligation [34]. In Vivendi vs. Argentina [35] the tribunal indicated the objective of the treaty drafters is to provide protection more than what is existing under minimum international law standard and to fit in a broader approach that relied on contemporary principles of international law.

However, there are awards which treats differently worded FET clause as similar or generic FET obligations [36]. The tribunal in Azurix vs Argentina [37] undertook a detailed textual analysis of FET provision in the US –Argentina BIT that the content of wording was substantially similar whether interpreted with ordinary meaning or with customary international law. In Parkerings-Compgniest AS vs Lithuania [38], the tribunal found no evidence that the plain meaning of equitable and reasonable or the intent of state parties in using these phrase was to provide a novel level of treatment. As a result the tribunal declared that it would interpret that the 'equitable and reasonable' as identical to 'fair and equitable'. The two distinct divisions towards the mode of interpretation leads us to the conclusion that from plain meaning of the standard to the shape what tribunals have given till date requires to analysed in toto. Failure to one aspect will not give the correct picture of the story.

1.2 Meaning of FET

The growing corpus of case law on fair and equitable treatment is progressively eclipsing the controversy between the plain meaning approach and the equating approach. The meaning of FET has developed through an incremental case by case approach [39]. Perhaps due to textual differences in the treaty provisions articulating the fair and equitable treatment standard, a universally accepted definition of the principle has still not been established. Rather, as mentioned earlier, the interpretations of this principle both by international panels and by investors have given rise to several consistent themes [40].

Some tribunals have pointed to the vagueness and lack of FET standard and the European Parliament has deplored the use of vague language in this context [41]. The methodology applied by arbitral tribunals is characterized by an attempt to simplify the concept of fair and equitable treatment in order to make it easy to manage in a particular proceeding [42]. Thereby, arbitral tribunals avoid dealing with the abstract concept of fair and equitable treatment, but are rather highlighting the fact specific nature of the norm and limiting their analysis to the facts of the specific case [43].

Several elements have been identified by the Tribunals which could be combined to form a working definition of fair and equitable treatment. Firstly, FET is an absolute or non contingent, standard which means that it fixes a level of treatment due to foreign investors that must be observed by the host state regardless of the fact that how it treats its own nationals [44]. Further the level fixed by FET is a floor, not a ceiling [45].

Secondly, FET provisions are interpreted according to the customary international law principle in consonance with Vienna Convention on Law of Treaty (VCLT) [46]. Thirdly, FET is not simply an application of ex aqueo et bono decision making, nor is it an opportunity for arbitrators to apply broad, subjective discretion. It is the rule of law with specific content [47]. Fourthly, bad faith is not a sine qua non of a breach of FET. For example in PSEG vs Turkey, tribunal did not attribute bad faith to the state but held that negligence short of bad faith in the handling of negotiations was sufficient to attract liability. Similarly, discrimination is not required to establish a breach of FET, although it is often present in situations of breach [48].

Fifthly, transparency clearly appears to be the element of FET [49]. However, there is a debate about what transparency means in this context. The following dictum for describing transparency is often cited from TECMED vs Mexico [50]: *the foreign investor expects the host state to act in a consistent manner, free from ambiguity and totally transparently in its relation 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 relevant policies or directives to be able to plan its investment and comply with such regulations. Any and all state actions confirming to such criteria should relate not only to guidelines, directives or requirement issued, or the resolution approved there under, but also the goals underlying such regulations.*

Sixthly, the tribunals have uniformly agreed that FET protects investor's legitimate expectations on investing in a host state. This aspect of FET has given rise to great discussion in arbitral awards [51].

One of the main fields of activity for legal scholars interested in the standard is the examination of these lines of jurisprudence on fair and equitable treatment. Obviously, the compilation of the cases and the framing and labelling of the different sub elements continues to differ considerably. Insofar, the different sub-elements have yet to be deemed perturb and are still in the early stages of their development. Such uncertainties notwithstanding, the sub-elements sufficiently expose the content of fair and equitable treatment and deliver a broad range of arguments to tackle measures of the host state. Since, the guarantee of fair and equitable treatment is indeed capable of potentially affecting all areas of domestic law, it has been rightly pointed out that this norm has the potential to reach further into the traditional *dornaine rservi* than any other provision of investment agreements.

1.3 Emerging Substantive Content of FET Standard

The application of fair and equitable treatment standard in most cases is difficult for a variety of reasons. Firstly, because the investment treaties do not define the term as such. Thus, arbitrators, government officials, investors legal counsel and other who would apply the term must begin interpretation by confronting two words, 'fair' and 'equitable', that because of their vagueness and generality this allows for great subjectivity. Secondly, as a result, the standard created will be highly flexible and may result in a subjective decision, that disappointed litigants may consider unprincipled. Thirdly, the fact situations to which the term must be applied are highly complex and in many cases involve troubled relationships between investors and host governments stretching over significant periods of time and involving multiple interactions. Thus, determining whether a particular governmental action violates the fair and equitable treatment standard depends greatly on the facts of individual case [52].

Usually the process of interpreting the fair and equitable treatment clause in most arbitral proceedings begins with a reference to Vienna Convention on the Law of Treaties (VCLT), particularly Article 31(1) [53]. The context of the term fair and equitable is the whole treaty in which it is employed. Thus, the term must be interpreted not just as three words plucked from the text but instead must be construed from within the context of various rights and responsibilities and conditions and limitations to which the contracting parties agreed [54].

The determination of what is fair and equitable leaves a large measure of discretion to arbitral tribunals, which have used it to gradually build the content of the standard by applying it circumstances of specific cases [55]. Thus, the emerging content of the standard includes principles as protections of investor's legitimate expectations, transparency, freedom from coercion and harassment, procedural propriety and due process and good faith [56].

1.3.1 Legitimate Expectation

The concept of legitimate expectations has surfaced in the field of investment treaty arbitration in parallel to its appearance in other fields, such as human rights, European Union Law, certain continental countries, English Administrative Law or in employment cases of international administrative tribunals [57]. Metalclad was one of the earlier decisions that famed treatment of investors in international law in terms of their expectations.

The rise of legitimate expectations has been compared to the incantatory formula that acquired rights played in France at the beginning of the nineteenth century. Such subjectivity is regrettable, because it seems to imply that the extent of state obligations depends upon how the state has understood them. It also invites state to advance its own expectations. The expectation of investors to receive certain treatment is opposed to the State's expectation to freely conduct its legitimate activities. By themselves, neither the legitimate expectations of investors nor those of the State allow the determination of the limits of the international responsibility of the State [58].

The key points in this evolution over the past decade will be traced below in a brief examination of the relevant decisions. The key issue has been to identify the parameters of those types of conduct, on the part of the host state, which determine the boundaries of the sphere of legally relevant expectations.

In 2003, Tecmed [59] required that the host state respect the basic expectations of the investor at the time of the investment and act without revoking any decisions, in an arbitrary manner upon which the investor had relied in planning its investment [60].

A year later, in 2004, Occidental v. Ecuador [61] confirmed that the unilateral change of the legal and contractual framework existing at the item of the original investment would frustrate the investor's legitimate expectations and thereby violate the FET standard [62]. Since 2004, legitimate expectations have been more fully articulated by Tribunals. In Waste Managenent [63], Additional Facility panel said that "[in applying [the fair and equitable treatment] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant." [64] And the MTD [65] Tribunal endorsed the Tecmed "basic expectations" finding [66]. More recent Tribunal hearings continue to accord considerable importance to investors' legitimate expectations.

In 2006, the Tribunal in LG&E v. Argentina [67] stated that the understanding of FET involves consideration of the investor's expectations when making its investment in reliance on the protections to be granted by the host state.

Also in 2006, Thunderbird v. Mexico ruled that an investor may rely on the host state's conduct which creates justifiable expectations: [T] he concept of "legitimate expectations" relates to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or an investment) to act in reliance on such conduct, such that a failure by the Party to honour those expectations could cause the investor (or the investment) to suffer damages [68].

In CME, [69] the Tribunal found that "[The Government] breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest [70].

In 2010, the Tribunal in Suez v Argentina [71] summarized the state of the law and highlighted the investor's legitimate reliance on the host state's laws and regulations: In examining the various cases that have justifiably considered the legitimate expectations of investors and the extent to

which the host government has frustrated them, this Tribunal finds that an important element of such cases has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country, acted in reliance upon those laws and regulations and changed their economic position as a result. Thus, it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably [72].

The new dominance of the role of legitimate expectations for the understanding of fair and equitable treatment was confirmed in 2011 in El Paso v. Argentina. "There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith [73].

In 2012, the Tribunal in Electrabel v. Hungary [74] highlighted that "the most important function" of the FET standard is the protection of the investor's legitimate expectations. The rationale and justification for the recognition of legitimate expectations seems obvious. The investor makes its calculations and decisions in the light of the law of the host state as it is made available to it by the host state, and the investor's assumptions about the return for its investment will depend upon the stability and predictability of those laws. Had the legal order been different, this decision to invest might have been different [75].

The appropriate starting point to determine legitimate expectations is the legal order of the host state at the time when the investor made its investment. A number of investment tribunals have relied on the nexus between legitimate expectations and the host state's legal order at the time of the investment [76].

To deny the relevance of the legal order of the host state in the context of legitimate expectations, would assume that stability and predictability of the laws of the host state have no bearing upon the object and purpose of an investment treaty and the notion of fair and equitable treatment [77]. Such assumptions would contravene the spirit in which investments agreements are generally concluded. It is well-known that major investments are concluded with a long term perspective, often for more than twenty years. The willingness of foreigners to invest is linked to the degree of stability in a host state, and stability is one factor for an investor to determine the location of its investment. BITs are meant to contribute to stability for these very reasons.

The shielding of legitimate expectation is many times described as one of the obligations to provide fair and equitable treatment. Tribunals have addressed the influence of host State's circumstances on this element of fair and equitable treatment standard, just as they have addressed the circumstances on denial of justice.

The majority of tribunal have taken into account the host State's circumstances when considering if there has been failure to protect legitimate expectations. The award in Bayinder provides an example. In that case, Bayinder alleged that termination of its construction of highway in Pakistan breached Pakistan's obligation to provide fair and equitable treatment standard. Specifically, Bayinder alleged that Pakistan frustrated its legitimate expectation. The tribunal applied the principle to find that Pakistan had not frustrated the claimant's legitimate expectations. It found that claimant could not reasonably ignore the volatility of political conditions prevailing in Pakistan at the time it agreed to the revival of the agreement [78].

The plea of late Thomas Walde that investment arbitration be distinguished from commercial arbitration and that investment arbitration should take into account the vulnerability of small investors, as voiced in his separate opinion appended to the Thunderbird award, has not been heeded to arbitral tribunals. According to Walde, commercial arbitration is a suitable mechanism for resolving the disputes of equal parties on equal footing and without need for the purpose of taking into account the position of weaker party; nor is there any policy purpose underlying commercial arbitration [79].

The different degrees of protection by which tribunals have defined the fair and equitable treatment standard should be analysed in light of the specific facts to which they were applied. While Tecmed may be considered to be highest standard of protection from an abstract point of view, the facts in that case may have justified a breach of fair and equitable treatment even if the standard had been set at a lower level of protection. Thus, the uncertainty created by divergent definitions of the standard may be attenuated by the similarity of facts that has been considered to breach the standard, irrespective of the level of protection which is set.

1.3.2 Transparency

The requirement of transparency appears to be an important element in creating a stable, predictable and secure climate [80] for foreign direct investments in developing countries [81]. Indeed, while not an end in and of itself, transparency is certainly a means to achieving better governance [82] and greater accountability [83] whilst avoiding arbitrary and discriminatory conduct [84]. In this sense, transparency can thus be regarded as requiring that the 'legal framework for the investor's operations [be] readily apparent and that any decisions affecting the investor [be traceable] back to [this] framework [85].

Accordingly, a violation of the obligation to afford transparency will be found to exist where the host state: does not act in accordance with the outcome of discussions previously held with the investor; [86] does not engage in forthright communications with the investor [87]; does not ensure that there is consistency between the representations made by the different arms of government with respect to the same investment [88]; does not allow access to information needed by the investor to prosecute an appeal [89]; does not disclose, at the time of negotiating the terms of admission, that the investment project would violate local law [90];" does not discuss with the investor its reason for treating the investment in a discriminatory manner [91]; does not disclose points of disagreement or respond to important communications [92]; and does not refrain from making transfers from the investor's bank account without his prior knowledge or approval [93]. Conversely however, arbitral practice appears to suggest that the host state would not violate the requirement of transparency where the investor should have known that the legal situation is changing because of the transitional nature of the economy, and should therefore have retained local counsel to advise it about the amendment process to local laws [94], nor would a violation be found where the relevant rules and regulations

are made public and the investor is therefore in a position 'to know beforehand [those] rules and regulations that govern their investments [95]."

Suffice it to say, it is submitted that while it is undoubtedly the case that transparency on the part of host states is integral to the adequate protection of investments, it must also be borne in mind that not many developing countries have the regulatory or institutional framework in place to allow for full transparency and investor participation. Indeed, to interpret the transparency requirement, a constitutive element of the FET standard, in a manner which does not take account of this is both inflexible and unrealistic [96]. Moreover, it appears that the very legal foundation of the transparency requirement, as a norm of international investment law, has been questioned [97]," with some authors even arguing that it has 'not materialized into the content of fair and equitable treatment with a sufficient degree of support [98].' But even if it is accepted that transparency is indeed an important constitutive element of the FET standard, developing countries are adamant that it remains an ambiguous concept, one which is exacting in scope, in that while they may very well be required to publish their laws, it is not clear whether they are under an obligation of specifically notifying investors of laws which might affect them, or changes to such laws, and whether they should, in all circumstances, afford investors the opportunity to comment on such laws or changes made thereto.

In addition, arbitral tribunals, such as the one in Metaclad, have seemingly been satisfied with espousing broad statements [99] as to the scope of the transparency requirement, though there is little consensus on its scope, with the result being that administrative agencies in developing countries have had to redefine their position and function, effectively now acting as 'consultative units and even as de facto insurer's [100] for foreign direct investors.

Indeed, it is quite evident that the former position is much less onerous for developing countries and a much harder threshold for investors to satisfy, as it relates to openness of administrative procedure when carrying out decisions, as opposed to imposing a positive obligation of notifying investors of laws enacted or changed during the lifetime of their investments [101].

1.3.3 Due Process

In contrast to the requirement of transparency, violation of due process rights is one of the least controversial and most often accepted grounds for demonstration of a failure to provide fair and equitable treatment [102]. Generally, due process rights consider whether the party was given a fair hearing before an independent tribunal, whether the party was given specific information in advance of the hearing of the claim and whether there was a reasonable disposition of the party's case [103]. The Waste Management Tribunal defined a lack of due process as leading to an outcome which offends judicial propriety such as "a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process [104]".

Factually however, it appears that a denial of justice claim would be successfully pleaded where domestic courts refuse to entertain a suit brought by the investor, if they subject it to undue delay, if they administer justice in a seriously inadequate way or where there is a clear and malicious application of the law [105]. In this sense, it is arguable that a violation of the obligation will only arise where the system of justice, as opposed to an individual decision in the course of proceedings, has been tried and has failed [106].

Nevertheless, despite the somewhat universal acceptance of the obligation not to deny foreign investors the justice which they seek, developing countries are particularly concerned about the lack of clarity and guidance provided by tribunals with respect to the appropriate length of delay which will constitute a violation of the obligation. Indeed, while one tribunal has held that a delay of 15 years will certainly violate the fair and equitable treatment standard [107], other tribunals have considered that, although a delay of 10 years is 'certainly unsatisfactory', such will not rise to the level of a denial of justice [108].

The divergent nature of these approaches and the sheer indifference of tribunals to definitively stating the outer periodic limits which will most certainly give rise to a successful denial of justice claim remains an area of concern for developing countries. Moreover, it is submitted that countenancing every foreign investor in an alleged denial of justice claim, in circumstances which are less than clear-cut, effectively amounts to allowing them to exit the domestic institutional regime (through arbitration), without exhausting all available domestic remedies. In this regard, arbitral tribunals are said to be acting as substitutes rather than complements to domestic legal systems in developing countries.

1.3.4 Discrimination

Discriminatory conduct or the treatment of domestic investors more favourably than foreign investors, has also been an often accepted ground for demonstrating a violation of the fair and equitable treatment standard [109]. For example, in S.D. Myers, the Tribunal held that the facts of the case demonstrated that a breach of the national treatment provisions of the NAFTA also demonstrated a breach of the fair and equitable treatment standard [110].

S.D. Myers involved a company whose role was to move polychlorinated biphenyl (PCB) chemicals from Canadian equipment and transport the equipment and the PCBs to a waste treatment facility in the United States for destruction of the PCBs. In November 1995, the Canadian government banned the export of PCBs from Canada, closing the border between the United States and Canada to the cross-border movement of PCBs for approximately sixteen months. The border was re-opened in February 1997 but closed again in July 1997. After the initial ban in November 1995, the investment was only able to ship waste materials across the border for a period of approximately five months.

The Tribunal found that this case was marked by "the protectionist intent of the lead minister... at every stage that led to the enactment of the ban" and that the ban effectively favoured nationals over non-nationals, as domestic PCB waste remediators were not affected by the ban [111]. These facts led the Tribunal to conclude that a violation of the national treatment provisions of the NAFTA had been established. The Tribunal also relied on these same facts to find a breach of the fair and equitable treatment standard. In doing so, the Tribunal held: "A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The 'minimum standard' is a floor below which treatment of foreign investors must not fall, even if a

government were not acting in a discriminatory manner [112]."

The Tribunal also noted that treatment of the investor in an unjust or arbitrary manner as measured from an international perspective will also violate Article 1105(1) of the NAFTA, particularly if the State violates an international law rule which was specifically designed to protect investors [113].

The effect of the S.D. Myers Ruling was to expand the scope of the concept of fair and equitable treatment by introducing the idea that a breach of an international law rule designed to protect foreign investors or the breach of an international law rule designed to protect foreign investors or the breach of Article 1102 of the NAFTA could also establish a breach of the fair and equitable treatment standard. However, the full expansion of the fair and equitable treatment standard by the S.D. Myers Tribunal was reined in to some extent by the NAFTA Parties in the FTC Note. In direct response to the S.D. Myers Ruling, the Note stated: "Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

Thus, although the FTC Note constrains the S.D. Myers Ruling in respect of using a violation of the national treatment provisions of the NAFTA to demonstrate a violation of the fair and equitable treatment standard, the Decision is still good law in establishing that discriminatory conduct, particularly with respect to a State's better treatment of its domestic investors than its foreign investors, can establish a breach of the fair and equitable treatment standard.

Recognition of discriminatory treatment as a basis for a breach of the fair and equitable treatment standard was also confirmed in the Lauder case. The Lauder Tribunal held that since the Media Council had not discriminated against the investor in favour of nationals, the investor had not demonstrated a breach of the fair and equitable treatment standard. 93 Similarly, in ADP Group, the Tribunal refused to find a violation of fair and equitable treatment, noting that the investor had not claimed that other companies in like circumstances had been granted waivers for the "Buy America" requirements while the investor's request was denied, that the investor did not allege that the requirements under the project contract had been so finely "tailored" that only a particular U.S. company could comply with the specifications or that the U.S. measures had imposed "extraordinary costs or other burdens" on the investor which were not imposed on other successful project bidders.94 From the ADF Group Tribunal's holding, it can be surmised that if the investor had proven the above requirements, which demonstrate discrimination or a failure to uphold national treatment, it would have been successful in its claim under the fair and equitable treatment standard.

1.3.5 Transparency

The transparency principle may be the most conceptually troubled element of the fair and equitable treatment standard. Several tribunals have regarded the fair and equitable treatment standard as requiring transparency, but no rule that describes the extent of transparency required has emerged.

In any event, a few awards have found violations of the fair and equitable treatment standard where the state did not disclose the rules to be applied, whether substantive or procedural, or where the state failed to disclose the reasons for measure that it had taken or declined to take. Thus, the transparency principle applies not only to host state law, but to host state policy. With respect to policy disclosures, the transparency principle does not seem to require disclosure of internal deliberations, but has been violated where a government refused to disclose its policy once the policy had been adopted. Finally, at least one award has found a violation of the standard where the host state failed to allow access to information needed by the claimant to prosecute an appeal [114]. Presumably because host state laws are more readily accessible than host state policies, claimants have succeeded more often with claims based on nondisclosure of policies than nondisclosure of laws, although the awards are insufficiently numerous to draw any firm conclusions.

In a typical case, the claimant alleges that the host state did not adequately disclose its laws or its policies. Awards in favour of the claimant, however, generally have been issued only where one, and usually both, of the following factors is present: (1) the host state failed to make material disclosures during discussions with the claimant; or (2) the host state's conduct also violated other principles, and thus the lack of transparency was not the sole basis for finding a violation of the fair and equitable treatment standard. In MTD Equity v. Chile [115], the tribunal held, as discussed earlier, that Chile's inconsistent conduct violated the fair and equitable treatment standard. Alternatively, the tribunal held that the lack of transparency also violated the standard. At the time that Chile induced the investors to invest, it had not disclosed that the project would violate local law. In effect, had Chile disclosed this circumstance, the investor could have made an informed decision whether to invest in light of the risk that the required local approval would not be received [116]. That is, Chile could have complied with the BIT in either of two ways: by having a consistent policy or by disclosing its in consistent policy. Chile did neither and thus violated the fair and equitable treatment standard.

By contrast, in Parkerings-Compagniet v. Lithuania [117], a case arising under the Norway-Lithuania BIT [118], the tribunal rejected a claim that the BIT was violated by the host state's failure to disclose its intention to modify local law in ways that would adversely affect the claimant's investment. The tribunal explained that the claimant should have known that the legal situation was changing in Lithuania because of the transitional nature of the economy, and that the claimant could have retained local counsel to advise it about the amendment process [119]. The tribunal contrasted this situation before it with the situation, such as in MTD Equity, where the state "made assurances or representation [sic] that the investors took into account in making the investment [120]."

In Champion Trading v. Egypt [121], a case arising under the United States-Egypt BIT [122], Egypt entered into a series of agreements to provide financial assistance to certain companies in Egypt's troubled cotton industry, but did not include the claimants in these settlements. The claimants originally asserted that these agreements violated the fair and equitable treatment standard, but abandoned that claim in favour of an argument that the agreements violated the principle of transparency under international law [123]. The claimants' authority for the existence of a principle of transparency was a WTO case [124] unrelated to the protection of foreign investment and he Tecmed decision,

discussed below [125]. As will be seen, Tecmed had based the requirement of transparency on the fair and equitable treatment standard. Thus, the claimants in Champion Trading ultimately were relying on the requirement of fair and equitable treatment. The tribunal acknowledged the existence of a transparency principle, but found that the claimants "were in a position to know beforehand all rules and regulations that would govern their investments for the respective season to come [126]."

2. Conclusion

It becomes obvious, that the historical roots of the FET standard do not only lie, as often stated, in treaty law, perhaps most prominently displayed by the practice of the US to conclude Treaties of Friendship Commerce and Navigation (FCNs). The above given detail shows the roots of the FET standard lie in the customary rules of the protection of aliens. When tracking the exact roots of the FET standard, one is faced with the problem that out of necessity customary rules protecting the rights of aliens as minimum standards are left highly general in their empirical evidence [127]. Attempts of arbitral tribunals to offer a definition of the FET standard, however, further exemplify that the FET standard is rooted in customary international law and is also not unfamiliar to modern human rights treaties. In MTD v. Chile, Metaclad, Techmad, S.D. Myers the tribunal concurred with a legal opinion of Judge Schwebel that fair and equitable treatment includes such fundamental standards as good faith, due process, non-discrimination, and proportionality [128].

The FET standard is undoubtedly a prominent and evolutionary feature of most international investment agreements concluded by developing countries today. Although it is a seemingly straightforward standard which imposes requirements on host states to act in a manner reflective of good governance, the FET standard has however been increasingly construed in ways which are not only intrusive, but perhaps antithetical, to the developmental and regulatory interests of developing countries. From an interpretive conundrum caused by the various interpretations employed by arbitral tribunals with regard to the issue of whether the FET clause is reflective of the international minimum standard, to the perceived regulatory chill caused by the many pervasive ways in which tribunals have applied the FET standard's substantive elements, the standard is indeed a prime concern for many developing countries.

Accordingly, and as a result of the plethora of concerns which have been highlighted over the course of this paper, it is indeed arguable that the time is ripe for rebalancing at both the conceptual and practical level, so as to better reflect the developmental needs of developing countries, whilst at the same time, preserving the economic interests of foreign investors.

These interpretations have opened the doors in many directions which have in many ways helped the investors by stepping beyond the protection level what is given in the treaty. Thus, making a debatable issue among the parties whosoever looses in the tribunals. The tentacles (like good faith, due process, non-discrimination, and proportionality) of this principle have entered in the field of human rights also.

Recent Tribunal practice advances thinking on two important issues in the study of the fair and equitable treatment standard. First, it adds to understanding of what State action violates the standard. In particular, the awards reviewed above confirm the importance host States must give to operating transparently and in a consistent manner in accordance with reasonable expectations, and to the closely related requirement to provide a stable legal and economic framework. The Gus and LG&E awards also discuss an important counterbalance to a State's obligations concerning stability. The defence of necessity has been successfully argued by Argentina, though it has also been rejected in very similar circumstances. Further arbitral interpretation on this is required.

Second, Occidental, Cus, Saluka and Azurix all found no practical distinction between the treaty standard and the customary international law minimum standard.

Whilst prima facie, this resolves confusion over whether fair and equitable treatment is a separate requirement, it is an artificial solution that remains in its infancy. Only Saluka identified fair and equitable treatment as an autonomous treaty standard. This article endorses this finding, though it remains uncertain in what situation an autonomous standard can offer a higher standard of protection than the minimum standard.

3. References

1. For instance if we look at the Ministry of Finance, India – List of BITs it is notable that it was only after the economic liberalization post 1991 that signed its first BIT in 1994 with United Kingdom. See http://finmin.nic.in/bipa_index.asp?pageid=1. See also UNCTAD 'Series on International Investment Policies for Development: The role of International Investment Agreements in attracting Foreign Direct Investment to Developing Countries, 2009.
2. Amit Sachdeva M. International Investment: A Developing Country Perspective; Heinonline 8 J. World Investment & Trade 2007; 533:534.
3. United nations conference on trade and development [UNCTAD], Research Note: Recent Developments in International Investment Agreements, 2005, 2. UNCTAD/WEB/ITEIIT2005/1 (Aug. 30), available at http://www.unctad.org/sections/dite-dir/docs//webiteiit2005l-en.pdf.
4. Fair. Equitable Treatment; UNCTAD series on issues in International Investment Agreements II; United Nation New York and Geneva, 2012
5. See also on this aspect OECD, 'Fair and Equitable Treatment Standard in International Law', September 2004, 3-4. available at <www.oecd.org/daf/inv/internationalinvestmentagreements/33776498.pdf> accessed on 15th February 2014.
6. Eagleton C. responsibility of states in International Law (New York University Press, New York, 1928.
7. Bochard E. The Minimum Standard of Treatment of Aliens 38 Michigan L Rev. 1940, 445.
8. Freeman A. The international responsibility of states for denial of justice, Longman Greens & Co, London 1939.
9. Elihu Root. The Basis of protection of citizens residing Abroad, 1910; 4AJIL:517
10. A H Roth, The minimum standard of International law applied to aliens, (AW Sijthoffs NV, Leiden, 1949.
11. 6 J. World Investment & Trade 297, 2005.
12. See especially UNCTAD series on issues of international investment agreements, Fair and Equitable Treatment, 1999; 3-4, 7-9, 25-28, 31-32.

13. See R. Wilson R. United States Commercial Treaties and International Law 113, 120. The treaty of Friendship, Commerce and Navigation, 29 October 1954, US-FRG, 273 UNTS 4. Article I of the 1954 treaty between Germany and United States reads: Each party shall at all time accord fair and equitable treatment to the nationals and companies of other party and to their property, enterprises and other interests, 1960.
14. The Article provided that the International Trade Organisation (ITO) could: make recommendations for and promote bilateral or multilateral agreements on measures designed to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another. However, the first award in which tribunal examined FET was render in Although the FET standard now occupies a position of prominence in the international investment relation between the stay, it has been not subject to extent unless in the literature of international investment law, 1997.
15. UNCTAD. International investment instruments: A Compendium, The draft Convention represented a private initiative by H Abs and Lord Shawcross, 2001; V:395.
16. OECD Draft Convention on protection of Foreign Property. 1967; 7 ILM 117, 119 (1968).
17. Hermann Josef Abs, by profession a banker, dedicated enormous efforts to a new initiative to protect foreign investment. When it soon became apparent that time was not ripe for such grand approach, Abs opted for more modest multilateral initiative together with Sir Hartley Shawcross. These efforts finally culminated in the Abs-Shawcross Draft which in led to the first effort of the organization for Economic Cooperation and Development (OECD), the forum 1962of capital exporting country to prepare multilateral treaty.
18. [1] UNCTAD, International Investment Agreements: A Compendium, Article 48 of the Agreement contained the following language: "48. Transnational corporations should receive [fair and] equitable [and non-discriminatory] treatment [under] [in accordance with] the laws, regulations and administrative practices of the countries in which they operate [as well as intergovernmental obligations to which the Governments of these countries have freely subscribed] [consistent with their international obligations] [consistent with international law]. 1996; I:172.
19. Guidelines on the treatment of foreign direct investment 7 ICSID Review-FILJ. 1992; 297:300.
20. UNCTAD. International Investment Instruments: A Compendium. 2001; IV:148
21. Article 12 dealing with "Eligible Investments" provides in part: "(d) In guaranteeing an investment, the Agency shall satisfy itself as to: (iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment."
22. The North American Free Trade Agreement (NAFTA) of 1992 contains the fair and equitable treatment principle in its Article 1105, Para. 1: "1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."
23. The Energy Charter Treaty of contains elaborate language around the requirement of fair and equitable treatment, with specific reference to stable and transparent conditions. It's Article 10, Para. 1 provides: "(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment, 1994."
24. Rudolf Dolzer and Christhoph Schreuer, Principles of International Investment Law, second edition, oxford university press, 2012.
25. US-Australia Free Trade Agreement signed on, 1, 2004.
26. US-Central America Free Trade Agreement (CAFTA) signed on January 28. The Central American countries are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, 2004.
27. US-Chile Free Trade Agreement signed on 6, 2003.
28. US-Morocco Free Trade Agreement signed on June 15, 2004.
29. US-Singapore Free Trade Agreement signed on May 6, 2003.
30. OECD. Fair and Equitable Treatment Standard in International Investment Law, OECD Working Papers on International Investment, 2004/03. OECD Publishing. http://dx.doi.org/10.1787/675702255435
31. OECD. Fair and Equitable Treatment Standard in International Investment Law, OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435
32. 31 (ILM) 1366-1384, 1992.
33. Meg Kinnear; The Continuing Development of Fair and Equitable Treatment Standard; British Institute of International and Comparative Law; ISBN 978-1-905221-12-7; 213.
34. Andrea Bojorklund K, Ian Liard A, Sergey Ripinsky. Investment Treaty Law Current Issues; British Institute of International and Comparative law. 2009; III:213.
35. Compania de Aguas Del Aconquija SA vs Argentine Republic, ICSID No. ARB/(973, Award, 20 August, Paras 7.4.6-7.4.7, 2007.
36. Thomas Westcott J. Recent practice on Fair and Equitable Treatment, 8 J World Investment and Trade 409. Also see UNCTAD (n 11) 13-15 (suggesting that there is no difference in meaning between 'fair treatment', 'equitable treatment' and 'fair and equitable treatment') 2007.
37. Azurix vs The Argentine Republic, ISCID No. ARB/01/12, Award, 14 July, Para 361, 2006.
38. Parkerings. Compgniest AS vs Lithuania ICSID No. ARB/05/8, Award, 11 September, 2007, 271-278.
39. Enron Corporation vs Argentine Republic, ICSID No. ARB/01/3, Award,. Enron tribunal noted,.. "fair and equitable treatment standard is none too clear and precise either on the treatment due to foreign citizens, traders and investors or with respect to the fact that pertinent standard have gradually evolved through centuries. Customary International Law, treaties of friendship, commerce and navigation and more recently

bilateral investment treaties have all contributed to this development. The evolution that has taken place is for the most part the outcome of a case by case determination by courts and tribunals. like with the international minimum standard, there is fragmentary and gradual development. 256-257.

40. 6 J. World Investment & Trade 297 2005, Choudhary Barnali, Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law. 437.
41. Rudolf Dolzer and Christhoph Schreuer, Principles of International Investment Law, second edition, oxford university press, 2012.
42. 6 J. World Investment & Trade, Choudhary Barnali, Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law, 2005; 297:439.
43. Mondev International v. United States of America, award (11 October 2002), ICSID Case No. Aius (AF)/99/2, para118; ADC Affiliate and Others v. Republic of Hungary, award (2 October 2006), ICSID Case No. AR/03/16, para 445.
44. OECD. Fair and Equitable treatment Standard in International Investment Law, working papers on International Investment, Number 2004/3, September 2004, 1, available at www.oecd.org; UNCTAD, 'Fair and Equitable treatment' UNCTAD/ITE/11 1999; III:15-16.
45. States can treat Foreigner better but can never treat them worse, than required by FET. See Compania de Auguas Del Aconquinja SA vs Argentine Republic, ICSID No. ARB/97/3, Award, 20 August 2007, para 7.4.7; Azurix Corp vs The Argentine Republic, ICSID No. ARB/01/12, Award, 14 July 2006, Para 359; Andrea K Bojorklund, Ian A Liard and Sergey Ripinsky; Investment Treaty Law Current Issues III; British Institute of International and Comparative law. 2009, 224.
46. Article 31 requires a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty to the context and in light of the object and purpose of the treaty. Some tribunals have sought to determine the ordinary meaning of FET through dictionary definition of fair and equitable using synonym as just, fair, evenhanded, unbiased or legitimate. See Siemens AG vs Argentine Republic, ICSID No. ARB/02/8, Award, 6 February, Para, 2006, 290.
47. Andrea Bojorklund K, Ian Liard A, Sergey Ripinsky. Investment Treaty Law Current Issues III; British Institute of International and Comparative law. 2009, 225.
48. Although national treatment and non-discrimination obligations in international investment agreements are generally addressed in idiosyncratic clauses, the notion of non-discrimination in some way pervades all sub clements of fair and equitable treatment. Accordingly, arbitral tribunals often fail to clearly distinguish between the different standards of investment protection. In addition to the requirement of a differential treatment, the presentation of a discriminatory intention of the host state contributes to the finding of a violation of fair and equitable treatment. Conversely, bad faith is not considered to be a necessary requirement for such a finding. Moreover, the existence of reasonable grounds for the measure taken by the host state may justify the differential treatment of the foreign investor.
49. On various occasions, arbitral tribunals have also identified a lack of transparency as a possible ground for liability of the host state. While closely related to the investor's legitimate expectations, transparency in this context is concerned with the openness and clarity of the host state's legal regime and procedures. It has therefore been observed that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments should be capable of being readily comprehensible to foreign investors. Beyond that, however, arbitral tribunals do not seem to have developed a uniform understanding of the notion of transparency in relation to fair and equitable treatment that would facilitate the deriving a set of specific disclosure or notification duties from it. Nevertheless, the clarity of communications between host state and investor is of importance in the context of fair and equitable treatment, since it may prevent wrong expectations on the side of the investor or contribute to the overall fairness of legal procedures.
50. Tecnicas Medioambientales TECMED SA vs Mexico, ICSID No. ARB(AF)00/2, Award, 29 May, 2003, 154.
51. Another important aspect of fair and equitable treatment is the protection of the investor's legitimate expectations. The protection of such expectations covers the abidance to promises and covenants that have been given to the investor and upon which the investor has relied, mostly with reference to the preamble of an investment agreement, arbitral tribunals have additionally found that the investor's expectations are directed at stability and consistency in the overall legal framework of the host state. This entails that not only administrative policy changes, but also acts of the legislative branch (especially if they constitute drastic alterations to the legal investment environment), are capable of establishing a violation of fair and equitable treatment. However, well-defined criteria designed to determine whether the investor had, in fact, legitimate expectations that the investment framework would remain unchanged are still non-existent. Likewise, it is more than contentious whether, and under what circumstances, the breach of an investor-state contract contravenes the investor's expectations as regards contractual stability.
52. Noble Ventures vs Roamnia, ICSID Cse No. ARB/01/11 (Award) 12 October 2005, 181.
53. Article 31(1) provides: (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning of to be given the terms of treaty in their context and in lights of its object and purpose. Thus, three elements are of particular importance in interpreting the fair and equitable standard: (1) the ordinary meaning of the term fair and equitable (2) the context in which the term fair and equitable treatment is used; and (3) the object and purpose of the investment treaty in question.
54. Although "fair and equitable" may be reminiscent of the extralegal concepts of fairness and equity, it should not be confused with decision ex aequo et bono. It is a legal concept that is susceptible to interpretation and application by a tribunal without an authorization by the parties to go beyond the law and to apply equitable

principles. The Tribunal in ADF Group pointed out that the requirement to accord fair and equitable treatment does not allow a tribunal to adopt its own idiosyncratic standard but must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law. See ADF Group, supra, footnote 40, para. 184. Also See also Mondev, supra, footnote 40, para. 119.

55. An examination of the cases applying fair and equitable standard reveals that arbitral tribunals have developed specific criteria, norms, and principles to determine whether host states have developed specific criteria, norms and principle to determine whether host state have given fair and equitable treatment to investors. See Jeswald W. Salacuse; The Law of Investment Treaty; Second Edition; Oxford University Press, 252.
56. Andres Rigo Sureda; Investment Treaty Arbitration – Judging under uncertainty; Hersh Lauterpacth Memorial Lectures; first publication 2012; Cambridge publication, 77.
57. State action affecting an investor's basic expectations was first considered part of the fair and equitable treatment lexicon around six years ago. Its prominence in Tribunal Awards, particularly since 2004, makes it currently the most important aspect of the fair and equitable treatment standard.
58. Gaillard E. ICSID Jurisprudence, Journal de Droit International, 2008, 332-3.
59. See. https://www.italaw.com/cases/1087, visited on December. 2016.
60. Tecmed Award. 159. In Tecmed, the Tribunal said that "...this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment... ".
61. Seehttp://kluwerarbitrationblog.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/, visited on December, 2016.
62. Occidental Final Award, NJ, 184-192.
63. Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3.
64. At the same time, it is clear that this principle is not absolute and does not amount to a requirement for the host State to freeze its legal system for the investor's benefit. A general stabilization requirement would go beyond what the investor can legitimately expect. It is clear that a reasonable evolution of the host State's law is part of the environment with which investors must contend. For instance, an adjustment of environmental regulations to internationally accepted standards or general improvements in labour law for the benefit of the host State's workforce would not lead to a violation of the fair and equitable treatment standard if applied in good faith and without discrimination. Practice demonstrates that problems do not so much arise from changes in host State legislation as from inconsistent positions taken by executive organs. See Waste Management, supra, footnote 78, at para. 98.
65. MTD vs Chile, Award, 25 May 2004, 12 ICSID Reports 6, 44 ILM 91, 2005.
66. MTD, supra note 61, at para 154.
67. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liab., T 127, Oct. 3, 2006. [hereinafter LG&E Decision], http/italaw.com/sites/defaultfiles/casedocuments/ita0460.pdf.
68. Int'l Thunderbird Gaming Corp. v. United Mexican States, Award, 147 (NAFTA Ch. 11 Arb. Trib. Jan. 26, 2006. http://italaw.com/sites/default/files/case-documents/itaO431.pdf [hereinafter Thunderbird Award].
69. CME Czech Republic BV. (The Netherlands) v. Czech Republic (CME), Partial Award, September 13, at para. 2001, 611.
70. On legitimate expectations see Tecnicas Medioambientales v. Mexico (Tecmed), Award, 29 May 2003, 43 I.L.M. 133, 2004, at para. 154; Metalclad, ibid.; CME Czech Republic B. V. (The Netherlands) v. Czech Republic (CME), Partial Award, September 13, 2001, at para. 611; Waste Management, Award, 30 April 2004; MD v. Chile (MTD), Award, 25 May 2004, ICslo Case No. ARB/01/7. See also S. Fietta, 'The "Legitimate Expectations" Principle under Article 1105 NAFTA - International Thunderbird Gaming Corporation v. The United Mexican States', The Journal of World Investment and Trade, Vol. 7, No. 3, June 2006, pp. 423-32; R. Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law', International Law and Politics, 2005; 37(953-72):961-4.
71. Suez. Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Re.
72. Suez v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liab., 226 July 30, 2010. http://italaw.com/sites/default/files/case-documents/ita0826.pdf.
73. El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB 03/15, Award, 348, Oct. 27, 2011. httpJ/italaw.com/sites/default/files/case-documents/ita0270.pdf [hereinafter El Paso Award].
74. Electrabel SA. Hung v. ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liab., 1 7.75 (Nov. 30, 2012).
75. See http://www.italaw.com/sites/default/filescasedocuments/italawl07lclean.pdf [hereinafter Electrabel Decision], visited on December, 2016.
76. From the viewpoint of the host country, it appears not unreasonable to accept the benchmark of the legal order which it has adopted for itself at the time of the investment. This way, the host state's exercise of its sovereign rights is respected, albeit focused on the time it admitted the investment. Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, 95-97 (Nov. 1, 1999), 14 ICSID Rev. For. Inv. L. J. 535, 1999. available at http://www.italaw.com/sites/default/files/case-documents/ita0057.pdf. See also Mondev Int'l Ltd. v. U.S., ICSID Case No. ARB(AF)/99/2, Award, 156 (Oct. 11, 2002) [hereinafter Mondev Award], 6 ICSID Rep. 192 (2004), available at

http://italaw.com/sites/default/files/casedocuments/ital076.pdf; Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, $ 128 (Dec. 16 2002), 7 ICSID Rep. 341 (2005), available at http://www.italaw.com/sites/default/files/case-documents/ita03l9.pdf; LG&E Decision, supra note 26, $ 130; Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 262 (May 22, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf [hereinafter Enron Award]; BG Group Plc. v. Republic of Arg., Final Award, TT 297-298 (UNCITRAL Arb. Trib. Dec. 24, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0081.pdf [hereinafter BG Final Award]; Duke Energy Electroquil v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, TT 340, 365 (Aug. 18, 2008), http://italaw.com/sites/default/files/casedocuments/ita0256.pdf [hereinafter Duke Award]; Jan de Nul N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04113, Award, 1 265 (Nov. 6, 2008), http://italaw.com/sites/default/files/casedocuments/ita0440.pdf, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/03129, Award, 190-191 (Aug. 27, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0075.pdf, EDF (Services) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award, 219 (Oct. 8, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0267.pdf; AES Summit Generation Ltd. v. Republic of Hung., ICSID Case No. ARB/07/22, Award, 1 9.3.8-9.3.18 (Sept. 23, 2010), http:/italaw.com/sites/default/files/case-documents/itaOO14_0.pdf; Frontier Petroleum Services Ltd. v. Czech Republic, Final Award, TT 287, 468 (UNCITRAL Arb. Trib. Nov. 12, 2010), http//italaw.coni/sites/defaultifiles/case-documentsita342.pdff and National Grid Award, supra note 28. Specifically on the relationship with the right to regulate, see PSEG Award, supra note 1, 1 255. ('While noting that no investor 'may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged,' the Tribunal in Saluka held that the investor can still expect that the conduct of the host State subsequent to the investment will be fair and equitable as the investor's decision to invest is based on 'an assessment of the state of the law and the totality of the business environment at the time of the investment.'"). See also Saluka Partial Award, supra note 1, 1 301.

77. For the purpose of determining where the limit of the State's international responsibility lies in respect of the standard of fair and equitable treatment it is necessary to review the cases from the perspective of what is expected from the investor in terms of risk assumption and due diligence, in order for it to be able to seek the protection of an investment treaty. On due diligence, see F.Lozano Contreareas, La nocion de diligencia debida en derechointernational public (Barcelona, Atlier, 2007.
78. Nick Gallus, The Fair and Equitable Treatment Standard; Cambridge University Press; Pg 234. Also see Bayinder Para 192. The Tribunal said; A second question concerns the circumstances that the Tribunal must take into account in analyzing the reasonableness or legitimacy of Bayinder's expectations at the time of the revival of contract. In so doing it find guidance in prior decisions including Saluka, Generation Ukraine and Duke energy which relied on all circumstances including political, economical, cultural and historical conditions prevailing in the host state.
79. International Thunderbird Gaming Corporation vs Mexico, UNCITRAL (NAFTA), Award, 26 January, 2006. Separate opinion of Walde, para.4, available at : http://ita.law.uvic.ca/.
80. OECD. 'Public Sector Transparency and the International Investor' (OECD Publishing 2003) 23.
81. Zoellner CS. Transparency: An analysis of an Evolving Fundamental Principle of International Economic Law' (2oo6) 27 MJIL, 569.
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85. Rudolf Dolzer, Christhoph Schreuer, Principles of International Investment Law, second edition, oxford university press, para 2012, 133-4.
86. See Tecnicas Medioambientales v. Mexico (Tecmed), Award, 29 May 2003, 43 I.L.M. 133, at para. 2004, 154.
87. See eg Pope and Talbot, para 177-79, visited at https://www.italaw.com/cases/863, visited on 12-04, 2016.
88. See eg Metaclad v. Mexico ICSID Case No. ARB (AF)/97/1 (NAFTA) 3 April, para, 76-88.
89. [1] Siemens vs Argentina, Decision on Jurisdiction, 3 August 2004, 44 ILM 138 (2005), Award, 6 February 2007.
90. MTD vs Chile, Award, 25 May 2004, 12 ICSID Reports 6, 44ILM 91, para, 2005, 163.
91. Saluka vs. Czech Republic, Swiss Federal Tribunal Decision, 7 September, 2006, 114.
92. PSEG Global vs Turkey, award, 19 January, para, 2007, 174.
93. Maffezini v. Kingdom of Spain, ICSID Case No. ARB/g7/7, Award (Nov. 13, 2000), 5 ICSID Rep. 419, para, 2002, 83.
94. Parkerings-Compagniet v. Lithuania ICSID Case No. ARB/o5/8, para 331.
95. Champion Trading v Egypt ICSID Case No. ARB/o2/9 - Decision on Jurisdiction, 21 October 2003, para 164.
96. UNCTAD International Investment Instruments: A Compendium, 2001; IV:72.
97. Graham Mayeda. Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties' 41 Joumal of World Trade 2, 273-91, 286. The author contends that it seems clear that [transparency] is not a recognized principle of customary international law, 2007.
98. A Newcombe and L Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International, 2009, 291-94.
99. Metaclad v. Mexico ICSID Case No. ARB (AF)/97/1 (NAFTA) 3 April, para 76. The tribunal stated that the

host state is required 'to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.

100. Schill, 'Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed' TDM 3, 2006, 15.
101. S Schill and others International Investment Law and General Public International Law in Jurgen Bering and others (eds), General Public International Law and International Investment Law: A Research Sketch on Selected Issues ILA German Branch, 2009, 9.
102. The fair and equitable treatment standard places an obligation on host states to afford foreign investors due process in relation to criminal, civil, and administrative adjudicatory proceedings. Typically manifested in arbitral awards as a duty not to deny justice, the due process obligation seemingly implicates a high threshold, in the sense that the outcome of proceedings involving the investor must "offend judicial propriety"; represent a "manifest failure of natural justice" or a "complete lack of transparency and candour" in order to be classified as a breach of the FET standard. See S Schill, 'Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality' in Schill (ed.), International Investment Law and Comparative Public Law (Oxford University Press, Oxford 2010) 75. Also see Francioni, 'Access to justice, Denial of Justice and International Investment Law' 20 EIL 729. International Thunderbird Gaming (n 134) para 200. The due process requirement is higher for a judicial decision than for an administrative decision, 2009.
103. See, for example, the 1961 Harvard Draft Convention on Responsibility of States for Damage done on their Territory to the Person or Property of Foreigners, as cited in Louis B. Sohn and R.R. Baxter, Responsibility of States for injuries to the Economic Interests of Aliens, 55 An. J. Int'l L. 545, 1961, at 550.
104. The United States-Morocco FTA and other recently signed FTAs to which the United States is a party also specifically prescribe the inclusion of due process rights as part of the fair and equitable treatment.
105. Azinian v. Mexico (ICSID Case No. ARB(AF)/97/2), para 102-03. Cf GAMI v. Mexico Final Award, 15 November 2004, para. 97. "Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counterbalance instances of disregard of legal or regulatory requirements.
106. Pantechniki v. Albania, ICSID Case No. ARB/o7/21, Award, 30 July 2009, paras. 96-7;Jan de Nul v Egypt, Award, 6 November, paras. 2008, 255-59.
107. Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877.
108. Jan de Nul (n 171).
109. Suffice it to say, while the obligation to desist from discriminatory and arbitrary treatment has a relatively uncontroversial place among the various obligations that constitute the fair and equitable treatment standard,186 developing countries remain adamant that the practical application of these principles is in a state of flux in that the thresholds applied by arbitral tribunals in order to classify conduct as arbitrary range from high to low to medium or vague. Indeed, in some instances, tribunals have sought to apply the ELSI standard which implicates a particularly high threshold; that is, the conduct of the host state must 'shock or surprise the tribunal's sense of judicial propriety.
110. Myers SD. supra, footnote 8, at para. 266. Article 1102(l) of the NAFTA governs national treatment. It states: "Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
111. Myers SD. supra, footnote 8, at paras. 162 and 252.
112. Ibid. at para. 259.
113. Ibid. at paras. 263-264.
114. Siemens AG. v. Arg. Republic, ICSID Case No. ARB/02/8, Award, 1 308 (Feb. 6, 2007), available at http://ita.law.uvic.ca/documents/SiemensArgentina-Award.pdf.
115. MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/ 01/7, Award, (May 25, 2004), 12 ICSID Rep. 6, 2007.
116. MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/ 01/7, Award, (May 25, 2004), 12 ICSID Rep. 6, 2007, 163.
117. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), available at http://ita.1aw.uvic.ca/documents/Pakerings.pdf
118. Agreement on the Promotion and Mutual Protection of Investments, Nor.-Lith., Aug. 16, 1992, available at http://www.unctadxi.org/templates/DocSearch.aspx?id=779.
119. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award Sept. 11, 2007. available at http://ita.1aw.uvic.ca/documents/Pakerings.pdf pg 342.
120. Id. 33
121. Champion Trading Co. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award, Oct. 27, 2006. available at http://ita.law.uvic.ca/documents/Championaward_000.pdf.
122. Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, U.S.-Egypt, S. Treaty Doc. No. 99-24, 1986.
123. Champion Trading Co., pg. 104.
124. US. Restrictions on Imports of Cotton and Man-made Fibre Underwear, (WT/DS24/AB/R), Feb. 10, 1997.
125. See text infra at notes 218-221. As will be seen, Tecmed had based the requirement of transparency on the fair and equitable treatment standard.
126. Champion Trading Co., pg 164.
127. See MS. Mc Dougal *et al*. 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights', 70 American Journal of International Law, 1976; 3(12):450. R. B. Lillich, The human rights of aliens in contemporary international law (1984), 1.
128. MTD Chile v. Award, 25 May 2004, 12 ICSID Reports 6; R. Dolzer & C. Schreuer, Principles of international investment Law, 2008, 149.