

International Minimum Standard of Treatment

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I. INTRODUCTION

The so-called Minimum Standard of Treatment has been mentioned time and time again through the history of international relationships and, most recently, in Investment Treaties. But what is the international minimum standard? What elements compound this concept? What are its features? How do we identify it? Is it the same standard as the fair and equitable treatment?

The existence of an international minimum standard for the treatment of foreign and, its property and investments, has been frequently challenged in the past. During most of the

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last century, it has been the object of tension between developed and developing countries, with several countries challenging the existence of a customary international law of minimum standard. As mentioned in the OECD Working Papers on International Investment:

*“This tension had implications in several sectors, for example the League of Nations and the UN International Law Commission was unable to reach agreement on a codification of the law of State responsibility for injury to aliens. The work of the UN centre and Commission on Transnational Corporation was equally impaired by the fundamental differences on issues related to the treatment of foreign property. With their overwhelming majority within the UN General Assembly, the developing countries were able to assert the principle of national treatment as the rule in the case of expropriation...”*¹

I. ORIGIN OF THE MINIMUM STANDARD

The Minimum Standard of Treatment can claim a long existence in international law throughout its origins in the ancient doctrine of denial of justice and the origins of the latter can be traced back as far as ancient Greece. Hugo Grotius and Emer de Vattel embraced the doctrine as part of the law of nations, which was viewed during the 17th and 18th centuries as derived primarily from natural law. During the 19th century, the natural law version was supplanted by the modern, positivist view of the law of nations. According to this view, the law of nations is based in the implicit consent of nations as demonstrated through customary practice. Yet, despite the rise of the positivist approach to international law, the doctrine of denial of justice endured into the early 20th century as part of the natural law legacy of the law of nations.²

¹ OECD Directorate for Financial and Enterprise Affairs. Working Papers on International Investment. Number 2004/3. Fair and Equitable Treatment Standard in International Investment Law. September 2004. Page 8.

² Alwyn V. Freeman. The International Responsibility of States for Denial of Justice. Longmans, Green and Co. Belgium. 1938. pp.498-507.

Professor Wallace Jr. in an article³, when explaining the origins of “denial of justice”, express that in ancient times as a result of a missing central power when people of one “country” or state, specially merchants, could not acceded nor obtained justice from a foreign country or state for the acts of their citizens some practices and law⁴ became spread by which the merchant, who was looking for the satisfaction of his rights or grievances, appealed to his prince or authorities who in turn appealed to the authority of the debtor and, in case of no response, the aggrieved person was authorized to take reprisal. This institution of reprisal became regularized and evolved into gunboat diplomacy and *“Out of this history there eventually developed, as institutions of customary international law, the more civilized practice of diplomatic protection and the attendant idea of an international minimum standard.”*⁵

Something quite similar was repeated during the colonial times. People and investor from the old continent were migrating to the new colonies which, by the time, were lacking evolved forms of government, institutions and legal framework. Worried about their citizens and interests, this capital exporting countries began to design new legal doctrines for the protection of their nationals (and even intervening in the host country if necessary).⁶ An international minimum standard was necessary in order to provide them satisfactory protection.

During colonial times the idea of minimum standard was linked to the protection of the life and liberty of nationals which evolved to protect also their properties and investments against expropriation and economic measures in developing countries. The international law doctrine of State responsibility for injuries to nationals provided that the injury caused to the national of a foreign State was an injury profited to the national’s State, allowing the protection of the latter when domestic recourse was unavailable or

³ Don Wallace Jr. Fair and Equitable Treatment and Denial of Justice: Loewen v. US and Chattin v. Mexico. International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law. Cameron May (2005) pp 672 and following.

⁴ *“Apparently the earliest discovered instance of a law condemning denial of justice is the law promulgated in 506 by the Visigoth King, Alaric II.”* Ibid.

⁵ Ibid

⁶ M. Sornarajah. The International Law on Foreign Investment, (CUP), 1994, pp. 8-20, 27-37.

exhausted.⁷ Two conditions were necessary: the nationality of the alien (corporations were also entitled to this protection), and the exhaustion of local remedies in the host State⁸. Hence, the State of nationality owned the investor's claim and under such power could pursue it,⁹ settle it or just ignore it.

National treatment was not an option for this capital exporting countries which, as said before, were not satisfied with the political, legal and judiciary system governing in these uncivilized countries.¹⁰ Investors and their countries were demanding for an absolute protection, a minimum standard, below which international law and their diplomatic protection would come in their defense.

A. The Calvo Doctrine

As a reaction to the abusive exercise of power, in defense of their citizens, by capital exporting countries (especially Europe and United States) Latin American countries started to develop a series of resistance founded in the principles of Sovereign Equality of States and the Equality of Nationals and Aliens. For this reason Carlos Calvo, a distinguished jurist from Argentina (born in Uruguay), declared in 1896 that the responsibility of governments toward foreigners cannot be greater than that which these Governments have towards their own citizens thus, an investor could not be granted with better rights than local citizens and investment disputes would be adjudicated by local courts applying domestic law.¹¹

⁷ Supra note 3, p. 674. See also footnote 23.

⁸ Justice Bagge, in the Finnish Ships case, talking about what the "exhaust" standard means *The received wisdom is that remedies must be "non-existent," or "futile" because of judicial bias is not the only reason to stop* quoted in supra note 3.

⁹ *This is known as diplomatic protection or diplomatic espousal as well.* The Center for International Environmental Law Issue Brief, International Law on Investment. August, 2003. www.ciel.org/Publications/investments_10Nov03.pdf, p. 1.

¹⁰ *The distinction between the civilized – uncivilized was central to the positivist international law project of European sovereign states and theorists in the XIXth Century [sic]. See A. Angie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", Harvard International Law Journal, 1999, p. 22-34. This distinction found its way to Article 38 (c) of the Statute of the International Court of Justice on the applicable sources of international law, "the general principles of law recognized by civilized nations". Id. Endnotes #6, p. 8.*

¹¹ *The challenge of Latin America's Calvo doctrine to the concept of denial of justice was part of its assault on diplomatic protection by the powerful (e.g. the United States) and on the notion of a minimum standard*

The practice of subjecting foreign investments to the sovereignty of the State, and thus to its law and forum, started to be extended and adopted by the States. The Calvo doctrine was adopted by the laws and constitutions of several countries in Latin America reflecting these countries' legal position towards an international minimum standard of treatment for aliens in general and investors in particular¹².

*"In the 1960s and 1970s advocates of a NEIO sought to expand the ideas of Calvo throughout the world in dealing with capital exporter and creditor nations; it is apparent that this attempt at establishing an NIEO has not succeeded".*¹³ However, this trend has change in the last decades; Latin American Countries have entered into bilateral investment treaties that contain languages and principles that notably leave behind the Calvo doctrine.¹⁴ However, in ironic contrast, in 2002 the U.S. Congress passed the Trade Promotion Authority Act instructing its trade negotiators to ensure that foreign investors are not accorded greater substantive rights than U.S. nationals. *"This language is clearly reminiscent of Calvo, and flows from the greater sensitivities in U.S. federal, State, and local governments affected by NAFTA Chapter XI cases. The impacts of these recent developments, contrasted against century-old positions and controversy, are yet to be assessed".*¹⁵

(other than national treatment for foreigner equal to one's nationals) – it led to a very narrow view of the concept: if a country's courts were open to foreigners that would be sufficient, irrespective of any subsequent judicial failure and without the need to meet any international minimum standard. Supra note 3, p. 677.

¹² In the North American Dredging Company case in 1926, the United States-Mexican Claims Commission authoritatively expounded the nature and scope of the Calvo Clause. This case involved two legal instruments: a contract between a U.S. corporation and the Government of Mexico and a Treaty between the United States and Mexico establishing a Claims Commission. The contract included a clause (18) whereby the contractor and its employees would be "considered as Mexicans in all matters", would not "enjoy any other rights than those established in favor of Mexicans", and were "consequently deprived of any rights as aliens". In contrast, the treaty establishing the Commission dispensed with the need to exhaust the local remedies rule. After careful analysis of the Calvo clause included in the contract, the Claims Commission found that the investor had waived his right to request diplomatic protection in any matter arising out of the contract and dismissed the claim. Supra note 9, p. 2.

¹³ Supra note 3, p. 677. NIEO New International Economic Order was a set of proposals by developing countries to promote a change of the Bretton Woods System to a new economic order in favor of Third World countries.

¹⁴ Mexico, a long time proponent of the Calvo doctrine, has accepted Chapter XI of the NAFTA. Supra note 9. P. 2.

¹⁵ Id.

II. WHAT IS THE MINIMUM STANDARD OF TREATMENT?

C. Rousseau, *Droit International Public*, Paris, 1970, p. 46, cited by OECD,¹⁶ expresses that the great majority of scholars consider that there exists an international minimum standard according to which the States have to accord to aliens certain rights ...even in the case they would deny the same treatment to their nationals. As defined by OECD: *The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property.* It continues by comparing this norm of customary international law with the national treatment, another standard of major importance, by saying: *While the principle of national treatment foresees that aliens can only expect equality of treatment with nationals, the international minimum standard sets a number of basic rights established by international law that States must grant to aliens, independent of the treatment accorded to their own citizens. Violation of this norm engenders the international responsibility of the host State and may open the way for international action on behalf of the injured alien provided that the alien has exhausted local remedies.*¹⁷

The American Law Institute's Restatement (Third) of Foreign Relations Law of the United States, in §711 e) refers to the protection ought by a state to a foreign national or his property making it responsible for injury when the protection falls below a minimum standard of reasonableness. Furthermore, a state is also responsible if it fails to provide to the foreign national remedies for injuries suffered, whether those injuries were inflicted by the state or a private person¹⁸.

¹⁶ Supra note 1. P 8, at note 32.

¹⁷ Id.

¹⁸ Restatement of the Law Third. The American Law Institute. The Foreign Relations Law of the United States. Volume 2. American Law Institute Publishers, 1987. "For instance, a state is responsible for injury resulting to a foreign national or his property from the state's failure to provide reasonable police protection. A state does not guarantee the safety of an alien or of alien property, but it is responsible for injury when police protection falls below a minimum standard of reasonableness" page 187, "A state is also responsible if it fails to provide to an alien remedies for injury to person or property, whether inflicted by the state or by private persons in circumstances in which a remedy would be provided by the major legal

A. In order to better understand the concept of the Minimum Standard of Treatment, some cases where the standard has been analyzed:

The 1926 decision on the *Neer* case, along with the *Roberts* case, became the landmark case for the international minimum standard. Following revolutionary activity in the beginning of twentieth century, Mexico signed agreements with European States and the United States to decide cases of injuries suffered by their nationals in the previous years. The United States – Mexico Commission was granted jurisdiction to decide thus cases.

U.S.A. (L.F. Neer) v. United Mexican States

Paul Neer was a U.S. national murdered on his way back from a mine. His wife filed a claim arguing that the Mexican Government had shown lack of diligence in investigating and prosecuting the murder. The Commission noted that although the authorities might have acted in a more effective way, it was not for an international tribunal to decide whether another course of procedure might have been better. It found that this did not violate the international minimum standard on the treatment of aliens, in what turned a classical pronouncement:

The propriety of governmental acts should be put to the test of international standards, and... The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether this insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of

systems of the world” page 188. Also, in the American Law Institute’s Restatement (Second) of Foreign Relations Law of the United States, 1965, par. 165.2, defines the standard in the following terms: “The international standard of justice ...is the standard required for the treatment of aliens by: (a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles, (b) analogous principles of justice generally recognized by States that have reasonably developed legal systems” Supra note 3.

*the country do not empower the authorities to measure up to international standards is immaterial.*¹⁹

Roberts v. United Mexican States

The second case mentioned above was about a U.S. national, *Roberts*, confined for nineteen months in a small cell along with thirty of forty other men, with no sanitary facilities, no furniture, and no opportunities to exercise. The Commission declared that equality, although relevant in determining the merits of a complaint of mistreatment of an alien, is not the ultimate test of the propriety of the acts of authorities in the light of international law. Rather, the test is whether aliens are treated in accordance with ordinary standards of civilization. The Commission concluded that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment. The Neer standard, whereby every reasonable and impartial man would readily recognize outrage, was applied.²⁰

B. Treaties of Friendship, Commerce, and Navigation

The debate over the recognition and importance of an international customary law which demands a minimum standard of treatment for investors evolved simultaneously with the emergence and proliferation of so called friendship, commerce, and navigation (FCN)²¹ treaties and the later appearance of bilateral investment treaties (BITs) -an overlap between customary and conventional law-. Regarding the FCN treaties, the earlier ones dealt more with the due process for aliens in host States; however, the FCN of the twentieth century contained provisions specific to investment, which later developed into BITs.²²

In the case relating to *Elettronica Sicula S.P.A. (ELSI)*, the United States brought an action before a Chamber of the International Court of Justice (ICJ) against Italy for

¹⁹ Quoted by supra note 9, p. 2.

²⁰ Supra note 9

²¹ The first FCN treaty negotiated by the United States was with France in 1778. www.wikipedia.org.

²² Supra note 9, p. 2.

alleged breach of an FCN treaty, between the two countries, which prohibited “arbitrary and discriminatory measures” and provided “constant protection and security” to the person and property of nationals of the other party. The case involved the temporary requisitioning of a foreign company by the local mayor who acted to prevent industrial strife at the plant when the company announced its plans for liquidation. In its judgment of 1989, the ICJ’s Chamber held that “protection and security” must conform to the “minimum international standard” and that a sixteen month delay in a municipal judicial proceeding did not by itself, and without more, amount to arbitrariness nor did it violate that standard, and that the reference to “constant protection and security” cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. This formulation by the Chamber has been considered to profoundly influence the contours of current debates on minimum standard of treatment.²³

C. Minimum Standard of Treatment and Bilateral Investment Treaties

Bilateral investment treaties started to proliferate since World War II. More than 2000 BITs were ratified during the second half of the 20th century, most of which included the obligation to provide the minimum standard of treatment to foreign investors, to which they were entitled under customary international law. Among the reasons bilateral investment treaties started to develop, scholars cite the need to clarify the uncertainties surrounding customary law and the desire to influence the progress of customary law. The references to the standard of treatment in BITs extend from national treatment²⁴, to

²³ See Murphy. The ELSI Case: An Investment Dispute at the International Court of Justice”, Yale Journal of International Law, 16 (1991), pp. 391-452.

²⁴ National Treatment (UNCTAD, 1999). Dispute Settlement: Investor-State. United Nations. New York and Geneva, 2003, p.72 *The guarantee of national treatment-meaning in this context that a foreign investor is entitled at least to the same level of treatment accorded to national investors in the host country-is an important feature of modern investment treaty practice. In the context of investor-State dispute issues, national treatment means that a foreign investor should have access to the same avenues of dispute settlement available to national investors. Given that host countries are usually willing to have FDI matters considered by local courts, modern treaty practice is furnished with numerous instances in which both national and foreign investors have access to the same domestic jurisdiction... foreign investors frequently seek access to internationalized means of settlement in the form of arbitration or conciliation that may not be available to national investors. To this extent, an entitlement to investor-State dispute settlement may be regarded as an exception to the notion that foreign investors must be given the same treatment as national*

most favored nation²⁵, to fair and equitable treatment²⁶. This latter principle served as precedent in subsequent instruments concerning international investment. By this time the equivalence between the minimum standard and the fair and equitable treatment, among capital exporting countries, became dominant.²⁷

III. FAIR AND EQUITABLE STANDARD AS PART OF THE MINIMUM STANDARD REQUIRED BY THE CUSTOMARY INTERNATIONAL LAW.²⁸

The Fair and equitable principle has been identified by part of the scholars as one of the elements of minimum standard of treatment required by international law. We mentioned before cases that support this position (*Neer* and *Roberts*). But lately, the question has been raised whether the content of the minimum standard is limited to the interpretation given in the early 20th century, or refers to an evolving customary law influenced by the BITs, international decisions involving investment disputes and the opinion of jurists.

investors in all respects. In this case it is better to see the treatment accorded to the foreign investor as being in line with the concept of “no –less-favorable-treatment”. Here a host country may give preferential treatment to foreign investors compared to the treatment it accords to comparable national investors, but not less than it affords national investors.

²⁵ “...IIAs [International Investment Agreements] typically include a requirement that a foreign investor be accorded the highest standard of treatment available to an investor from any other foreign country also known as most-favored-nation (MFN) treatment. Mark Kantor. Case Book, Georgetown University Law Center. P. 481. See Emilio Agustin Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7.

²⁶ Go to letters III and IV for definitions.

²⁷ Of significance is the fact that many BITs granted jurisdiction to the International Centre for the Settlement of Investment Disputes (ICSID) for the settlement of disputes between the investor and the host State. ICSID resurfaced the old mixed-claims tribunals and created an investor-state arbitral mechanism, which ultimately permits the investor to advance whatever arguments on MST that will strengthen its claims. In the context of NAFTA Chapter XI, some claimants argued, as they had regarding earlier BITs, that “fair and equitable” are additional to or beyond MST.

²⁸ *A large number and a wide variety of international legal rules are generated by means other than the explicit consent of states expressed in treaties. Sometimes these other kinds of international law are grouped together under descriptive rubrics like “general international law” or “international common law”, but they are usually better known by their more specific appellations: customary international law, the general principles of international law, natural law, jus cogens and equity. Despite diverse sources, international rules not based on treaties share certain characteristics; among other things, they may sometimes be more generally applicable to states than are rules emanating from international agreements; however such rules are typically less definite in their formulation and thus often more subject to doubt in practice”. An Introduction to International Law. Mark. W. Janis, Second Edition. Little, Brown and Company, 1993, p.41.*

Most international instruments, mainly BITs, have adopted the fair and equitable standard of treatment although, in most of them, with certain exceptions including the NAFTA, the US Free Trade Agreements and the commentaries of the OECD Draft Convention, this is done without any reference to an international law standard. Some think this is a possible way of avoiding the divergence surrounding the international standard and in order to give to it a direct content. However, international law is referred to in relation to “fair and equitable treatment” in a number of BITs, in particular those concluded by France, Japan, the UK and the US and the new US and Canada model BITs.²⁹

According to the Notes and Comments to Art. 1 of the OECD Draft Convention on the Protection of Foreign Property, the Committee responsible for the draft pointed that: *The phrase “fair and equitable treatment”, customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that –subject to essential security interests- protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the “minimum standard” which forms part of customary international law*”.³⁰ This view has also been sustained by the Swiss Foreign office in a statement issued in 1979 by which was articulated that the fair and equitable treatment refers to a classic principle of international law according to which the states have to provide to foreigners who are in their territory, and their property, the benefit of an international minimum standard, that is a minimum of personal, procedural and economic rights.³¹

In the NAFTA Chapter XI context, the minimum standard and the fair and equitable treatment are contained in Article 1105 (1), which reads:

²⁹ Supra note 1 p.10.

³⁰ Ibid.

³¹ Annuaire Suisse de Droit International, 178 (1980), quoted by Dolzer and Stevens, op. cit. n. 34, quoted by supra note 1. p. 10, in the original language (French), unofficially translated by the author of this work.

*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.*

In order to clarify the interpretation of Article 1105 (1), since tribunals gave different interpretation of the fair and equitable provision, the NAFTA Free Trade Commission (FTC) issued a binding interpretation on July 21, 2001, according to which:

Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105 (1).

In the light of this interpretation, arbitral tribunals have sought to unveil the content of the customary law minimum standard of treatment. As mentioned in the *Neer* case, the standard there was that a State was held to fall below the minimum standard if its treatment to foreigners amounted to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. The following cases: *Mondev*, *ADF*, and *Loewen*, addressed whether this standard continues to be applicable customary law.

A. NAFTA Cases

1. *Mondev International LTD v. United States of America*

The *Mondev*³² case concerned a dispute heard by the Courts of Massachusetts between Mondev, a Canadian real estate developer on one side, and the city of Boston and the Boston Redevelopment Agency on the other. The Massachusetts Supreme Judicial court ruled that Mondev failed to establish an actual breach of the contract, and on Mondev's claim of tortious interference with contractual relations, the Court ruled that the agency was immune from suit under the Massachusetts Torts Claims Act. After the court denied Mondev's petition for certiorari, the Canadian investor brought claims for loss and damage pursuant NAFTA Chapter XI. The Mondev Tribunal ultimately dismissed all claims, on what the tribunal described as "rather technical grounds".

The Tribunal dealt with claims of denial of justice, which required elucidating the content of customary law of minimum standard in investment treaties. The tribunal observed that "both the substantive and procedural rights of the individual in international law have undergone considerable development" and that the concordant practice apparent in the 2000 plus BITs in force around the world "will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law". In this light, the tribunal reasoned that "what is unfair or inequitable need not equate with the outrageous or egregious", and in particular that, "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith".

Having abandoned the *Neer* standard as the applicable law on minimum standard, the Mondev tribunal set out to articulate the test for evaluating whether a judicial action meets the international law standard. In this sphere of issues, the Mondev tribunal regarded the ICJ Chamber's focus on "judicial propriety" in *ELSI* as a useful criterion in the context of denial of justice. It followed this line of reasoning to express its test on the minimum standard: "whether, at an international level and having regard to generally accepted standard of the administration of justice, a tribunal can conclude in the light of all of the available facts that the impugned decision was clearly improper and

³² *Mondev International LTD v. United States of America*, ICSID Case No. ARB (AF)/99/2. 11 October, 2002. Supra note 9.

discreditable, with the result that the investment has been subject to unfair and inequitable treatment”.³³

2. ADF Group Inc. v. United States of America

Next, the *ADF*³⁴ tribunal was called to decide upon performance requirements and other exceptions in government procurement, as well as on the minimum standard in a regulatory framework. The ADF case concerned the United States’ “Buy America Requirements” included in statute and regulations, which provided that only steel products produced and manufactured in the United States could be used in federal-aided high-way construction projects. This requirement affected the operations of ADF, a Canadian investor that was awarded a sub-contract for the supply and delivery of structural steel components for nine bridges of the Springfield Interchange Project in Northern Virginia, and which sought to carry out fabrication work of U.S. produced steel in its facilities in Canada.

In its discussion of minimum standard, the tribunal first noted that FTC interpretations were necessary “for consistency and continuity of interpretation, which multiple ad hoc arbitral tribunals are not well suited to achieve and maintain”. The tribunal then observed that what customary law projects is not a static photograph, and that minimum standard in customary law is constantly in process of development. Next, after extensively quoting *Mondev*’s reasoning for departing from the *Neer* standard, the ADF tribunal added that “there appears no logical necessity and no concordant State practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of treatment of foreign investors” by a host State. The ADF tribunal ultimately dismissed all claims.

3. The Loewen Group, Inc. and Raymond L. Loewen v. United States of America

³³ *Id.*

³⁴ *ADF Group Inc. v. United States of America*, ICSID Case No ARB (AF)/00/1, 9 January, 2003. *Ibid.*

In the *Loewen*³⁵ case, it was argued, before the tribunal, that the conduct of the trial, in permitting flagrant appeals to prejudice, was so flawed that it violated minimum standard. The tribunal observed that bad faith or malicious intention is not an essential element of minimum standard, but rather that a “manifest injustice in the sense of lack of due process leading to an outcome which offends a sense of judicial propriety is enough”. The Loewen tribunal thus embarked in an inquiry of judicial propriety, quoting both ELSI and Mondev, and found that “the whole trial and resultant verdict were clearly improper and discreditable” and could not be squared with minimums standard.

However, the Loewen tribunal also observed that, before a violation of minimum standard is established, the whole judicial process, including available recourse for review on appeal, must be examined. That is, the nature of a claim of injury based upon judicial action necessitates finality of action on the part of the States’ legal system. In following this principle, the Tribunal expressed its view that the content of the rule of judicial finality is no different from the local remedies rule, and consequently embarked to elucidate whether there was an adequate and effective recourse available to review the trial’s miscarriage. The tribunal, in obiter dicta, found that Loewen failed to pursue its domestic remedies, notably a petition for certiorari to the Supreme Court, coupled with an application for a stay, and therefore no violation of minimum standard was established. The tribunal dismissed all claims for lack of jurisdiction.³⁶

B. Cases outside NAFTA

1. Azurix Corp. v. The Argentine Republic

³⁵ The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID case No. ARB (AF)/98/3. Ibid.

³⁶ Subsequent to the hearing on the merits, the Loewen Group International, Inc filed for bankruptcy in the United States, ceased to exist, and organized all of its business as a U.S. corporation. In assessing these developments, the Tribunal applied the principle of continuous national identity, from the date of the events giving rise to the claim (dies a quo) through the date of the resolution of the claim (dies a quem). Under this approach and looking beyond formalities and into substance, the Tribunal noted that all of the benefits of any award would clearly inure to the American corporation, thereby fatally destroying the diversity of nationality required by NAFTA.

*Azurix*³⁷ filed a request for arbitration against the Republic of Argentina with the ICSID for the recovery of damages suffered for the violation by the latter of the 1991 Investment Treaty between United States of America and Argentina (the BIT) with respect of Azurix investment in a utility which distributes drinking water and treats and disposes of sewerage water in the Argentine Province of Buenos Aires³⁸.

Azurix claimed, among other things, that Argentina failed to accord to it *fair and equitable treatment, full protection and security, and treatment required by international law (Article II (2) (a))*³⁹. Further more, Azurix claim that the BIT emphasizes this treatment by including in the preamble that the fair and equitable treatment “...*is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources...*” but notes that fair and equitable treatment is not defined by the BIT, and the tribunal will have to determine whether it means the minimum standard required by international law or whether the phrase is an independent, self-contained principle as supported by Azurix.⁴⁰

Argentina argued that Azurix did not comply with the Concession Agreement, in particular with its investment obligations, and the actions of the Province were justified.⁴¹ In addition, Argentina disagrees on the meaning of fair and equitable, which it considers inextricably attached to the international minimum standard⁴², and the host State would have to incur in acts that demonstrates a premeditated intent to not comply with an obligation, insufficient action falling below international standards or even bad faith.⁴³

The tribunal had to decide if fair and equitable treatment is -as supported by Azurix- or is not -as claimed by Argentina- additional to the minimum treatment requirement under international law. It found that:

³⁷ http://www.worldbank.org/icsid/cases/pdf/ARB0112_Azurix-Award-en.pdf

³⁸ Id. Paragraph 3

³⁹ Id. Paragraph 9

⁴⁰ Id. Paragraph 324

⁴¹ Id. Paragraph 44

⁴² Id. Paragraph 332

⁴³ Id. Paragraph 333

*“The last sentence ensures that, whichever content is attributed to the other two standards, the treatment accorded to investment will be no less than required by international law. The clause... permits to interpret fair and equitable treatment ... as higher standards than required by international law. The purpose... is to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law. While this conclusion results from the textual analysis of this provision, the Tribunal does not consider that it is of material significance for its application of the standard of fair and equitable treatment to the facts of the case. As it will be explained below, the minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”*⁴⁴

Making some references to NAFTA cases, in particular *Mondev* and *Loewen*, the tribunal agrees with the tendency to consider the customary international law to be applied not limited to its concept of past centuries, but to a new one shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce.⁴⁵

The tribunal found the conduct of the Province to be in breach of the fair and equitable treatment.⁴⁶

2. *Saluka Investments BV (The Netherlands) v. The Czech Republic*

*Saluka*⁴⁷ brought a claim against the Czech Republic for the recovery of approximately US\$1.4 billions, plus interest and cost, under the BIT between the Netherlands and Czech Republic. The claim was decided by UNCITRAL arbitration.

⁴⁴ Id. Paragraph 361

⁴⁵ Id. Paragraph 368

⁴⁶ Id. Paragraph 377

⁴⁷ *Saluka Investments BV (The Netherlands) v. The Czech Republic*. <http://www.pca-cpa.org/ENGLISH/RPC/SAL-CZ%20Partial%20Award%20170306.pdf>.

Investicní a Postovní Banka (IPB) was the first of four large commercial Czech banks to be privatized after the Czech Republic started a privatization program in the nineties. IPB faced problems of bad debt and needed capital injection. The investor Nomura did not want to be a strategic investor and had only made a portfolio investment when it acquired a 46.16% stake in IPB's equity. It afterward transferred it to Saluka, a special purpose vehicle. In 1999 the Czech National Bank (CNB), inspected IPB and concluded that it had serious financial deficiencies. In 2000 the government put IPB under forced administration with the purpose of its consequent sale to CSOB.

Because of the differences the Czech Republic did under the "Revitalisation Programme" (assisted the largest banks with the exception of IPB), Saluka considered that the Czech Republic failed to provide the fair and equitable standard contained in Article 3.1 of the treaty. The tribunal then had to decide whether, as claimants argue; *the standard is a specific and autonomous treaty standard* and should be interpreted broadly as on *Pope and Talbot, Inc. v. The Government of Canada*⁴⁸ or, as Respondents affirms, *the standard laid down in Article 3.1 conforms in effect to the "minimum standard" which forms part of customary international law.*⁴⁹ The tribunal held that:

*"...it appears that the difference between the Treaty standard (referring to the fair and equitable treatment) laid down in Article 3.1. and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real..."*⁵⁰

In addition to this, the tribunal remarks the existence of an international minimum standard of protection, regardless of the State policy to investments, and a higher protection conceded to investments in bilateral treaties:

"...the customary minimum standard is in any case binding upon a State and provides a minimum guarantee to foreign investors, even where the State follows a policy that is in principle opposed to foreign investment; in that context, the minimum standard of "fair

⁴⁸ Id. Paragraphs 286/287.

⁴⁹ Id. Paragraph 289.

⁵⁰ Id. Paragraph 291

and equitable treatment” may in fact provide no more than the “minimal” protection...”⁵¹ “Bilateral investment treaties, however, are designed to promote foreign direct investment as between the Contracting Parties; in this context, investors’ protection by the “fair and equitable treatment” standard is meant to be a guarantee providing a positive incentive for foreign investors. Consequently, in order to violate the standard, it may be sufficient that States’ conduct displays a relatively lower degree of inappropriateness”⁵²

The tribunal concluded that the fair and equitable standard embodied in Article 3.1 of the Treaty points to the autonomous character of the standard as a consequence of the omission to any reference in the treaty to the customary international minimum standard.⁵³

IV. DIFFERENT DEFINITIONS OF MINIMUM STANDARD OF TREATMENT AND FAIR AND EQUITABLE TREATMENT.

Besides the NAFTA treaty - (Article 1105 (1)) and its interpretation by FTC, with the respective recognition by Canada, United States and Mexico of an evolving and not static concept of the minimum standard of treatment- there are other international instruments which relates the minimum standard and the fair and equitable treatment. Another example of this would be the 2004 US Model BIT⁵⁴ which in its article 5 and the recently concluded US Free Trade Agreements in their Chapter on Investment go further and attempt to define the minimum standard of treatment:

“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

⁵¹ Id. Paragraph 292

⁵² Id. Paragraph 293

⁵³ Id. Paragraph 294

⁵⁴ Supra note 1.

For greater certainty [the previous paragraph] describes the customary international minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments...

*[This] obligation to provide “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world...*⁵⁵

The OECD work in this subject also mention the additional interpretative provision in the US FTAs, which states that parties share the understanding of the meaning of customary international law as the general and consistent practice of States that they follow from a sense of legal obligation; the customary international law minimum standard of treatment of nationals from other states refers to all customary international law principles that protect the economic rights and interests of the former, confirming in this way the parties view that the standard is a customary international law standard and not a conventional one.

With the trend towards incorporating the fair and equitable standard, some Latin American countries, such as the members of MERCOSUR, provide for such treatment in their investment instrument i.e., the Colonia Protocol on Reciprocal Promotion and Protection of Investments within MERCOSUR, signed in January 1994.⁵⁶

⁵⁵ Id. Page 12. Also see United States Practice in International Law, volume 2: 2002-2004, Sean D. Murphy. Cambridge University Press, 2006 U.S.A. *“The new model contains far more detailed provisions on certain procedural matters, such as access to investor-state dispute settlement (Articles 23-34) and transparency of national laws and proceedings (Article 11), and on certain substantive protections accorded to investors, such as the minimum standard of treatment (Article 5 and Annex A) and the applicable standard for expropriation (Article 6 and Annex B). New articles also address the inappropriateness of encouraging foreign investment at the expense of protections afforded in national environmental and labor laws (Articles 12 and 13).”*pp.163-164.

⁵⁶ Latin American investment instruments that do not include reference to fair and equitable treatment included Decisions 24 and 291 of the Commission of the Cartagena Agreement, dated 1970 and 1991, respectively. UNCTAD/ITE/IIT/11 (Vol. III) pp. 29-30.

The new Foreign Investment Protection and Promotion Agreement of Canada (FIPA) model also contains similar language and links the fair and equitable treatment to the minimum standard:

*“The Minimum Standard of Treatment ensures investments of investors, fair and equitable treatment and full protection and security in accordance with the principles of customary international law. The minimum standard provides a “floor” to ensure that the treatment of an investment cannot fall below treatment considered as appropriate under generally accepted standard of customary international law”*⁵⁷

The United Nations Centre on Transnational Corporations (UNCTC) has issued a study which stated that

*“Fair and equitable treatment is a classical international law standard” and “classical international law doctrine considers certain elements to be firm ingredients of fair and equitable treatment, including non-discrimination, the international minimum standard and the duty of protection of foreign property by the host State”*⁵⁸

A document prepared by the WTO Secretariat for the Working Group on the Relationship between Trade and Investment states that the principle of *“fair and equitable treatment”* has its roots in customary international law and it is generally considered *“to cover the principle of non-discrimination, along with other legal principles related to the treatment of foreign investors, but in more abstract sense than the standards of MFN and national treatment”*.⁵⁹

CONCLUSION

Is the fair and equitable standard the same as the international minimum standard?

⁵⁷ Supra note 1. p. 12.

⁵⁸ Ibid. p.13.

⁵⁹ Ibid.

From the interaction shown above, between these two standards, the question is whether the international minimum standard is equivalent to the fair and equitable treatment, or do they differ from each other?

If States and investors believe that the fair and equitable standard is entirely equivalent with the international minimum standard, they could easily indicate this in their investment instruments; but most investment instruments do not make an explicit link between the two standards. Hence, we cannot say that most States and investors believe fair and equitable treatment implies the same as the international minimum standard.⁶⁰

Efforts to equate these two standards may bring some difficulties regarding the substantial debate in international law concerning the international minimum standard. Moreover, considering that the last has a stronger support among developed countries, a number of developing countries have traditionally held doubts regarding the pertinence of the international minimum standard to the customary international law, making it more difficult to assume that these countries will apply this standard to their investment treaties in cases in which they have not incorporated it expressly.

A number of sources derived mainly but not exclusively from developed countries, indicate that these two standards are in fact equivalent. However, in the practice, there have been contrary conclusions on the relationship between the two. *It has been argued, for instance, that it is both pointless and misleading to equate the two concepts because fair and equitable treatment envisages conduct “which goes far beyond the minimum standard and affords protection to a greater extent and according to a much more objective standard than any previously employed form of words”. By this interpretation, therefore, in ascertaining the content of the fair and equitable standard, no other form of words is appropriate: for each dispute, the content of the standard is to be determined by inquiring whether “in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable” (Mann, 1990, p.238).*⁶¹

⁶⁰ Supra note 56.

⁶¹ Supra note 56. p.38.

These considerations point towards fair and equitable treatment not being synonymous with the international minimum standard. The two standards may overlap significantly, but the presence of a provision assuring an international minimum standard does not automatically incorporate for foreign investors fair and equitable treatment in an investment instrument. Although I believe that the inverse, if a fair and equitable treatment is demanded, this must be understood on a basis of minimum standard treatment.

As Professor Wallace said “Fair and Equitable Treatment is utopia on earth, could be everything...”⁶²

⁶² Professor Don Wallace Jr. in his Investor State Dispute Settlement class at Georgetown University Law Center

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