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Does a higher threshold of responsibility translate into greater possibilities for defending domestic regulatory measures?

The fair and equitable standard of treatment in Latin American countries with emphasis in Colombia

Yadira Castillo

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Does a higher threshold of responsibility translate into greater possibilities for defending domestic regulatory measures?

The fair and equitable standard of treatment in Latin American countries with emphasis in Colombia

Yadira Castillo*

Achieving clarity in core provisions negotiated in international investment agreements entails rethinking Investor-State Dispute Settlement. In Latin American countries, the trend is to include the fair and equitable treatment as part of the minimum standard of treatment, based on customary international law. Such a provision has been contested by developing countries until recent international multilateral bargaining processes. In fact, developing countries have come to realize that the fair and equitable treatment and the high threshold of responsibility framed in customary international law can be viewed as an alternative means for governments to protect domestic regulations under international law. Although, there is still an indeterminacy about the scope of this concept, countries have attempted to focus on the type of evidence put forward by foreign investors before international tribunals and, to reduce tribunals' discretion. Even though some treaties like CETA, and models such as Colombia's model on International Investment Agreements (IIAs), comprise fair and equitable treatment as independent provisions and have included a list of types of conduct, the truth is that some conducts fall within the parameters required by the minimum standard of treatment. For Latin American countries, the creation of a regional center of investment disputes may provide for a more certain interpretation of the fair and equitable treatment standard.

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Pour assurer la clarté des dispositions fondamentales négociées dans les accords internationaux d'investissement, il faut repenser le règlement des différends entre investisseurs et États. Dans les pays d'Amérique latine, la tendance est d'inclure le traitement juste et équitable dans le cadre de la norme minimale de traitement, fondée sur le droit international coutumier. Une telle disposition a été contestée par les pays en développement jusqu'aux récents processus de négociation multilatérale internationale. En fait, les pays en développement se sont rendus compte que le traitement juste et équitable et le seuil élevé de responsabilité définis dans le droit international coutumier peuvent être considérés comme un autre moyen permettant aux gouvernements de protéger les réglementations nationales en vertu du droit international. Bien que la portée de ce concept reste indéterminée, les pays ont tenté de se concentrer sur le genre de preuve présentée par les investisseurs étrangers devant les tribunaux internationaux et de réduire le pouvoir discrétionnaire des tribunaux. Même si certains traités comme l'AECG et des modèles tels que le modèle colombien des accords internationaux d'investissement (AII) comprennent le traitement juste et équitable sous la forme de dispositions indépendantes et ont inclus une liste de types de conduite, il n'en demeure pas moins que certaines conduites respectent les paramètres requis par la norme minimale de traitement. Pour les pays d'Amérique latine, la création d'un centre régional de règlement des différends relatifs aux investissements peut permettre une interprétation plus certaine de la norme de traitement juste et équitable.

Introduction

Investor-State Dispute Settlement disciplines have given rise to regulatory tension between rights endowed to foreign investors and government-protected public interests. Regulatory restrictions adopted by host countries have become an issue when governments enter into investment treaties. Those restrictions and tensions have led to a rethinking of Investor-State arbitration, for the following reasons: (i) the ambiguity found in provisions of investment treaties and the scope defined by some tribunals; (ii) the inconsistent and contradictory interpretation by tribunals regarding common principles of foreign investment protection; (iii) the dynamics of the Investor-State Dispute Settlement mechanism;[1] and (iv) the belief that international law on foreign investment is biased in favor of foreign investors. These four reasons have led to a contestation of foreign investment arbitration.[2]

Consequently, some Latin American countries have withdrawn from investment treaties, as well as from the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention"),[3] to return to the Calvo Doctrine. As a result, these countries require foreign investors to file their claims before domestic tribunals, granting them no better treatment than domestic investors.[4] Other countries have either renegotiated or negotiated new treaties seeking more control

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1 See Stephan W Schill, "Derecho Internacional de Inversiones y Derecho Público Comparado en una Perspectivssa Latino-Americana" in Attila Tanzi et al, eds, *International Investment Law in Latin America, Problems and Prospects* vol 5 (Leiden: Koninklijke Brill NV, 2016), 23 at 31; see also Charles Browner & Stepan Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law" (2009) 9:2 Chicago J Intl L 471 at 473.

2 Castillo identifies a weakness bias in favor of foreign investors, embedded into the scope of international foreign investment law and reproduced since its creation. This gives rise to the need of regulated rights for foreign investors, with the exclusion of binding obligations for this non-state actor. See Yadira Castillo, *El sesgo de debilidad a favor del inversionista extranjero. Un límite a la responsabilidad internacional de las corporaciones transnacionales* (Ediciones Uniandes, 2015) at 3.

3 This is the case, for example, for Bolivia, Ecuador and Venezuela. See Rodrigo Polanco "Two Worlds Apart: The Changing Features of International Investment Agreements in Latin America", in Tanzi et al, *supra* note 2 at 97; see also Catherine Titi "Investment Arbitration in Latin America. The Uncertain Veracity of Preconceived Ideas" (2014) 30:2 Arbitration Intl 357.

4 On this point Prieto Muñoz sustains that the best example is Ecuador, "because in 2008 it introduced in its new Constitution a clause forbidding the consent of the State to international arbitration on commercial agreements outside the region." José Prieto Muñoz, "International Investment Disputes in South America: Rethinking Legitimacy in the Context of Global Pluralism" in Tanzi et al, *ibid* at 148.

over their obligations and limiting the scope of provisions, such as the fair and equitable obligation.[5] The consequences and notoriety of the fair and equitable treatment standard has brought to the forefront for both developed and developing countries the issue of the scope and accuracy of obligations incorporated into the treaties. This may lead to more clarity when it comes to their enforcement.

It is possible to identify a trend in the negotiation of the fair and equitable provision tied to the minimum standard of treatment of aliens based on customary international law, especially in Latin American countries such as Peru, Chile, Uruguay, Colombia and Mexico,[6] although such a trend seems to introduce a different approach to the debate. Indeed, in the Model Agreement on International Investment published by Colombia, the wording of the fair and equitable treatment excludes any reference to a minimum standard of treatment or custom. However, the list of obligations described by the provision is framed within the parameters of interpretation of the fair and equitable treatment standard tied to the minimum standard of treatment.

Against this backdrop, this paper delves into whether the fair and equitable treatment provision and its accuracy endows governments with more tools to defend their regulatory measures under international law. Regulatory measures are understood as the exercise of administrative, legislative and judicial powers. With respect to fair and equitable treatment, governments hope to reduce the number of lawsuits filed by investors in the framework of investment treaties,[7] thereby securing their right to regulate on the grounds of public interest,[8] and limiting expansive or confusing

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5 That is the case of countries like Australia and the Model of Investment Treaty proposed by India.

6 See *infra* notes 97—101 referring to treaties signed by the mentioned countries. In a 2012 report on fair and equitable treatment, UNCTAD stresses the increase of international investment agreements bearing the fair and equitable obligation as part of the minimum standard of treatment of aliens under customary international law. Additionally, UNCTAD indicates that the link between fair and equitable standard and international minimum standard has been maintained in the IIA recently signed by Canada and the United States and, also in FTAs concluded in the Western Hemisphere. To date there are 2,575 bilateral investment treaties registered with UNCTAD, out of which 1,990 are classified as agreements with an unqualified provision on fair and equitable treatment, i.e., the provision on fair and equitable treatment is neither tied to the minimum treatment standard nor to international law. Likewise, 80 treaties out of 2,575 make reference to the minimum customary international law treatment standard for aliens. Finally, 348 treaties out of 2,575 make reference to international law and principles of international law regarding fair and equitable treatment. UNCTAD, "Mapping of IIA Content", online: *UNCTAD* <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu >.

7 Andrew P Tuck reviews NAFTA cases like *S.D Myers, Pope &Talbot, Mondev,* and *Glamis Gold* to understand the struggle of the United States "to find a balance between providing robust foreign investment protections based on international law and simultaneously avoid investment treaty disputes". Andrew P. Tuck, "The "Fair and Equitable Treatment" Standard Pursuant to the Investment Provisions of the U.S Free Trade Agreements with Peru, Colombia and Panama" (2010) 16 LBRA 385 at 386.

8 See UNCTAD, "World Investment Report 2015 - Reforming International Investment Governance" (2015) at 128, online: <https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf>.

interpretations.[9] There is also the belief that the link between fair and equitable treatment with the minimum standard of treatment "will lend consistency and predictability to both investors and States alike."[10]

Furthermore, this paper suggests that the return of developing countries (especially Latin America countries) to the minimum standard provided in customary international law should not be looked upon as a step backwards, but rather as a strategy to protect regulatory sovereignty under international law by means of a higher threshold of responsibility based on customary international law. Indeterminacy of the standard contents does not imply that the goals pursued by States when negotiating this type of provisions fade away. As to the threshold of responsibility, there is consensus in the sense that a serious breach of a State's obligation requires the proof of gross, egregious or outrageous conduct. However, provisions on treaty interpretation may be useful for contracting parties if they agree to limit the content and scope of core standards of treatment. Finally, this paper explores the possible effect of having a regional investment arbitration center, using the Investment Arbitration Center's (under the aegis of the Union of South American Nations (UNASUR) failure as a benchmark. The purpose of the above was to allow Latin American countries to pursue agreeing on the fair and equitable treatment as part of minimum standard of treatment. Despite the UNASUR treaty being denounced by Colombia and some states suspending their participation, the draft proposal is a regional approach that tackles the most important flaws of the mechanism and addresses the considerable asymmetry and imbalance between the parties to the dispute, skewing the balance against States. As a matter of fact, the initiative is a contribution from the region to the global debate around the reform of the Investor-State Dispute Settlement. Having said that, this paper attempts no review of the customary feature of fair and equitable treatment.[11] Furthermore, it does not intend to put forward a proposal on the contents of the fair and equitable standard as part of the international minimum standard. Rather, the purpose of this paper is to explore alternatives available for States and the consequences of defending regulatory measures based on the fair and equitable standard tied to the minimum standard of treatment, taking into account the threshold of breach and the standard's accuracy. This paper has two parts. The first part provides the background, concept and evolution of the minimum standard of treatment. It then reviews positions articulated by parties and adopted by courts in relation to the fair and equitable treatment obligation as part of the minimum standard of treatment of aliens, on

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9 See *Polanco, supra* note 4 at 97.

10 J. Roman Picherack, "The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far" (2008) 9:4 JWIT 255 at 262.

11 See Patrick Dumberry, "The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States' Foreign Investment Law Resolution" (2015-2016) 2 MJDR 66 at 66.

the grounds of customary international law. It should be mentioned that submissions filed by governments and investors were not always available. This part is based on awards rendered under Article 1105(1) of the North America Free Trade Agreement ("NAFTA").

The second part explores the impact of awards on the defense of regulatory measures under international law, considering the trend among Latin American countries to negotiate fair and equitable treatment as part of the minimum standard of treatment of aliens in customary international law. This part focuses on the Colombian case because it is possible to identify two types of fair and equitable provisions. The first one ties the fair and equitable treatment to the minimum standard of treatment, which has been the trend around the treaties ratified by Colombia. This kind of provision will be analyzed considering the Free Trade Agreement between Colombia and the United States. The second one can be found within the sophisticated Model Agreement on International Investment issued by Colombia in 2017. This model strives to strike a balance between the foreign investor and the State in terms of rights and obligations. With that purpose, it pursues to exclude some grounds of investment disputes and qualifies in detail certain articles. In the case of fair and equitable treatment, as with the Comprehensive Economic and Trade Agreement ("CETA"), there is no reference to the minimum treatment standard or custom.

Nevertheless, the accuracy pursued by the draft is based on identifying a list of conducts prohibited for States, and most of which are characterized by a high threshold of breach under the parameters of the minimum standard of treatment of aliens. In that sense, this article attempts to analyze the fair and equitable provision´s model and Article 8(10) CETA where fair and equitable treatment is an independent provision. Moreover, this paper will explore the legitimate expectations and denial of benefits because the wording may have important consequences on the defense of regulatory measures. Following a review of NAFTA jurisprudence, this second part also uses as a reference Article 10(5) of the Free Trade Agreement between Colombia and United States with the objective of assessing whether a higher threshold of responsibility can better provide for the defense of regulatory measures. As Article 10(5) is a dependent provision, this section attempts to provide alternatives for giving content and scope to fair and equitable treatment tied to the minimum standard of treatment of aliens. Finally, the second part explores the potential impact of the creation of a regional investment arbitration center like the UNASUR Center in terms of the application of the fair and equitable treatment, as part of the minimum standard of treatment.

PART ONE - The Fair and Equitable Standard of Treatment

The fair and equitable standard of treatment has become the core subject of discussion in the context of Investor-State Dispute Settlement mechanisms.[12] In fact, this provision is included in most investment treatments, thus giving rise to debate regarding its content and scope. Unlike relative or contingent standards such as national treatment and most favored nation, it is an absolute standard of treatment. This means that State obligations should be determined on a case-by-case basis, rather than on the treatment provided by the State to domestic investors or investors from third countries.[13] Furthermore, the fair and equitable standard may be used as an alternative in the case of a court's refusal to acknowledge violations of other standards alleged by investors, such as expropriation, national treatment or most favored nation.

Generally, the fair and equitable standard of treatment embodies two different aspects: one of autonomous nature and the other of customary nature. In principle, both imply the existence of underlying criteria to aid in the determination of whether or not a State is liable for non-compliance. Nevertheless, in both cases, indeterminacy of the standard's contents and the fact that it is a norm of international public law have implicitly enabled arbitrators to shape their own view.[14] However, such indeterminacy has posed further risks for States when the standard is drafted as an autonomous provision. As an autonomous provision, the fair and equitable treatment is associated with a greater degree of discretion on the part of the arbitrators. Imprecision in the wording of the provision has allowed arbitrators to review regulatory measures adopted by governments with less rigor than required. The autonomous nature of the standard enhances foreign investors' protection under international law, as it goes beyond the minimum standard of treatment of aliens based on customary international law.[15] Those features provide the foreign investor with a greater range of possibilities to challenge the regulatory powers of governments regarding the scope of

12 See Davor Muhvic, "Fair and Equitable Treatment Standard in Investment Treaties and General International Law" (Paper delivered at the 16th International Scientific Conference on Economic and Social Development – The Legal Challenges of Modern World, Split, Croatia 1-2 September 2016).

13 "Non-contingent standards require a host State to accord an absolute degree of protection to foreign investors, regardless of changes in the host State´s law or its potential lapses with respect to treatment of its own nationals and companies. FET thus differs from contingent standards of investment protection such as the most-favoured nation standard or national treatment standard."; see Margaret Clare Ryan, "Glamis Gold Ltd v The United States and the Fair and Equitable Treatment Standard" (2011) 56:4 McGill LJ 919 at 927.

14 Prieto Muñoz, *supra* note 5 at 143.

15 See Hussein Haeri, "A Tale of Two Standards: "Fair and Equitable Treatment" and The Minimum Standard in International Law. The Gillis Weller Prize" (2011) 27:1 Intl Arbitration 27 at 37; see also *Ryan*, *supra* note 14 at 930.

decisions adopted by the host country. As stated by Roman Picherack, the standard allows a "plain" interpretation: "tribunals can assert new elements and requirements to the standard, without having to test them against established customary or general international law."[16]

As to the second form of fair and equitable treatment, its threshold and content are tied to the minimum standard of treatment of aliens in customary international law. In theory, this means that State-made decisions require stricter scrutiny to secure the adoption of decisions consistent with international law. In principle, tribunals should interpret the scope and content of the provision based on the practice of States and the *opinio juris* vis-à-vis its evolution. This framework of interpretation may translate into more consistency and predictability for investors and States.[17] The following section provides an introduction to the customary international law minimum standard of treatment of aliens.

1. The Customary International Law Minimum Standard of Treatment of Aliens

The international minimum standard of treatment was developed by Western countries as part of the classic doctrine of State liability for damages caused to aliens and their properties.[18] In the adoption of said provision, developed countries have relied on customary international law. Such countries argue that it is a binding standard for all States, regardless of whether or not it is included in treaties. Its scope enhances protection for foreign investors, as compared to domestic investors. Like the fair and equitable standard, this means that a State may grant investors the national treatment standard, however, it does not mean that the State is not bound to afford investors with a basic minimum under international law, other than the treatment granted to its nationals, on pain of incurring liability due to a breach of an international obligation.[19]

The ambit accorded to this standard by developed countries has given rise to a great deal of resistance, in view of the associated creation and imposition process. New countries that emerged from decolonization had their own views on international law and brought forward their own arguments of sovereignty. For these countries, injury provisions affecting aliens, such as non-compliance with international minimum standards, constituted a body

16 Picherack, *supra* note 11 at 258.
17 *Ibid* at 262.
18 See Patrick Dumberry, "*The Emergence of the Concepts of the Minimum Standard of Treatment and the Fair and Equitable Treatment*" in Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Alphen aan den Rijn: Wolters Kluwer, 2013) at 14.
19 See OECD, "Fair and Equitable Treatment Standard in International Investment Law" (2004) Working Papers on International Investment at 8, footnote 32 (OECD).

of international standards used by Western countries to protect the economic interests of their domestic investors abroad.[20] In general, these developing countries distinguished between international obligations and international law, thus limiting their international obligations *vis-à-vis* foreign investors.[21] According to them, foreign investor regulations should be tied to domestic law, while investors should be considered bound by international law, to the extent that they ratified international treaties.[22] Furthermore, they argued that, since they had not participated in the creation of customary rules, such as the minimum standard of treatment, those obligations could not be enforceable against them.

Some of the staunchest opposition to the minimum standard of treatment came from Latin American countries. These countries relied on the Calvo Doctrine to resist to what they called "*gunboat diplomacy*" and other meddling actions by developed countries, aimed at defending their nationals and sovereignty. This doctrine, whose author is Argentine Carlos Calvo (1824-1906), endorses the equality of treatment between nationals and aliens, rejects the more favorable treatment of foreigners *vis-à-vis* nationals, and leads to the refusal of a minimum international standard. The Calvo Doctrine also contends that aliens have no legal instruments at their disposal, other than mechanisms established for nationals in the host country. Therefore, this doctrine rejects the resource of diplomatic protection, the use of international dispute settlement mechanisms, the use of military intervention, or the application of laws, other than those of the host country.[23] There are exceptions such as denial of justice or gross violations of international principles, in which case, diplomatic protection is allowed.[24]

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20 Foreign investors were very influential in the process of developing the international law to protect foreign investment. The international protection of persons was conceived in line with the opinion of developed countries, having as background the unbalanced relation between powerful and small countries. Foreign investors were the means to put into practice the interests of developed countries abroad; accordingly, there was a need to protect them in countries having no legislation whatsoever to protect investors and their investments. Antony Anghie holds that in post-colonial eras, new states "were intent on challenging, principally, those doctrines of existing international law, such as state responsibility, which had furthered colonial relations and which hindered the new states from meeting their aspirations." Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 202. He also holds the view that, the impact of the new states on the doctrine of state responsibility regarding protection of foreign investment, focuses on international minimum standards, "[a]ccording to the West, the law basically stipulated that host states were bound by international minimum standards with regard to their treatment of foreign investment, even in a situation where these international standards exceeded the standards prescribed by domestic law. A failure on the part of a state to abide by such international standards would give rise to state responsibility under international law." *Ibid* at 209; see also Dumberry, *supra* note 19 at 15.

21 *Castillo*, *supra* note 3 at 99—101.

22 *Ibid* at 102; see also Anghie, *supra* note 21 at 209.

23 Wenhua Shan, "Is Calvo Dead?" (2007) 55:1 AJCL 123 at 126.

24 *Polanco*, *supra* note 4 at 70.

Ideological differences have emerged between developed and developing countries in several scenarios of multilateral negotiations as to protection of foreign investments and investors, through the international minimum standard of treatment.[25] To date, the international minimum standard is acknowledged in view of its customary nature.[26] For instance, the Organization for Economic Cooperation and Development ("OECD") acknowledges its customary status and refers to it as the "minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property."[27] UNCTAD points out that when there is a link between an international investment agreement and the fair and equitable obligation as part of the customary international law outlining the minimum standard of treatment of aliens, "the threshold of liability as applied by arbitral tribunals has been generally higher: the State's conduct needs to be egregious or outrageous in accordance with the *Neer* case. Indeed, the minimum standard of treatment of aliens is the minimum standard, an international lowest common denominator or a floor for the assessment of governmental conduct."[28]

In Investor-State Dispute Settlement, the floor of the minimum standard usually has a high threshold, which means that the contents and scope of the standard become stricter. This is problematic for foreign investors because the non-compliance test for the minimum standard is more onerous, and countries are afforded more possibilities to defend their regulatory measures under international law. But what is the content of that international minimum standard? The award of the *Neer* case in 1926 is a benchmark for the scope and content of the international minimum standard.[29] Paul Neer, a US citizen, was killed in Mexican territory, and the United States, acting on behalf of Paul Neer's relatives, filed a lawsuit against Mexico. The submission alleged denial of justice because Mexican authorities failed to adopt measures to arrest and punish the people behind the murder of Mr. Neer.[30] To settle the dispute, the American-Mexican Claim Commission

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25 Negotiation processes which led to the New International Economic Order, the Charter of Economic Rights and Duties of States and the United Nations Code of Conduct for Transnational Corporations, are a reflection of the regulatory tensions surrounding foreign investment regulations between developing and developed countries. The Code of Conduct allows to track how influential it was for developing countries the distinction between international obligations and international law, as such distinction impacted the inclusion or not of the minimum standard of treatment.

26 See *Glamis Gold v The United States of America*, (8 June 2009) UNCITRAL, 2019 [*Glamis*]; see also *Mondev v The United States,* ICSID Case No. ARB (AF)/99/2 (2002) at para 94; see also Kendra Leite, "The Fair and Equitable Treatment Standard: A Search for a Better Balance in International Investment Agreements, Comment" (2016) 32:1 American U Int'l LR 363 at 372.

27 OECD, *supra* note 20.

28 *UNCTAD,* "Fair and Equitable Treatment" (1999) at 13, online: *UNCTAD* <https://unctad.org/en/Docs/psiteiitd11v3.en.pdf> [*UNCTAD*].

29 See Dumberry, *supra* note 19 at 16—17.

30 *LFH Neer and Pauline Neer (USA) v The United Mexican States* (15 October 1926) IV Reports

established criteria to be taken into account to judge the State conduct under international law:

> and (second) that the treatment of an alien, in order to constitute and 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. [31]

Despite the nature of the award and its context, the *Neer* case is still a benchmark. However, for some academics, the *Neer* case fails to meet the standard of a customary rule.[32] In the *Railroad Development Corporation v Nicaragua* case under the CAFTA treaty, the tribunal reached this very conclusion. For the tribunal, it was "*ironic*" that the opinion of some commentators, without the support of a study on State practice and *opinio juris*, became a benchmark to define what is the minimum standard of treatment of customary international law.[33] The *Neer* test has been used by some investment tribunals as a benchmark for the analysis of what could be adopted or rejected to define the scope of the international minimum standard with respect to fair and equitable treatment.[34]

The next section analyzes the effects of the *Neer* case *vis-à-vis* the content of the minimum standard of treatment, and the relationship between the minimum standard of treatment and the fair and equitable standard.

2. The Fair and Equitable Treatment Standard as Part of the Minimum Standard of Treatment of Aliens Based on Customary International Law

The relationship between fair and equitable treatment and the minimum standard of treatment of aliens under customary international law aims at affording greater protection to regulatory measures adopted by a State. Consequently, States can build their defense arguing that their responsibility is linked to proven gross behavior, covered by *opinion juris* and court practices. With this argument, States seek to raise the threshold of treaty violation. Hence, in this section it is not only relevant to track the positions adopted by arbitral tribunals, but the arguments presented by foreign investors and States in terms of the relationship between fair and equitable

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of International Arbitral Awards United Nations at 61.

31 *Ibid*.

32 See Stephen M Schwebel, "Is Neer far from Fair and Equitable?" (2011) 27:4 Arb. Intl 555; see also Dumberry, *supra* note 19 at 16.

33 *Railroad Development Corporation (RDC) v Republic of Guatemala*, ICSID Case No ARB/07/23 (2012) at para 216 (Arbitrators: Dr. Andrés Rigo Sureda, Honorable Stuart E. Eizenstat, Professor James Crawford).

34 See *Glamis, supra* note 27; see also *Cargill Inc v The United Mexican States*, ICSID case No ARB (AF)/05/2 (2009) [*Cargill*].

treatment under international law, and the minimum standard of treatment.

The jurisprudence canvassed in this article relates to NAFTA Article 1105(1) for three reasons: first, such jurisprudence is a good basis for studying the influence of the *Neer* case in determining the content of the minimum standard of treatment and the connection between such minimum standard of treatment and the fair and equitable standard; second, it allows for the analysis of arguments put forward by State parties to the treaty not directly involved in the dispute who defend points of view regardless of the claimant's nationality;[35] and third, the binding interpretation made by the Free Trade Commission (FTC) on Article 1105(1) of NAFTA has become a benchmark for Latin American countries in negotiating the fair and equitable obligation as part of the minimum standard of treatment.[36]

Cases like *Glamis Gold v The United States*, *Pope & Talbot v Canada* and *Mondev v The United States*, shed light on particular issues. The ruling in the *Glamis Gold* case (subsequent to the other two cases), adopts a rigid view on the content of the minimum standard of treatment, linking its scope to the *Neer* test. The *Pope &Talbot* case allows us to track the arguments of the parties and third parties at two different times: before and after the interpretation of Article 1105(1) of NAFTA rendered by the FTC; it also includes a new element for understanding the fair and equitable treatment. Finally, *Mondev v The United States* is a case which upheld the arguments put forward by parties and third parties in the hearings of the *Pope & Talbot* case, as elements to determine the scope and content of the minimum standard of treatment.

Article 1105 – "minimum standard of treatment" – provides that each State shall accord to investments of investors of another Party, a treatment in accordance with international law, including fair and equitable treatment and full protection and security.[37] This language raises the question of

35 Article 1128 NAFTA states: "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement". *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*].

36 The FTC established on Article 1105 (1): Minimum Standard of Treatment in Accordance with International Law (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); (2) 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; (3) determining that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not mean the breach of Article 1105(1). Robert B Zoellick, Luis Ernesto Derbez Bautista and Pierre S Pettigrew, "North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions" (July 31, 2001), online: *NAFTA Free Trade Commission* < http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp > [*NAFTA*].

37 NAFTA, Article 1105: "Minimum Standard of Treatment: 1. Each Party shall accord to

what does fair and equitable treatment cover under international law and what are the consequences of including fair and equitable treatment under a provision of "minimum standard of treatment." Linking the fair and equitable treatment to the minimum standard of treatment of aliens limits the scope to an international customary rule, thus prevailing over any other possibilities foreseen in Article 38 of the Statute of the International Court of Justice. It is worth mentioning that the Free Trade Commission, empowered to make binding decisions, sets out possible disagreements regarding the customary character of the minimum standard of treatment incorporated in Article 1105. Regarding the concepts of fair and equitable treatment and full protection and security, the Commission stated that these: "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[38] However, the Commission's determination did not put an end to the debate on the content of the minimum standard of treatment.

Glamis Gold v The United States (2009) is one case under NAFTA where the Tribunal had to consider the evolution and content of the international minimum standard. In this case, the tribunal had to determine whether or not certain measures on environment and cultural impact adopted by the California government regarding mining activities performed by Glamis Gold, fell under the scope of Article 1105. For that purpose, the Tribunal pondered what the customary international law of minimum standard of treatment requires from the State in relation to a foreign investor from another State party. Is it the same as was established in *Neer v Mexico*, in 1926?

In this case, the claimant did not challenge the relationship between the fair and equitable obligation and the minimum standard of treatment as part of customary international law. Nevertheless, in order to put forward a proposal of content and scope, it challenged the possibility of freezing the interpretation of the customary rule, and emphasized, instead, the evolving nature of the fair and equitable standard.[39] The claimant showed no interest in proving the existence of an international customary obligation binding the respondent. Instead, the claimant equated the scope of the fair and equitable standard of treatment to its content, regardless of whether or not it is incorporated as an autonomous or customary standard. The claimant held that it is unnecessary to establish the difference between the autonomous and customary international law standard because the "two sources of law (...) require the same conduct of states."[40] Based on the above, the claimant did not dwell on a rigorous analysis of the State conduct but instead

investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." *NAFTA, supra* note 36.

38 See *supra* note 37.

39 *Glamis, supra* note 27 at para 547.

40 *Ibid* at para 551.

emphasized the existence of universal principles that are "fundamental" and "common" across the world, such as good faith, due process, transparency and candor, and protection against arbitrariness.[41] Finally, on the grounds of the *Mondev, Pope & Talbot, Lowen* and *ADF* awards, the claimant alleged that there is no rule requiring the tribunal's interpretation of the fair and equitable obligation under customary international law. For that reason, in the claimant's view, there was room for using the sources of international law to define the content of the standard.[42]

On the other hand, the United States restated the customary nature of the minimum standard of treatment, pointing out differences between the autonomous and the customary fair and equitable standard. In accordance with the note of interpretation of Article 1105(1) of NAFTA issued by the FTC on July 31st, 2001, it argued that Article 1105(1) requires the customary international law minimum standard of treatment, nothing more and nothing less.[43] According to the United States, a foreign investor "*is barred from claiming that the language regarding the fair and equitable treatment standard under Article 1105(1) differs from or is greater than that required by customary international law*."[44] Furthermore, the respondent considered that the claimant failed to meet the burden of proof, insofar as the latter did not prove that the foreign investor should have been granted something different from the international minimum standard of treatment. Based on the UNTACD study on fair and equitable treatment which asserts that "the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors".[45] The United States argued that the provision assuring fair and equitable treatment in bilateral investment treaties, had not been drafted in the same fashion.[46] The United States emphasized that decisions of international tribunals do not constitute State practice.[47]

The Tribunal called into question the binding character of the FTC's interpretation of Article 1105(1) of NAFTA and adopted the customary test benchmark of the *Neer* case.[48] Therefore, the tribunal refrained from discussing whether such a standard met the requirements of a customary rule. Thereupon, the tribunal addressed the problem of whether the customary rule discussed in *Neer* had evolved, and underlined that the current practice allowed no conclusion as to the degree of scrutiny for reviewing the evolution

41 *Ibid* at para 545.
42 *Ibid* at para 550.
43 *Ibid* at para 555.
44 *Ibid*.
45 *UNCTAD*, *supra* note 29 at 40.
46 *Glamis*, *supra* note 27 at para 557.
47 *Ibid* at para 554.
48 *Ibid* at para 599—600.

of the fair and equitable obligation, compared with the ruling in *Neer*.[49] Nevertheless, it recognized the possibility of finding a gross, egregious and shocking event without bad faith.[50] In light of the arguments put forward by the claimant, the tribunal held that arbitral awards "do not constitute State practice and thus cannot create or prove customary international law."[51] Based on the above, the Tribunal asserted that the analysis of Article 1105(1) NAFTA should be made on the basis of its customary nature rather than its autonomous character, following the practice of other treaties.[52] Under those circumstances, the Tribunal upheld the arguments put forward by the United States, and determined that the minimum standard of treatment applied for studying the fair and equitable treatment should be the one found in *Neer*:

> The fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105(1).[53]

Acknowledging that the *Neer* standard – in terms of the current international view of what is outrageous and shocking – had evolved and, that the violation of the fair and equitable standard may not be conditioned to bad faith, the Tribunal in *Glamis Gold* found a high threshold of responsibility.[54] The Tribunal further found that customary international law had not evolved beyond the parameters found in *Neer* .[55] Based on those considerations, the Tribunal made it clear that the level of scrutiny continues to be the same as in *Neer*, as there is no evidence of *opinio juris* or State practice to the contrary.[56] The Tribunal brought forward arbitral awards that used strict standards.

49 *Ibid* at para 616.

50 *Ibid* at paras 612, 616.

51 The Tribunal added: "They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation." *Ibid* at para 605.

52 *Ibid* at para 606.

53 *Ibid* at para 616.

54 *Ibid* at para 613. Likewise, the Tribunal in *Cargill v Mexico* pointed out that the obligations under the Article 1105(1) of NAFTA "are to be understood by reference to customary international minimum standard of treatment of aliens." Also, the Tribunal established that "the requirement of fair and equitable treatment is one aspect of this minimum standard." In that sense, it determined that the violation of fair and equitable treatment requires measures that are: "grossly, unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy´s very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety." See *Cargill*, *supra* note 35 at para 296.

55 See *Glamis*, *supra* note 27 at para 614.

56 *Ibid* at paras 612, 614, 616.

In spite of the evolution of customary law, the tribunal in *Thunderbird* recognized that the threshold of responsibility still remained high.[57] In *SD Myers,* the Tribunal held the view that a breach of Article 1105 occurs when an investor is treated "in *such an unjust or arbitrary* manner." In *Glamis Gold*, the tribunal quoted *Mondev*, although in that case the tribunal refused to recognize the *Neer* standard as the applicable standard.[58] However, the Tribunal resorted to the argument put forward in the *Mondev* award: "the test is not whether a particular result is surprising, but whether the *shock or surprise* occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome ..."[59]

For both the Tribunal and the United States (the respondent), the fair and equitable treatment embedded in Article 1105(1) cannot be assessed autonomously, that is to say, separately from customary international law. Unlike the Tribunal, the respondent did not condition the analysis of responsibility to the *Neer* case. Nevertheless, both the Tribunal and the respondent agreed that not every conduct against the interest of foreign investors falls within the minimum standard of treatment; the standard only includes actual conducts, while the rigorousness of its parameters fall within the absolute minimum standard of treatment built on the principles of customary international law (nothing more, nothing less). Therefore, the Tribunal applied a high threshold of responsibility, but made no in-depth analysis to establish the customary character of the *Neer* test. On the other hand, the claimant sought to broaden the scope of Article 1105(1), and to that end, suggested to leave in second place the determination of the customary character of the obligations undertaken by the State under the fair and equitable treatment, as part of the minimum standard of treatment. In other words, the claimant proposed to resort to Article 38 of the Statute of the International Court of Justice.

In *Pope & Talbot v Canada*, the United States took the same position as that adopted in *Glamis Gold* regarding the customary character of the minimum standard of treatment and the threshold defined for reviewing regulatory measures. The Tribunal had to determine whether the restrictions faced by *Pope* for exporting wood to the United States violated the fair and equitable treatment. This case is significant as it allows for the tracking of

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57 *International Thunderbird* held*:* "The content of the minimum standard should not be rigidly interpreted and it should reflect evolving customary international law. Notwithstanding the evolution of customary law since decision such as Neer Claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence." The tribunal used the terms "*gross* denial of justice" and "*manifest* arbitrariness" to describe the acts which supposedly breached the minimum standard of treatment. *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL, Award of 26 January 2006, at para 194 (emphasis added).

58 See *SD Myers v Canada* (13 November 2000), UNCITRAL, at para 263 (emphasis added).

59 *Glamis*, *supra* note 27 at para 614 (emphasis added); see also *Mondev*, *supra* note 27 at para 127.

the points of view of the tribunal, the State and non-State parties in the dispute regarding the minimum standard of treatment in two moments in the proceedings.

The Tribunal's decision on the merits described herein below, occurred prior to the FTC's binding interpretation of Article 1105(1) of NAFTA. The claimant proposed to broaden the scope of Article 1105(1) equating its content to an autonomous standard. The claimant argued that the requirements of international law in Article 1105 included: "(1) all the sources of international law found in Article 38 of Statute of the International Court of Justice, (2) the concept of "good faith" (including *pacta sunt servanda*), (3) the World Bank´s guidelines on foreign direct investment, (4) the NAFTA Parties' other treaty obligations, and (5) the body of domestic law of each NAFTA Party that addresses the exercise of domestic regulatory activity."[60]

Canada (as respondent) reaffirmed that the fair and equitable standard is tied to the minimum standard of treatment, as well as to the validity of the *Neer* test.[61] Canada's view was that, according to previous cases, violation of the minimum standard of treatment occurs when the facts show an egregious conduct.[62] For more accuracy it asserted: "a government´s treatment of a foreign investment must be such that it would be unacceptable in reasonably developed legal systems."[63] Regarding the explanation of the high threshold of responsibility on the minimum standard of treatment, Canada pointed out: "conduct of government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the wilful neglect of duty."[64] Canada also took the position that regardless of whether or not the *Neer* test is applied, "egregious circumstances must exist for a Tribunal to find a breach of the minimum standard of treatment."[65]

The United States, acting as party to the treaty and, on the claimant's behalf (a US citizen), reinforced its view. Before issuance of the FTC's binding interpretation of Article 1105(1), the US asserted that parties in Chapter XI "expressly tied the fair and equitable treatment to the customary international minimum standard." The US based its argument on Canada's statement regarding implementation of NAFTA, whereby Article 1105(1) "provides for a minimum absolute standard of treatment, based on long-

60 *Pope & Talbot v Canada* (10 Apr. 2001), UNCITRAL (Award on the merits of Phase 2) 10 April 2001 at para 107 [*Pope & Talbot 2001*].

61 *Pope & Talbot v Canada* (10 Oct. 2000), UNCITRAL (Counter-Memorial (Phase Two)) at para 237 [*Pope & Talbot 2000*].

62 *Ibid* at para 325.

63 *Pope & Talbot v Canada* (7 Nov. 2000), UNCITRAL (Supplemental Counter-Memorial (Phase Two)) at para 36 [*Pope & Talbot, Supplemental*].

64 *Pope & Talbot 2000*, *supra* note 62 at para 309.

65 *Pope & Talbot, Supplemental*, *supra* note 64 at para 25.

standing principles of customary international law."[66] The United States concluded that "[T]he international minimum standard is an [sic] umbrella concept incorporating a set of rules that have crystallized over the centuries into customary international law in specific contexts. The relevant principles are part of the customary international law of state responsibility for injuries to aliens."[67] Mexico, concurring with Canada´s view, held that the threshold to find a violation of Article 1105(1) should be high, and indicated that "[t]he conduct of government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the willful neglect of duty." Mexico also remarked that "[t]he standard of treatment articulated under Article 1105 is the international minimum standard presently existing under customary international law." Finally, Mexico agreed to apply the *Neer* test for establishing a violation of the minimum standard of treatment.[68]

The Tribunal in *Pope & Talbot v Canada* dismissed the arguments put forward by the respondent and third-States non-parties to the dispute. The Tribunal analyzed the provision as an autonomous standard, and considered that under Article 1105(1) foreign investors "are entitled to the international law minimum, *plus* the fairness elements."[69] The Tribunal disagreed with Canada´s view that the violation of the standard occurs if egregious conduct is proven ,[70] and consequently held that Article 1105 provided that foreign investors and investments receive the same treatment provided under ordinary standards applied in NAFTA member countries, "without any threshold limitation that the conduct complained of be "egregious, "outrageous" or "shocking," or otherwise extraordinary".[71] It concluded that "the contrary view of that provision would provide to NAFTA investors a more limited right to object to laws, regulation and administration than accorded to host country investors and investments as well as to those from countries that have concluded BITs with a NAFTA party."[72]

By the time the Tribunal addressed the matter of damages, the FTC had rendered a binding interpretation of NAFTA Article 1105(1) on July 31st, 2001. In this regard, Canada submitted that a "Tribunal cannot interpret Article 1105 in a manner that is inconsistent with the interpretation set out in the "Notes of Interpretation" because the Commission´s interpretation is binding."[73] The United States upheld Canada's views (put forward in a

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66 *Pope & Talbot v Canada* (1 Nov. 2000), UNCITRAL (Fourth Submission of the United States of America) at para 7.

67 *Ibid* at para 8.

68 *Pope & Talbot* (5 Nov. 2000), UNCITRAL (Mexico's Submission on the Interpretation of Article 1105 of the NAFTA) at 6, 10.

69 *Pope & Talbot*, *supra* note 61 at para 110.

70 *Ibid* at para 117.

71 *Ibid* at para 118.

72 *Ibid* at para 117.

73 *Pope & Talbot v Canada* (10 Sept. 2001), UNCITRAL (Canada's Submission re Implications of

submission) on the binding character of the Commission's interpretation, to hold that the contents of Article 1105(1) had not changed.[74] On the other hand, Mexico underlined the binding nature of the Free Trade Commission's interpretation, the relevance of taking into account the elements of international customary rule, and brought forward comments made by the Supreme Court of British Columbia in the context of a judicial review of the *Metalclad* award. Justice Tysoe considered that the interpretation of Article 1105 provided by the Tribunal in *Pope & Talbot* included criteria inconsistent with both the contents of Article 1105 and the rules of interpretation under the Vienna Convention on the Law of Treaties.[75] Justice Tysoe held as follows:

> In my opinion, the Tribunal did make decisions on matters the Tribunal did not simply interpret Article 1105 to include a minimum standard of transparency. (...) No authority was cited or evidence introduced to establish that transparency has become part of customary international law

In the award section concerning damages, the Tribunal once more dismissed Canada's arguments to the effect that customary international law had evolved since 1926. The Tribunal held that even applying the standard suggested by Canada, foreign investors would sustain damages and, for that reason, considered the reformulation of the standard unnecessary.[76]

Regardless of whether the Tribunal had been persuaded to follow the Commission´s interpretation, in this case, the Tribunal went beyond the intentions of the parties to the treaty. The Tribunal failed to respect the contracting parties' will in the sense that the threshold for finding a violation could be chosen by them. In fact, the United States, Mexico and Canada highlighted that Article 1105(1) encompasses the fair and equitable treatment as part of minimum standard of treatment of customary international law. Their position also implied that they should not offer anything below or

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the Interpretation of NAFTA Article 1105 by the NAFTA Commission) at 2.

74 *Pope & Talbot v Canada* (2 Oct. 2001), UNCITRAL (Sixth Submission (Corrected) of the United States of America), citing *Pope & Talbot v Canada* (1 Oct. 2001), UNCITRAL (Canada's Reply to the Tribunal's Letter of September 17, 2001).

75 See *The United Mexican States v Metalclad Corporation,* 2001 BCSC 664 at paras 65, 67—68, online: *ITALAW* <https://www.italaw.com/sites/default/files/case-documents/ita0512.pdf>. Mexico's submission in Response to Tribunal´s Questions, 6 November 2001. Regarding *Pope & Talbot v Canada*, stated that in *Pope & Talbot* the Tribunal 'has interpreted the word ´including´ in Article 1105 to mean 'plus', which has a virtually opposite meaning. Its interpretation is contrary to Article 31(1) of the Vienna Convention, which requires that terms of treaties be given their ordinary meaning. The evidence that the NAFTA Parties intended to reject the "additive" character of bilateral investment treaties, lies on the fact that they chose not to adopt the language used in such treaties and, it is surprising that the Tribunal considered further evidence necessary.

76 *Pope & Talbot Inc v Canada* (31 May 2002), UNCITRAL (Award in Respect of Damages) at paras 62, 65—66. Award in respect of damages by the arbitral tribunal in *Pope & Talbot Inc v Canada*, according to the tribunal, more than 1,800 BITs with fair and equitable treatment allow to conclude the existence of a State practice reflected on such treaties.

above the minimum standard of treatment of customary international law. For example, Canada considered that the Tribunal could have resolved not to apply the *Neer* test; for that reason, it asserted that regardless of whether the *Neer* test applied, the conduct should encompass an egregious, outrageous or shocking conduct. In contrast, the Tribunal lowered the threshold and added fairness elements. With that decision, the Tribunal underscored that the fair and equitable treatment obligation embodied ordinary standards whose limits do not depend on the proof of an "egregious," "outrageous" or "shocking conduct."

In *Mondev v The United States (2002)*, a case subsequent to *Pope & Talbot v Canada,* the Tribunal addressed considerations of the *Neer* case and post-hearings arguments put forward by the respondent and other States non-party to the *Pope & Talbot* dispute. Once again, the Tribunal had to address the scope of the customary international law as to fair and equitable treatment, in order to determine whether the conditions of the contract entered into by *Mondev* and *Boston* and its performance, constituted a violation of Article 1105. The claimant held that, in view of the additional word "customary", the FTC's interpretation was an amendment, not an interpretation. Additionally, for the claimant it was "astounding" that in the FTC's opinion the violation of a treaty may be in conformity with international law and concluded that there was a need to update the content of the minimum standard of customary international law. To that effect, the claimant suggested a consideration of bilateral investment treaties, including NAFTA and other recent international rulings and arbitral awards.[77] For the United States, the interpretation of Article 1105(1) "had been 'conclusively established' by the FTC's interpretation of 31 July 2001". The obligation of the parties under Article 1105(1) "was intentionally limited to that pre-existing body of customary international legal obligations". "Fair and equitable treatment and full protection and security were accordingly subsumed within the minimum standard."[78]

In making its decision, the Tribunal took into account the post-hearing arguments put forward by Canada,[79] the United States,[80] and Mexico[81]

77 See *Mondev*, *supra* note 27 at para 102.

78 *Ibid* at para 103.

79 Canada, the directly affected by the decision, when putting forward its view on the *Pope & Talbot* award noted that: "its position has always been that customary international law can evolve over time, but that the threshold for finding violation of the minimum standard of treatment is still high". *Ibid* at para 109.

80 Based on its views on the *Pope & Talbot* award, the United States challenged the Tribunal position to the end that it is not bound by the interpretation rendered by the Free Trade Commission. Underlying the importance of the standard, the United States reminded that prior the ratification of the BIT advised the Senate that the "fair and equitable treatment" standard "was intended to require a minimum standard of treatment based on customary international law." Also, said that the Pope & Talbot Tribunal erred in its "automatic equation of customary international law with the content of BITs, without regard to any question of opinion juris." *Ibid* at para 106.

81 Mexico, the other NAFTA States criticized the *Pope & Talbot* award because "[t]he *Pope &Talbot*

regarding the *Pope & Talbot* award. Generally, all three parties challenged (i) the fact that the Tribunal had failed to address the content of the minimum standard under customary international law; and (ii) the shallow study made by the Tribunal relating to the evidence of an *opinio juris* in bilateral investment treaties. The Tribunal considered the threshold of responsibility established in *Neer* to be inapplicable nowadays for two reasons: firstly because the case was limited to obligations assumed by a State to ensure the physical integrity of an alien against criminal actions from third parties; secondly because the Tribunal maintained that according to NAFTA, it is impossible to deny the existence of an international minimum standard.[82] However, the Tribunal indicated that inclusion of the content of the fair and equitable standard and full protection and security into the international minimum standard should be identified with reference to the international law. Therefore, the content of the minimum standard of treatment cannot be limited to the notion of customary international law in the context of the 19th century or the first half of the 20th century, insofar as the standard evolves over time.[83] The Tribunal concluded that the FTC's interpretations embody the current international law which "content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce."[84]

Conclusion

According to the jurisprudence on NAFTA Article 1105(1), the content of the fair and equitable treatment as part of the international minimum standard remains undetermined. However, this indetermination cannot justify decisions by tribunals which disregard the threshold negotiated by the parties and reinforced thereafter to find a violation. The fact that the *Neer* test has not been unanimously accepted for defining the content of fair and equitable treatment under the international minimum standard of treatment means that arbitrators have no discretion to manipulate the threshold of responsibility. The tribunals' position *vis-à-vis* those parameters overlooks the fact that when contracting parties chose the fair and equitable standard as part of the minimum international standard, the proof of violation to determine a State's responsibility demands greater efforts by foreign investors.[85] A different position assumed by contracting parties would not

Tribunal created the interpretative problem that it complained of" in particular in adopting and "additive" approach to Article 1105(1). *Ibid* at para 108.

82 *Ibid* at para 120.

83 *Ibid* at paras 123 & 125; see also *Chemtura Corporation v Canada*, UNCITRAL (Award) at para 236. In the same sense is *Chemtura v Canada* award. Regarding the determination of the content of Article 1105, says: "In determining the standard of treatment set by Article 1105 of NAFTA, the Tribunal has taken into account the evolution of customary international law as a result *inter alia* of the conclusion of numerous BITs providing for fair and equitable treatment."

84 See *Mondev*, *supra* note 27 at para 125.

85 Kendra Leite says beyond if Neer is still applied, what it is broadly recognized is a principle

recognize that, under Article 1105(1), the contracting parties are entitled to defend a high threshold of responsibility regardless of the nationality of the foreign investor. Therefore, the defense of State parties by consensus on certain limits of responsibility under international law, is not linked to the protection accorded to the foreign investor's private interest, but to the application of a threshold of responsibility that promotes consistency and predictability in the host country's jurisdiction, thus helping countries to reduce Investor-State disputes.[86]

If it were irrelevant for the defense of the States' interests, the distinction between a fair and equitable treatment as autonomous standard and the fair and equitable treatment as a standard tied to the minimum standard of treatment, States would not adopt clear and consistent positions regarding their content and scope. States are well aware of the evolution of the minimum standard of treatment and the *Neer* test, but in that context, foresee the need to examine decisions or regulatory measures adopted under the framework of a high threshold of breach. Therefore, a breach of the standard should be shown to be egregious and shocking. States prompt the interpretation of fair and equitable treatment with a minimum standard of treatment, as doing so provides further alternatives for defending a measure under international law as well as more predictability for States and investors.[87] In contrast, when arbitrators analyze said provision disregarding the customary international law, it may be subject to multiple interpretations, resulting in a "potential for inconsistent and conflicting decisions and reasoning".[88]

The next chapter addresses the trend amongst Latin American countries in the negotiation of the fair and equitable treatment as part of minimum standard of treatment under the customary international law, focusing on the Colombian case because of the new Colombian Model of International Investment Treaty that introduces a fair and equitable treatment as an independent clause.

PART TWO. Latin American Countries' Trend *vis-à-vis* Fair and Equitable Treatment. The Colombian Case.

This section explores whether the trend amongst Latin America countries to

according with the treatment of a State regards to foreigner national and his properties is determined against an international minimum standard of treatment; see Leite, *supra* note 27 at 373—374; see also, Raphael de Vietri, "'Fair and Equitable Treatment' for Foreign Investment: What is the Current Standard at International Law" (2011) 14 International Trade and Business Law Review 414 at 418.

86 See *Tuck*, *supra* note 8.

87 Picherack, *supra* note 11 at 262.

88 *Ibid*.

raise the threshold of responsibility by means of the fair and equitable treatment has afforded additional tools to defend regulatory measures under international law. This part also focuses on the Colombian case because it is possible to identify two types of provisions related to fair and equitable treatment. The first one is a dependent provision that has been included in a good number of the treaties signed by Colombia. The second one is an autonomous clause which was introduced by the sophisticated Colombian model on International Agreements published in 2017. It is worthwhile to study these two clauses since their wording may have important consequences with regards to the international defense of regulatory measures.

Concerns relating to the dynamics of Investor-State Dispute Settlement are on the agenda of developing countries. The conclusion of investment treaties between developed countries has altered the traditional North-South dichotomy, thereby also modifying the role played by international stakeholders and reallocating those concerns. In response thereto, the new generation of provisions aims to preserve the regulatory space of countries.[89] In general, countries are moving towards negotiation and renegotiation of international investment treaties, focusing on subjects such as dispute settlement substantial provisions, inclusion of mechanisms aimed at defining the provisions' scope and content, etc. Reviewing the fair and equitable treatment is one of the strategies used to lessen the tribunals' discretion,[90] which countries such as Japan[91] and

89 See UNCTAD, "World Investment Report 2015 - Reforming International Investment Governance", online: *UNCTAD* <https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf UNCTAD, 2015 at 128>.

90 See "Fair and Equitable Treatment", *UNCTAD Series on Issues in International Investment (Second Series)*, UNCTAD, 2011, UNCTAD/DIAE/IA/2011/5 at 23, 25—6, online (pdf): <https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf> [*UNCTAD*]. In a 2012 report on fair and equitable treatment, UNCTAD stresses the increase of international investment agreements bearing the fair and equitable obligation as part of the minimum standard of treatment of aliens under customary international law. Likewise, UNCTAD recalls that the note of interpretation of the NAFTA Free Trade Commission has been replicated in several BIT models signed by NAFTA countries. Also, said note of interpretation has been included in other countries which do not belong to NAFTA, to wit: The Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (2009); the Japan-Philippines FTA (2006); the China-Peru FTA (2009); the Malaysia-New Zealand FTA (2009); the India-Republic of Korea Comprehensive Economic Partnership Agreement (2009); and others. Additionally, UNCTAD indicates that the link between fair and equitable standard and international minimum standard has been maintained in the IIA recently signed by Canada and the United States and, also in FTAs concluded in the Western Hemisphere. United Nations Conference on Trade and Development.

91 See *Agreement Between Australia and Japan for Economic Partnership*, 2014 at Art. 14.5; *Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment*, 2011 at Art. 4; *Comprehensive Economic Partnership Agreement Between Japan and the Republic of India*, 2011 at Art. 87; *Agreement Between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment*, 2016 at Art. 5; *Agreement Between Japan and the Lao People's Democratic Republic for the Liberalization, Promotion and Protection of Investment* (2008) at Art. 5; *Agreement Between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment*, 2008 at Art. 5; *Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment*, 2015 at Art. 5.

Korea have pursued.[92]

In the case of Latin American countries, some have chosen to withdraw from international treaties on investment protection. That is the case of countries like Ecuador, Venezuela and Bolivia. However, in Ecuador, political changes brought by the last government seem to influence its approach to foreign investment. Under its new President, Ecuador has recently issued its new Model on Bilateral Investment Treaties, signaling its renewed interest in the bargaining process afforded by these tools after rejecting Investor-State arbitration proceedings and bilateral investment treaties.[93] In fact, in 2008, Ecuador approved a new constitution and prohibited the State from consenting to investment arbitration, according to Article 224. As a result, Ecuador denounced the ICSID Convention, and terminated 26 bilateral investment treaties in force, starting with nine in 2008 and the remainder in 2017.[94]

In the new Ecuadorian model, the definition of fair and equitable treatment is linked to the minimum standard of international treatment. However, the model frames violations of fair and equitable treatment within two specific situations: i) denial of justice and ii) discrimination. The denial of justice bears a connection with the Calvo Doctrine since both: “(i) illegal judicial decision; and (ii) wrongful refusal by the judicial authority to hear the claim”, which fall under those heads have as a requirement the need to exhaust “all national levels of jurisdiction.” Regarding discrimination, this treatment is analyzed in the light of “reasons of nationality, sex, race or religion”. Finally, the Ecuadorian model limits the offer to arbitration procedure to “arbitration mechanisms in regional proceedings in Latin America” or to arbitration centers of the host State.[95] Such a restriction seems to indicate there is no intention to return to the ICSID Convention. This would suggest that Ecuador is signaling that some of the trust in the investor State dispute system could be restored by having a regional investment arbitration dispute center such as the UNASUR Center.

For now, it is important to say that this initiative led by Ecuador seems to be a failure in terms of its ultimate outcome. This is because Colombia´s

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92 See Article 10.4 of the *Comprehensive Economic Partnership Agreement between the Republic of Korea and the Republic of India*, 7 August 2009. Article 5 of the *Agreement Between the Government of the Republic of the Union of Myanmar and the Government of the Republic of Korea for the Promotion and Protection of Investments*, 5 June 2014 (entered into force 31 October 2018). Article 10.7 of the *Free Trade Agreement between New Zealand and the Republic of Korea,* 23 March 2015 (entered into force 20 December 2015). Article 2 of the *Agreement between the Government of the Republic of Korea and the Government of the Republic of Rwanda for the Promotion and Protection of Investments*, 29 May 2009 (entered into force 16 February 2013). Article 1.6 of the *Framework Agreement Establishing a Free Trade Area between the Republic of Korea and the Republic of Turkey*, 26 November 2015 (entered into force 1 August 2018).

93 See Javier Jaramillo, “New Model BIT proposed by Ecuador: Is the Cure Worse than the Disease?” (20 July 2018), online (blog): <http://arbitrationblog.kluwerarbitration.com/2018/07/20/new-model-bit-proposed-ecuador-cure-worse-disease/>.

94 See Jose Gustavo Prieto Muñoz, “Ecuador’s 2017 termination of treaties: How not to exit the international investment regime” (2017) 14:2 Braz J Intl L 149 at 150.

95 Jaramillo, *supra* note 94.

president, Ivan Duque, denounced the UNASUR treaty and is interested in fostering a new initiative named PROSUR. One of his main interests is to isolate and limit the alliance of Venezuela´s President in the region. Beyond this political stage, according to Article 224 of the Ecuadorian Constitution and the current interest of the government to renegotiate and negotiate international investment treaties, Ecuador would be one of the countries to benefit the most from an investment arbitration dispute regional center, because it is a condition to provide guaranties to foreign investors.

In contrast to Ecuador, other countries have maintained their international investment agreements and have elected to focus on the scope and content of some provisions, such as the fair and equitable treatment clause. This trend has been observed since 2006 in countries such as Peru,[96] Uruguay,[97] Chile,[98] Mexico[99] and

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96 See Article 10.5 of the *United States - Peru Trade Promotion Agreement*, 12 April 2006 (entered into force 1 February 2009). Article 11.4 of the *Chile-Peru FTA*, 22 August 2006 (entered into force 1 March 2009). Article 4 of the *Colombia-Peru BIT*, 11 December 2007 (entered into force 20 December 2010). Article 10.5 of the *Peru-Singapore FTA*, 29 May 2008 (entered into force 1 April 2009). Article 132 of the *China-Peru FTA*, 28 April 2009 (entered into force 1 March 2010). Article 9.5 of the *Korea-Peru FTA*, 21 March 2011 (entered into force 1 August 2011). Article 12.4 of the *Costa Rica-Peru FTA*, 26 May 2011 (entered into force 1 June 2013). Article 12.4 of the *Panama-Peru FTA*, 25 May 2011 (entered into force 1 May 2012). Article 12.4 of the *Guatemala-Peru FTA*, December 2011 (entered into force 4 July 2013). Article 805 in the *Canada-Peru FTA*, 29 May 2008 (entered into force 1 August 2009). Article 11.6 of the *Mexico Peru FTA*, 6 April 2011 (entered into force 1 February 2012). Article 5 of the *Peru-Japan BIT*, 22 November 2008 (entered into force 1 February 2012).

97 See Article 5 of the *Treaty between the United States of America and the Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment*, 4 November 2005 (entered into force 2006). Article 5 of the *Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment*, 26 January 2015 (entered into force 14 April 2017). Article 5, *Acuerdo de Inversiones entre La República Oriental del Uruguay y La República de Chile y sus Anexos*, 2010. Article 2, *Corea-Uruguay Acuerdo en Materia de Promoción y Protección de Inversiones*, 1 October 2009 (entered into force 8 December 2011).

98 See Article 10.4 of the *United States-Chile Free Trade Agreement*, 6 June 2003 (entered into force 1 January 2004). Article 11.4, *Acuerdo de Libre Comercio entre el Gobierno de la República del Perú y el Gobierno de la República de Chile, que modifica y sustituye el ACE N° 38, sus anexos, apéndices, protocolos y demás instrumentos que hayan sido suscritos a su amparo*, 22 August 2006 (entered into force 1 March 2009). Article 9.4, *Acuerdo de Libre Comercio entre Chile y Colombia*, 27 November 2006 (entered into force 8 May 2009). Article 10.5 of the *Australia-Chile Free Trade Agreement*, 30 July 2008 (entered into force 6 March 2009). Article 75 of the *Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership*, 27 March 2007 (entered into force 3 September 2007). Article 10.5 of the *Free Trade Agreement between the Government of the Republic of Korea and the Government of the Republic of Chile*, 15 February 2003 (entered into force 1 April 2004)..

99 See Article 11.6, *Acuerdo de Integración Comercial entre la República del Perú y los Estados Unidos Mexicanos*, 2011. Article 13-06, *Tratado de Libre Comercio entre los Estados Unidos Mexicanos y la República Oriental del Uruguay*, 2003. Article 58 of the *Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership*, 17 September 2004 (entered into force 1 April 2005). Article 10.5, *Free Trade Agreement between Mexico and Panama*, 3 April, 2014, (entered into force 1 July 2015). Article 3 of the *Agreement*

Colombia,[100] which have linked the international minimum standard of aliens and the fair and equitable treatment in several international tools. Nevertheless, in 2017, Colombia published a Model Agreement on International Investments, perhaps motivated by recent treaty-based arbitration disputes in which it is the

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between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments, 2006 (entered into force 25 July 2007). Article 5, *Acuerdo entre el Gobierno de los Estados Unidos Mexicanos y la República de Trinidad y Tobago para la Promoción y Protección Recíproca de las Inversiones*, 3 October 2006 (entered into force 16 September 2007). Article 5 of the *Agreement between the Government of the United Mexican States and the Government of the Republic of India on the Promotion and Protection of Investments*, 22 May 2007. Article 5, *Acuerdo entre los Estados Unidos Mexicanos y la República Eslovaca para la Promoción y Protección Recíproca de las Inversiones*, 26 October 2007 (entered into force 8 April 2009). Article 5 of the *Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments*, 11 July 2008 (entered into force 6 June 2009). Article 5 of the *Agreement between the Government of the United Mexican States and the Government of the Republic of Belarus on the Promotion and Reciprocal Protection of Investments*, 04 September 2008 (entered into force 27 August 2009). Article 10.5, *Tratado de Libre Comercio entre los Estados Unidos Mexicanos y la República de Panamá,* 3 April 2014 (entered into force 1 July 2015). Article 4 of the *Agreement between the Government of the United Mexican States and the Government of the State of Kuwait on the Promotion and Reciprocal Protection of Investments,* 22 February 2013 (entered into force 22 February 2016). Article 4, *Acuerdo entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de la República de Singapur para la Promoción y Protección Recíproca de las Inversiones*, 12 November 2009 (entered into force 3 April 2011).

100 See Article 10.5 of the *Colombia-United States Trade Promotion Agreement*, 22 November 2006 (entered into force 15 May 2012). Article 9.4 of the *Acuerdo de Libre Comercio Chile-Colombia*, 27 November 2006 (entered into force 15 May 2012). See Article 4, *Acuerdo entre el Gobierno de la República del Perú y el Gobierno de la República de Colombia sobre Promoción y Protección Recíproca de Inversiones*, 11 December 2007 (entered into force 30 December 2010). Article 805 of the *Free Trade Agreement between Canada and the Republic of Colombia*, 21 November 2008 (entered into force 15 August 2011). Article 2.4 of the *Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the People's Republic of China*, 22 November 2008 (entered into force 3 July 2012). Article 3.4 of the *Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India*, 10 November 2009 (not yet in force). Article 2.4 of the *Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Colombia*, 17 March 2010 (entered into force 14 October 2014). Article 4 in the *Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment*, 12 September 2011 (11 September 2015 entered into in force). Article 4, *Acuerdo entre el Gobierno de la República de Singapur y el Gobierno de la República de Colombia sobre Promoción y Protección de Inversiones*, 17 July 2013 (not yet in force). Article 8.5 of the *Free Trade Agreement between the Republic of Colombia and the Republic of Korea*, 21 February 2013 (entered into force 15 July 2016). Article 12.4, *Tratado de Libre Comercio Colombia-Costa Rica*, 2013. Article 14.5 of the *Free Trade Agreement between the Republic of Colombia and the Republic of Panama*, 20 September 2013 (no yet in force).

defendant and is currently facing 20 claims,[101] and by critics around Investor-State dispute settlement. In this model, Colombia introduces certain changes regarding the language of fair and equitable treatment.

Like CETA between Canada and the European Union,[102] the Colombian model defines the concept of fair and equitable treatment by identifying its elements in what could be interpreted as an exhaustive list.[103] As a matter of fact, the Constitutional Court in applying the exequibility control (control de exequibilidad) to the law which Colombia incorporated in the international bilateral investment treaty between Colombia and France (2013) ruled that it was necessary to conditionate the expression "inter alia" used to introduce the list of elements of fair and equitable treatment. The court pointed out that this expression is a source of legal uncertainty, given that it does not allow for the determination of the scope and content of the standard. As a consequence, the restrictive interpretation of that expression is the path to limit the obligations assumed by Colombia. That is to say, in terms of fair and equitable treatment, the list of obligations included in the provision is the only source of international responsibility; there is no place for additional obligations.[104] Compared to previous negotiations, the Colombian model avoided explicitly mentioning the high threshold of responsibility embedded in the fair and equitable treatment tied to the minimum standard of treatment, leaving this link to the provision

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101 See Corte Constitucional, Bogotá, 6 June 2019, *C-252-19* (2019) (Colombia) at para 60 [C-252-19]. 9 of them are in a period of direct settlement and 11 are in investment arbitral proceedings.

102 See Article 8.10, "Treatment of investors and covered investments" of the *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union, of the other part*, 30 October 2016 (entered into force 21 September 2017): "1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2-6. 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1, if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.'"

103 See Gus Van Harten, "The EU-Canada Joint Interpretive Declaration/Instrument on the CETA" (2017) Osgoode Legal Studies Research Working Paper No 6 at 4—5. Gus Van Harten with respect to the term a closed list in the light of the drafting CETA Article 8.10 has expressed the possibility to bring different interpretations in favor of foreign investors: "example of the CETA's ambiguity is its handling of the foreign investor right to 'fair and equitable treatment'". This right has been used more than any other to order compensation for foreign investors. The CETA firstly is not clear on whether the list of elements of this right, laid out in CETA Article 8.10(2), is a closed list – as often claimed by the European Commission. If Canada and the European Union wanted to agree to a list that was reliably closed, they could have done so by making that point clear in the CETA, such as by inserting the word "only" before "if the measure" in Article 8.10(2). Even after the Declaration, however, Canada and the EU have left the point open to the interpretation that the list is not closed."

104 See *C-252-19*, *supra* note 102 at paras 208—9.

on protection and physical security for foreign investors.[105] The draft provision states:[106]

> **Article. Fair and equitable treatment.**
>
> 1. Each contracting party shall afford fair and equitable treatment to foreign investors and covered investments.
>
> 2. Fair and equitable treatment afforded to investors and covered investments is only framed in the prohibition of:
>
> (a) denial of justice in criminal, civil or administrative proceedings;
>
> (b) material violation of due process, in adjudicatory and administrative proceedings;
>
> (c) manifest arbitrariness;
>
> (d) discrimination on manifestly wrongful bases, such as gender, race or religious belief;
>
> (e) abusive treatment of investors, such as coercion, duress and harassment. The council may review the content of this article upon request of a party. A determination on the violation of another provision of this agreement or any other international obligation of the host party before a covered investor or investment, does not imply the violation of fair and equitable treatment.

Although, in principle, Colombia requires no proof of breach of the standard, in terms of State practice and *opinio juris* linked to the minimum standard of treatment, certain conditions demand a high threshold of seriousness to claim a violation, which is framed in the parameters of the minimum standard of treatment. For example, denial of justice, violation of due process, manifest arbitrariness, discrimination based on manifest wrongful conduct and outrageous treatment towards a foreign investor, including coercion, constraint and harassment. Regarding this approach, Dumberry uses as a reference Article 8(10) of CETA which contains the definition of fair and equitable treatment to say the "omission of the term MST [minimum standard of treatment] should not be interpreted as a possible setback to the phenomenon of the "return" of the MST. This is because the list of obligations contained at article 8(10) is in fact the same as those generally considered to be comprised within the umbrella concept of the MST."[107]

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105 See for more information Narthirun Junngam, "The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully Protected and Secured from?" (2018) 7:1 AUBLR 1 at 88.

106 "Acuerdo de Inversiones entre la República de Colombia y", *Ministry of Commerce, Industry and Tourism of Colombia* (2017) at 7, online: <http://www.mincit.gov.co/temas-interes/documentos/aai-modelo-2017.aspx>.

107 Patrick Dumberry, "Fair and Equitable Treatment: Its Interaction with the Minimum Standard

Colombia includes as an alternative the "material breach of due process in judicial or administrative proceedings."[108] The fair and equitable provision of the Colombian model read together with the applicable legal provisions requires applying the investment treaty, the domestic law and the international applicable law to the dispute. Likewise, the Colombian model provides that the tribunal should abide by the prevailing interpretation of domestic law made by local courts and other authorities of the respondent State.[109] Unlike investment treaties, the purpose of the Model is to highlight the important role played by domestic laws in a dispute. Although the Colombian model provides that the tribunal should adhere to domestic courts' interpretation, it cannot disregard the principle of international law whereby a decision consistent with domestic law is not necessarily consistent with international law.[110]

For example, international law tribunals are not bound by judgments made by higher domestic courts.[111] In general, on an international stage,

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and Its Customary Status" (2017) 1:2 Brill Research Perspectives in International Investment Law and Arbitration 1 at 46.

108 Corte Constitucional, Bogotá, 8 February 2011, *T-076-11* (2011) (Colombia). Material or substantive defect occurs when the administrative authority grounds a decision on the application of inexistent or unconstitutional regulations adjudged illegal by the administrative jurisdiction, or openly inapplicable to the case at issue. Jurisprudence has also established that any unreasonable interpretation of legal rules may give rise to substantive defect; in this case, the commonly accepted meaning of the provision and its application by the administrative authority should be strongly conflicting, thus falling in the doctrine of interpretation *contra legem´*.

109 On the law applicable to the dispute, the Colombian model of Investment Agreement reads as follows

1. The tribunal shall decide on claims framed under the conditions of this agreement and the applicable rules of domestic and international law.
2. (...)
3. The tribunal shall abide by the prevailing interpretation of domestic law made by local courts and other authorities of the respondent State.
4. Any interpretation by the Council on the content of this Agreement shall be binding upon the Contracting Parties and any other tribunal or court responsible for assessing this Agreement. See Ministry of Commerce, Industry and Tourism of Colombia, *supra* note 107 at 18 (author's translation).

110 See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 86. "Article 3. *Characterization of an act of a State as internationally wrongful*. The characterization of a State act as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." The relevance of domestic law in foreign investment arbitration is meaningful. This, because the parties may choose it as part of the applicable law, or in the absence of an express selection of applicable law, despite the fact that the procedural rules provide the application of domestic law, like the ICSID Convention. In any case, domestic laws may be useful to complete legal concepts or to determine whether or not there is an international responsibility under international law. This significant role of domestic law may not overlook Article 3 mentioned above. This article implies that no tension exists between these two regimes – international and domestic law – insofar as, in the framework of international law, domestic law included *per se*.

111 See *Corte Mining Kenya Limited v Republic of Kenya* (22 October 2018) ICSID (Award) at para 11.

the revision of a judgment is conducted having regard to the denial of justice criterion.[112] However, as this criterion is an element of the fair and equitable treatment standard and there is not a concept of *stare decisis* in investment arbitration, there are no clear parameters for revision in light of rulings made by higher domestic courts. This means that a judgment could be considered licit under domestic law but wrongful under international law. That uncertainty regarding the scope and content of denial of justice is not resolved when the fair and equitable treatment is tied to minimum standard of treatment, but as there is a high threshold of breach, the revision done by the tribunal should be conditioned on the exhaustion of all judicial proceedings applicable to the case and the rigorous revision of the judgment.

Legitimate expectations will now be discussed as their interpretation differs under the fair and equitable treatment as a dependent or an autonomous clause.

Legitimate expectations under the Colombian Model and CETA

In order to define the scope of the provision and reduce the tribunals' discretion, Colombia did not include transparency and legitimate expectations as possible violations of the provision. As previously mentioned, Colombia chose to expressly define what is to be considered as conduct prohibited in terms of the fair and equitable treatment. The exclusion made by the Colombian model is meaningful, considering that the legitimate expectations are normally analyzed under the fair and equitable treatment, regardless of whether it is an autonomous or dependent provision, and they have become a source of frequent lawsuits by investors. In addition, the ambiguity regarding their scope and content makes them more attractive because foreign investors can then attack a State's conduct in many different ways.

Indeed, there is no consensus as to inclusion and scope of legitimate expectations as part of the minimum standard of treatment. Picherack sustains that the fair and equitable treatment should be understood as "a reference to or integral part of the minimum standard of treatment in customary international law". In that sense, he argues for the inclusion of "new requirements as essential or core elements" like transparency or legitimate expectations in the analysis of fair and equitable treatment.[113] Referring to the approach of NAFTA tribunals to Article 1105, Dumberry states that "the concepts of transparency and legitimate expectations are considered by the vast majority of NAFTA tribunals only as 'factors' to be taken into account when assessing whether or not other well-established

112 See Rene Uruena´s comments in *C-252-19*, *supra* note 102 at para 363.
113 Picherack, *supra* note 11 at 258—71.

elements of the FET standard have been breached."[114] Such an approach might entail that in cases where fair and equitable treatment is tied to the minimum standard of treatment, the tribunal may assess State conduct, including the legitimate expectations, but it might not find a State responsible for its violation. Rather, States will only be responsible for the breach of "well established" elements such as manifest arbitrariness.

Such an approach does not seem to be that adopted in non-NAFTA treaty-based arbitration where fair and equitable treatment is an independent clause. In laying out the fair and equitable treatment as an independent standard, the lack of threshold of responsibility may lead to a flexible or lax analysis. For instance, if the goal is to determine whether or not a State has violated the legitimate expectations of the investor, based on the fair and equitable treatment obligation as an independent standard, the tribunal is not bound to undertake the analysis of the standard with considerable deference *vis-à-vis* measures adopted by the State. Thus, there is no explicit intent of the contracting parties to limit the tribunal's discretion. Therefore, the tribunal may expand the content and scope of the provision without clear restrictions, as in *Tecmed v Mexico*, where the tribunal ruled as follows:

> The Arbitral Tribunal considers 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. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.[115]

Likewise, as seen in *Urbaser vs. Argentina,* another dispute based on the fair and equitable treatment as an independent provision, the tribunal upheld expectations as part of the protection afforded to investors under the fair and equitable standard of treatment, despite the fact that the treaty between Argentina and Spain did not include the legitimate expectations.

114 Dumberry, *supra* note 12 at 37.

115 *Tecmed SA v Mexico* (29 May 2003), ICSID Case ARB (AF)/00/2 (Award) at para 154.

The Tribunal held that the legitimate expectations are not limited by the contractual commitments:

> they are placed in a legal framework embracing the rights and obligations of the host State and of its authorities, subject to the protections provided in the BIT".[116] It ruled that expectations should be afforded with protection under more reasonable parameters aimed at a more precise identification, rather than generalization.[117] Finally, it argued the role played by the transparency requirement into the fair and equitable treatment standard and indicated this does not mean a treatment given to the investor and his investment under the same initial conditions of the project excluding unforeseen circumstances as economic, political or social crisis:
>
> The fair and equitable treatment does not provide for a standard according to which the investor would remain completely isolated and immune from the host State's endeavors to deal with such situations in complying with public interests. If the host State is hit, for instance, by an epidemic threat to the health of a very large amount of people, it has to take all measures required by the situation even if this implies hurting investors' interests, provided that the authorities proceed with deference to those interests and with the aim to restore their efficient preservation as soon as the circumstances so allow. What the fair and equitable treatment standard requires is that the basic expectations of the investor in respect of the fate of its investment are nevertheless taken care of by the host State when reacting to unforeseen circumstances. There is no bar for the host State to act accordingly merely because a situation of public concern emerged that was not transparent to the investor at the outset.[118]

In conclusion, in treaties where fair and equitable treatment is an independent provision, there is no clear possibility to limit the discretion of the tribunal. Perhaps, for this reason, the fair and equitable treatment clause in the Colombian model does not provide for legitimate expectations. Nevertheless, Colombia now has a general framework to negotiate future investment treaties in view of the C-259 2019 decision made by the Constitutional Court. After studying the expression of legitimate expectations included in the fair and equitable treatment and expropriation, the Court ruled that it was necessary to define what should be understood as legitimate expectations,

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116 *Urbaser SA and Consorcio de Aguas Bilbao Biskaia Bilbao Biskaia ur Partzuergoa v The Argentine Republic* (8 December 2016), ICSID Case ARB/07/26 (Award) at para 619.

117 See *ibid* at paras 622—28.

118 *Ibid* at para 628.

considering that there will only be a place for them if they come from specific and repetitive acts carried out by the Contracting Party and if they foster an environment of good faith conducive to the foreign investor maintaining his investment, and finally if there are sudden and unexpected changes made by the public authorities and if they affect the investment.[119]

If, in future negotiations, Colombia decides not to include legitimate expectations in an independent clause, and should a tribunal decide to analyze legitimate expectations as part of the fair and equitable treatment standard, the tribunal would need to bear in mind that a State could only be found liable for breach of the provision if it has engaged in the conducts itemized in the article. The situation is different in CETA. As is the case for the Colombian model, neither refer to a minimum standard of treatment or custom; instead, they incorporate a list of obligations for States. However, in Article 8(10) of the CETA, the Contracting Parties include legitimate expectations as part of the fair and equitable treatment, but independently of the list of conducts:

> When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

In the case of CETA, despite the European Commission indicating its intention to limit legitimate expectations to promises made by a State, some writers state that the wording "specific representation" remains vague regarding the nature of the undertakings given by a state that would give rise to legitimate expectations".[120] Such vagueness could translate into claims brought by the investor. For example, if a State's conduct does not fall within the list of prohibitions stated in the fair and equitable treatment clause, the foreign investor could consider whether that behavior is a violation of a legitimate expectation. That possibility could be supported by the fact that the State contracting parties did not establish a high threshold for breaching legitimate expectations. Since the fair and equitable treatment under CETA is an independent clause, it follows that arbitrators are not restricted in their interpretation of the scope and content of the legitimate expectations.

Despite the lack of consensus around the legitimate expectations as part of the fair and equitable treatment linked to minimum standard of treatment, the rule under NAFTA seems to be that the analysis, when that

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119 See *C-252-19*, *supra* note 102 at paras 211—12.

120 Flavien Jadeau & Fabien Gélinas, "CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation" (2016) 13:1 TDM 1 at 9.

standard of treatment is a dependent provision, is required to consider an action or omission that could affect legitimate expectations with a high threshold of seriousness. However, in this case, legitimate expectations are not analyzed as an element of the fair and equitable treatment connected to the minimum standard of treatment, but rather as "factors" that need to be considered in light of the other "well-established elements of the FET".[121] Such a high degree of seriousness in the State's conduct and the necessity to find a connection between legitimate expectations and some element of the fair and equitable treatment could be a guarantee for States under the fair and equitable treatment tied to the minimum standard of treatment, given that tribunals would assess the State's actions or omissions with more deference.

As stated above, under the fair and equitable treatment tied to the minimum standard of treatment, not all breaches are admissible. Tribunals require evidence as to the seriousness of the violation which materially impacted the investors´ expectations. In *Thunderbird v Mexico,* under NAFTA Article 1105(1), the Tribunal held that legitimate expectations referred to a situation where "a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct."[122] When addressing the issue of legitimate expectations in *Glamis Gold v The United States*, the Tribunal relied on the *Thunderbird* case and declared that the absolute minimum for fair and equitable treatment is not satisfied by a mere breach of contract; it also requires either denial of justice or discrimination. According to the *Thunderbird* Tribunal, mere expectations contained in the contract are insufficient to violate the minimum standard of treatment.[123] Likewise, in a separate opinion, arbiter Thomas Walde in *Thunderbird v Mexico*, held that "[t]he disappointment of legitimate expectations must be sufficiently serious and material. Otherwise, any minor misconduct by a public official could go to the jurisdiction of a treaty tribunal."[124] Future disputes might clarify whether the exclusion of legitimate expectations from the list of obligations under the fair and equitable treatment standard will result in an assessment of State actions or omissions without considering their implications. In the following section, denial of benefits and its relation to regulatory freedom and fair and equitable treatment standard will be discussed.

121 Dumberry, *supra* note 12 at 37.
122 *International Thunderbird, supra* note 58 at para 147.
123 See *Glamis Gold*, *supra* note 27 at para 620.
124 Separate opinion of arbitrator Thomas Walde in *Thunderbird v Mexico* case under NAFTA para 14.

General exceptions under the Colombian Model and CETA

Considering other relevant provisions of the Colombian model, it is important to note that it attempts to limit the opportunities for the foreign investor to engage in an investment dispute, while concurrently increasing the chances of the State to defend regulatory measures. This is not only determined by the wording of the fair and equitable standard of treatment. The model intends to protect the State's regulatory freedom to achieve legitimate objectives of public policy, such as those embraced by the Constitution or international agreements to foster and protect human rights, health, public security, natural resources, the environment and sustainable development. Likewise, it clarifies that the negative impact of the regulatory measures on the investment or expectations on the part of an investor including their expectation of profit does not entail a breach of any provision under the agreement. It also provides a list of the grounds excluded from investment disputes unless there is a discriminatory or arbitrary treatment against the investor, which include:

> a. The protection of human rights;
>
> b. The protection of human life, animal and vegetable health;
>
> c. The protection of environment;
>
> d. The protection and maintenance, defense of the natural resources;
>
> e. The protection of customers rights;
>
> f. The protection of the market about uncompetitive conducts;
>
> g. The enactment of obligatory licenses granted in relation to intellectual property rights or the annulment, limitation or creation of intellectual property rights, provided that such annulment, limitation or creation be consistent with the ADPIC Agreement.[125]

At the same time, the Model endeavors to balance the asymmetries between States and foreign investors in terms of advantages and disadvantages in treaty-based arbitration disputes. As is well known, the will of the parties to arbitrate any dispute is the cornerstone of this alternative mechanism for resolving disputes. Under the general structure of Investor State Dispute Settlement based on treaties, States make a general and prospective offer incorporated in an investment treaty and the foreign investor accepts such an offer when he files a request for arbitration. Only in this form is there

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125 See Ministry of Commerce, Industry and Tourism of Colombia, *supra* note 107 at 11.

an arbitration agreement between the host State and the foreign investor. Such acceptance by the investor needs to be in writing because it is a validity requirement of the arbitration agreement.[126] As arbitration is an alternative method for resolving disputes, a State needs the consent of an investor to initiate an investment dispute. In that sense, the investment treaty is insufficient and does not allow to infer the consent of the investor.

Taking into account this limitation, the Colombian model incorporates commitments called prohibitions for the foreign investor as a condition to file an international claim based on the Agreement. The provision about investors' corporate social responsibility states that "investors-claimants shall respect the prohibitions established in international tools, which a contracting Party being or becoming party, related to human rights and environment". Furthermore, it adds that foreign investors shall assume those prohibitions as "mandatory" during the fulfillment, execution, and operation of their investment in the host Party's territory for filing a claim before a Court or Arbitral Tribunal. The article referencing the denial of benefits states that one Party could deny benefits given by the Agreement if the foreign investor-claimant, for instance, committed serious violations against human rights or caused some grave environment damage in the host State, provided that the direct or indirect responsibility of the foreign investor has been proven by an international court or judicial or administrative authority of any State which maintains diplomatic relations with contracting parties. The draft provision states:

> **Denial of benefits**
>
> 1. A Contracting Party could deny the benefits of this Agreement to:
>
> > d. An investor of the other Contracting Party, when an international court of judicial or administrative authority of any State which maintains diplomatic relations with contracting parties has proved that such investor directly or indirectly:
> >
> > > i. committed serious human rights violations;
> > >
> > > ii. sponsored people or organizations condemned by serious violations of human rights or violations against International Humanitarian Law or sponsors terrorist organizations included on international lists.
> > >
> > > iii. caused some grave environment damage in the host State territory;[127]

126 See Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford University Press, 2015) at 75—76.

127 See Ministry of Commerce, Industry and Tourism of Colombia, *supra* note 107 at 12.

The wording around the prohibitions and denial of benefits for the investor re-asserts the dynamic in the relationship between a foreign investor and a State in investment arbitration disputes. In other words, the host State of the investment is not entitled to initiate an arbitration procedure against the foreign investor, but this restriction is countervailed by a denial of benefits given under the Agreement. In that sense, in the Colombian model the denial of benefits is not limited to serious violations committed in the territory of the host State. As it has an expansive scope, it demands more engagement on the part of the foreign investor in any State where they have investment activities. Unfortunately, such type of denial of benefits for the foreign investor are not often included in new generation investment treaties, such as the Morocco-Nigeria BIT 2016 and CETA. In the first treaty, Article 18 establishes the duty of the foreign investor and their investments to uphold human rights in the host State as well as the duty to respect the International Labor Organization's Declaration on Fundamental Principles and Rights of Work (1998). Moreover, Article 24 states the engagement of the investor with sustainable development of the host State and local community. However, in Article 8 CETA, the investor´s absence of commitment to human rights and sustainable development does not mean that the investor will be denied benefits. For example, Article 22, Denial of Benefits, of the Morocco- Nigeria BIT 2016 states that:

> 1) A Party may deny the benefits of this Agreement to an Investor of another Party that is an Investment of such Party and to Investments of such investor if investors of a non-Party own or control the Investment and the denying Party:
>
> > a) Does not maintain diplomatic relations with the non-Party; or
> >
> > b) Adopts or maintains measures with respect to the non-Party that prohibit transactions with the investment or that would be violated or circumvented if the benefits of this Agreement were accorded to the Investment or to its Investments.
>
> 2) A Party may deny the benefits of this Agreement to an Investor of another Party that is an investment of such other Party and to Investments of that Investor if the Investment has no substantial business activities in the territory of the other Party and persons of non-Party, or of the denying Party, own or control the Investment.

The denial of benefits in the Colombian model is an additional alternative to limit claims that could be tied to the breach of the fair and equitable treatment standard. Despite that standard of treatment in the model, it does not make an express reference to a minimal standard of treatment or custom. Rather,

the provision defines and identifies what can be considered as a breach of the standard in terms of the fair and equitable treatment linked to the minimum standard of treatment. Therefore, the actions or omissions that may fall into the standard of treatment are determined according to a high threshold of severity and gravity. Such a requirement commands an onerous burden of proof on the part of the foreign investor since it gives more opportunities to the State to defend a regulatory measure. Furthermore, it limits the scope of interpretation afforded the tribunal, requiring an analysis of liability with a considerable deference towards regulatory measures adopted by States.

In the event, the Colombian model is adopted in future negotiations or renegotiations, the threshold of breach to be applied by the tribunal is not clear. However, the reference to some obligations framed in the parameters of breach of the minimum standard of treatment seems to require a threshold of liability which would only be met if a State engaged in quite egregious and shocking conduct. Despite all this, there is an important distinction to be drawn between the fair and equitable treatment and full protection, and the security clauses included in the model. In fact, in the latter provision there is an express reference to the necessity on the part of the foreign investor to prove the *opinion iuris* and the State practice as elements of the international customary law, given that the full protection and security is tied to minimal standard of treatment of international customary law. Such a distinction suggests that the fair and equitable treatment as an independent clause in the Colombian model, must be assessed with a high threshold of breach and be disconnected from the elements of international customary law. In any case, as will be canvassed in the next section, contracting parties to the treaty could make joint interpretations and clarify the content and scope of the provision.

Finally, if Colombia decided to negotiate treaties with the express reference to the minimum standard of treatment, after revisiting the concept of fair and equitable treatment as part of the international minimum standard of treatment of aliens, it makes sense to consider the fact that the Latin American countries mentioned and NAFTA State parties[128] have

128 See UNCTAD, *supra* note 91 at 26. In the case of Canada, the explicit mention of links between the international minimum standard and the fair and equitable treatment became a rule after 2006: Canada-Benin BIT, 2013 (entered into force 12 May 2014), Article 7; Canada-Hong Kong BIT, 10 February 2016 (entered into force 06 September 2016), Article 6; Canada-Peru FTA, 29 May 2008 (entered into force 1 August 2009), Article 805; Canada-Senegal BIT 27 November 2014 (entered into force 5 August 2016), Article 6; Canada-Cote D`lvoire BIT 30 November 2014 (entered into force 14 December 2015), Article 6; Canada-Guinea BIT 27 May 2015 (entered into force 27 March 2017), Article 6; Canada-Jordan BIT, 28 July 2009 (entered into force 14 December 2009), Article 5; Canada-Kuwait BIT 26 September 2011 (entered into force 19 February 2014), Article 6; Canada-Latvia BIT 5 May 2009 (entered into force 24 November 2011), Article 2; Canada-Mali BIT, 28 November 2014 (entered into force 08 July 2016), Article 6; Canada-Mongolia BIT, 8 September 2016 (entered into force 24 February 2017), Article 6; Canada-Nigeria BIT 6 May 2014, Article 6; Canada-Republic of Korea FTA (2014), 22

embraced the FTC's Note of Interpretation regarding Article 1105(1) of July 2001 as grounds to restrain the arbitrators' discretion requiring an analysis of State behavior under the umbrella of the fair and equitable treatment tied to the minimum standard of treatment.[129] This presupposes that serious and gross State conduct is sufficient to be considered a breach of the provision. Furthermore, the necessity on the part of claimant to prove the *opinion iuris* and State practice with respect to the State conduct alleged as a breach of the fair and equitable treatment tied to minimum standard of treatment makes it more difficult to prove the breach of the provision. However, as mentioned above, the jurisprudence on Article 1105 reflects disagreements on the content of the minimum standard of treatment. Therefore, this leaves one to wonder how these provisions, that have become a trend, foster the defense of regulatory spaces and what are their associated advantages and disadvantages.

1. Are There More Possibilities to Defend Regulatory Measures through a Higher Threshold of Responsibility?

At first sight, the incorporation of the international minimum standard of treatment by Latin-American countries could indicate a regression in their multilateral international policy. A second reading may lead one to conclude that such regression is associated with the defense of regulatory spaces. Raising the threshold of responsibility means endowing States with further tools to defend their regulatory measures in the international law space. As the minimum standard of treatment is an international customary standard of protection, States protect the rights of foreign investors using rigorous parameters to review State's measures. That implies that the foreign investor must prove that a State's non-compliance is sufficiently serious, manifestly gross, egregious or outrageous. In other words, although the content of the minimum standard of treatment tied to the fair and equitable treatment obligation remains undefined, it does not mean that the goals pursued by

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September 2014 (entered into force 1 January 2015), Article 8.5; Canada-Romania BIT, 8 May 2009 (entered into force 23 November 2011), Article 2; Canada-Serbia BIT 1 September 2014 (entered into force 27 April 2015), Article 6; Canada-Slovakia BIT, 20 July 2010 (entered into force 14 March 2012), Article 3; Canada-Honduras FTA, 5 November 2013 (entered into force 1 October 2014), Article 10.6; Canada-Colombia FTA, 21 November 2008, Article 805. As to the United States, see: United States of America-Uruguay BIT, 4 November 2005 (entered into force 31 October 2006), Article 5; Rwanda-United States of America BIT, 19 February 2008 (entered into force 1 January 2012), Article 5; United States of America-Colombia FTA, 26 November 2006 (entered into force 2012), Article 10.5. In the following treaties there is a mention of the fair and equitable treatment according to international law principles: Canada-Argentina BIT, 5 November 1991 (entered into force 29 April 1993), Article 2; Canada-Costa Rica BIT, 18 March 1998 (entered into force 29 September 1999), Article 2; Canada-Venezuela BIT, 1 July 1996 (entered into force 28 January 1998), Article 2; Canada-Uruguay BIT, 29 October 1997 (entered into force 1999), Article 2.

129 See *Polanco*, *supra* note 4 at 84—85; see also *supra* note 91.

States by means of such delimitation are vague. Indeed, this absence of definition cannot continue to be associated with a disproportionate discretion of arbitrators; jurisprudence on NAFTA Article 1105 provides valuable input to analyze this concept in light of Article 10 (5) of the Free Trade Agreement between Colombia and United States.

During the negotiation of the United Nations Code of Conduct on Transnational Corporations and Other Business, between 1974-1991, developing countries took the stance that, if they agreed on the minimum standard of treatment, they would broaden the spectrum of investors' protection, because, in their view, investors would be sheltered by both conventional and customary rules. Developing countries viewed the international minimum standard as an imposition by developed countries inherent to colonial-imperial periods and, hence, put up a great deal of resistance. As a way out of this stance, during the boom of international treaties on foreign investment in the 1990s, most developing countries included the fair and equitable treatment as a standard devoid of connection with the minimum standard of treatment. Under this logic, it may be considered that these were consistent with their initial stance, that is to say, denying the binding nature of the minimum standard of treatment as part of customary international law.

However, the interpretation and scope of the fair and equitable treatment has led to reconsider its formulation. While developing countries initially assumed that foreign investors would enhance their protection with the inclusion of the minimum standard of treatment of aliens under customary international law (i.e., treaties and customary international law), today, those countries consider their responsibility limited, if they succeed to include the fair and equitable treatment as part of the minimum standard of treatment of aliens under customary international law. The trend in Latin American countries regarding the scope of the fair and equitable treatment relies on NAFTA's Note of Interpretation of Article 1105(1) by the Free Trade Commission.[130] Along these lines, jurisprudence shows that tying the fair and equitable treatment obligation to the minimum standard of treatment of aliens under customary international law partially solves the problem of scope and content of the minimum standard.

It only partially solves the problem because the standard of treatment establishes a high threshold for finding a breach. Therefore, the analysis of State responsibility requires giving considerable deference to the regulatory measures or actions under dispute, which entails demonstrating a sufficiently egregious and shocking conduct, such as gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process or

130 See *supra* note 37.

evident discrimination.[131] However, it does not completely solve the problem of the scope and content because it fails to clarify the content of the fair and equitable treatment tied to the minimum standard of aliens; nevertheless, that indeterminacy does not mean that States have no tools for doing so. The threshold of responsibility chosen by State parties in conjunction with other mechanisms may altogether contribute to the interpretation of the content. Indeed, the analysis of Article 10(5) of the Investment Chapter of the Free Trade Agreement between Colombia and the United States sets out advantages and disadvantages of this kind of provision. The clause provides as follows:

> **Article 10.5: Minimum Standard of Treatment**
>
> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. 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 that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> > (a) "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; and
> >
> > (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
>
> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

This Article is to be interpreted in accordance with the Annex 10-A which

131 See *Glamis, supra* note 27 at para 616.

states:

> **Colombia – United States FTA, Annex 10-A, Customary International Law**
>
> The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Article 10(5)(2), together with the first paragraph, limits the threshold of breach that a tribunal may apply to determine a State´s responsibility. It provides that the fair and equitable treatment for foreign investors is the minimum standard of treatment of aliens under customary international law. This wording sets limits to the framework of analysis under which a tribunal may declare responsibility for actions or omissions attributable to a State, whose actions and omissions should comply with the standard of customary law: the floor is the *opinio juris* and the State practice. This article makes it clear that the concept of fair and equitable treatment requires nothing in addition to the minimum standard of treatment of aliens under customary international law.

Nevertheless, this precision has proven insufficient, as illustrated by some experiences under NAFTA. Cases like *Pope & Talbot v Canada* and *Metalclad v Mexico* overlooked the *Neer* test as benchmark for determining the content of the minimum standard of treatment and disregarded the threshold of breach chosen by State parties, which assumes conduct that is egregious and shocking.[132] Those cases raised concerns given the criteria used by the parties to define the standard scope, and the rigor applied for the analysis of the breach of a State´s obligations. Jurisprudence disregarded the consensus reached by State parties (Canada, the United States and Mexico) with regard to the threshold of responsibility under Article 1105(1). On the other hand, tribunals other than NAFTA, have adopted as a benchmark, the jurisprudence under Article 1105(1) NAFTA. In *Railroad Development*

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132 See *Railroad Development Corporation (RDC) v Republic of Guatemala* (29 June 2012), ICSID Case No ARB/07/23 (Award) at para 209.This can be read in the *RDC v Guatemala* case. State parties incorporated into the treaty the fair and equitable treatment as part of minimum standard of treatment of aliens under customary international law. However, the Tribunal dismissed the arguments put forward by the respondent and the three CAFTA State parties, including the United States. Those arguments referred to the threshold of responsibility applicable to the dispute. *Railroad Development Corporation RDC v Republic of Guatemala,* ICSID Case No ARB/07/23, Award of 29 June 2012.

Corporation RDC v Republic of Guatemala, under the CAFTA treaty, the Tribunal refused to apply the *Neer* test and its evolution.[133] After reviewing NAFTA arbitral awards, the Tribunal adopted the *Waste Management II* view on the minimum standard of treatment:

> the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this 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.[134]

Inconsistent decisions adopted by some tribunals can neither perpetuate nor ignore ongoing changes that have taken place in State practice. In fact, the trend of inclusion of a high threshold of breach to assess the fair and equitable treatment provided to foreign investors may lead to consensus. It also may allow States to assume that the scrutiny of their actions and omissions in light of international law would be subject to rigorous parameters, thus conveying to tribunals the message that a new generation of international investment treaties aims to establish the minimum standard of treatment of aliens as a floor. Recognition of this fact by tribunals may translate into more coherent decisions in line with the will of State parties. NAFTA jurisprudence, despite some decisions, shows that, in general, when tribunals analyze regulatory measures, they followed the high threshold of breach included by contracting parties. This may contribute to create *momentum* for more predictable arbitral awards, in order to confer more certainty to the parties in the dispute, as well as legitimize the Investor-State Dispute Settlement mechanism.

Article 10(5)(2)(a) attempts to provide content to the standard by stating that the 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". This provision indicates that the alleged denial must be assessed in accordance with the due process principle and its application in the main legal systems of the world. Despite

133 See *ibid* at paras 216—18.

134 *Ibid* at para 219, citing *Waste Management Inc v United Mexican States* (30 Apr. 2014) ICSID Case No ARB(AF)/00/3 (Award) at para 98.

the fact that its language seems to be insufficient to determine whether there is a breach due to denial of justice,[135] this obligation requires the State to provide to the foreign investor the legal actions, procedures and institutions suitable as a condition to demand from them the exhausting of all national levels of jurisdiction. Regarding the reference to the main legal systems of the world, Stephan Schill proposes to understand the fair and equitable standard as a rule of law that should be embraced by States as a standard of treatment for foreign investors. Thus, he suggests applying the comparative method for the purpose of identifying a normative framework to interpret the fair and equitable standard. In line with this methodological approach, it may be possible to identify general principles of domestic systems (administrative and constitutional), as well as other international systems.[136]

According to Article 10(5), it is clear that denial of justice and its application in the main legal systems of the world does not exhaust its scope. The reason is that the Annex to the provision ties the minimum standard of treatment of aliens under customary international law to "all customary international law principles that protect the economic rights and interests of aliens." This suggests that, in order to determine liability, the denial of justice under the principle of due process should not leave aside the need to demonstrate that an action constitutes a breach recognized by State practice and *opinion juris* with a high threshold of breach. Eventually, in determining liability due to breach of the fair and equitable treatment standard, pursuant to Article 10.5, the contents of the due process principle as a source for analysis of the denial of justice may not be assessed, unless it refers to the elements of an international customary law.

According to the above interpretation of Article 10(5), the lack of definition of the content of minimum standard does not imply that the tribunals' discretion may not be further limited. The NAFTA experience has

135 See Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law*, 2nd ed (Kluwer Law International, 2017) at 10—12. Monique Sasson holds that treaties and customary international law often fail as to the accuracy of legal concepts; those gaps are usually filled in with domestic law. In those cases, domestic law helps to determine the existence of rights in international contexts. That is the case of concepts such as investment and property, investor´s nationality and shareholders' rights; see also Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2004) 74:1 BYBIL at 197—98. Zachary Douglas addresses the role played by municipal law of the host state: "Customary international law contains no substantive rules of property law. They cannot be a source of rights in property. Nor do investments treaties (…) It is therefore the municipal law of the host state that determines whether a particular right *in rem* exists, the scope of that right, and in whom it vests. It is the investment treaty, however, that supplies the classification of an investment and thus prescribes whether the right *in rem* recognized by the municipal law is subject to the protection afforded by the investment treaty".

136 See Stephan Schill, "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law" (2006) IILJ Working Paper 2006/6 at 4, 9—10, online: <http://www.iilj.org/wp-content/uploads/2016/08/Schill-Fair-and-Equitable-Treatment-under-Investment-Treaties-as-an-Embodiment-of-the-Rule-of-Law-2006-2.pdf >.

been useful because of the inclusion of provisions on treaty interpretation in international agreements containing an investment chapter and, moreover, in bilateral investment treaties. Although investigating those matters exceeds the scope of this paper, it is worth mentioning that those interpretations can be made directly by the contracting parties (i.e., joint or *ad hoc* authoritative interpretations) or, by a committee made up of representatives of State parties.[137] In case of a committee or a commission, in addition to the interpretation of clauses in the treaty, they are also responsible for monitoring the treaty implementation. Such interpretations are binding in case of an Investor-State arbitration dispute under the treaty.[138]

Joint interpretations made by a committee or commission may guide a tribunal as to the content and scope of the fair and equitable treatment in an international investment agreement. Ideally, such interpretations should be made before triggering the Investor-State dispute mechanism. Bilateral consultations are important to prevent potential breaches of the foreign investor's right to due process.[139] Likewise, it must be stressed that there are agreements where contracting States, even though they are not a party to the dispute, are still entitled to participate. The participation of States which are not party to the dispute can prove to be quite valuable as it allows States to defend their views on international law, regardless of claimant's nationality. This possibility reinforces positions or concepts likely to limit the tribunals' discretion, thus leading tribunals to render decisions consistent with the consensus reached by States.

Joint interpretations described above could be quite useful in cases like CETA or in the Colombian model. Both are characterized by the fact that the fair and equitable treatment standard is not tied to the minimum standard of treatment or a custom, but instead the provision is defined by a list of obligations for States. Even though some of them are framed in what has been understood as part of the fair and equitable treatment tied to the minimum standard of treatment, like manifest arbitrariness or discrimination on manifestly wrongful bases, such as gender, race or religious beliefs, there are others that entail a considerable ambiguity. As the threshold for breaching the provision is not clear, joint interpretations might contribute to the scope and content of some conducts prohibited for States. In that sense, contracting parties could agree how those ambiguous prohibitions should be interpreted by tribunals, providing more certainty to parties in dispute, and more tools for the tribunal in order to build predictability in the investment arbitration disputes.

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137 *Polanco*, *supra* note 4 at 88.

138 *Ibid*.

139 See Tomoko Ishikawa, "Keeping Interpretation in Investment Treaty Arbitration "on Track": The Role of State Parties" in Jean E Kalicki and Anna Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System* (TDM, 2015) at 142—49 [Kalicki & Joubin-Bret].

In the case of the Colombian model, it foresees a Bilateral Investment Council which will be in charge of adopting and enacting authorized interpretations on the agreement. Those interpretations are binding insofar as the last part of the provision highlights "any decision adopted by the Council shall be enforceable directly." Indeed, it is clear in the provision on fair and equitable treatment that the Council could review the content of that article upon request of a Contracting Party. Regarding the CETA, it provides in Article 8(31) (applicable law and interpretation) that an "interpretation adopted by CETA Joint Committee shall be binding on the Tribunal established under this Section. Such Joint Committee may decide that an interpretation shall have binding effect from a specific date." The binding power of those interpretations about fair and equitable treatment, for example, might diminish the discretion of the tribunal while rendering awards which reflect the will of the contracting parties.

In the case of the Free Trade Agreement between Colombia and United States, Article 20(1), Chapter 20, provides that the FTC, composed of cabinet-level representatives of the Parties, may according to Article (20) (3) (c) "issue interpretations of the provisions of this Agreement." In that sense, with regards to Article 10(23) (interpretation of Annexes), the role played by the commission on investment arbitration disputes seems to be limited to issuing binding interpretations with respect to the tribunal about matters related to Annex I or Annex II. This is because that provision does not prohibit the intervention of the FTC on other issues (i.e., fair and equitable treatment), but in terms of the Investor-State dispute settlement's section defines a specific responsibility for the commission in terms of the Annex I or II. Such annexes are schedules of the parties where they include by sector measures "that are not subject to some or all of the obligations imposed in some" standards of treatment, for example, national treatment, or most favored nation treatment.[140]

Moreover, the objective of achieving accuracy around the content and scope of some provisions may be reinforced by an appellate tribunal. Annex 10(D) of the Free Trade Agreement Colombia-United States includes the legal duty of the parties to consider "whether to establish an appellate body or similar mechanism to review awards rendered under Article 10.26 in arbitrations commenced after they establish the appellate body or similar mechanism". Article 8(28) CETA recognizes the possibility of setting up an appellate tribunal to review awards rendered on investment issues. It highlights that this tribunal "may uphold, modify or reverse the Tribunal´s award based on (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the

140 *Colombia-United States Trade Promotion Agreement*, 22 November 2006 (entered into force 15 May 2011) at Annex 1, Explanatory Notes.

appreciation of relevant domestic law; and (c) the grounds set out in Article 52(1)(a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).” Colombia’s model does not foresee an appellate tribunal. However, it envisages the review of the Investor-State settlement dispute mechanism in 5 years or at any moment within that period of time. That provision could be aligned with Article 8(29) of CETA because it determines that in case of the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes, the CETA Joint Committee shall “make appropriate transitional arrangements.” Both dispositions allow for the conclusion that they were worded to take into account the initiatives on investment arbitration reform.

Article 10(5)(3) USA-Colombia FTA provides that a violation to the fair and equitable treatment standard does not mean a breach of another provision of the treaty or another international agreement. The purpose of this provision is to limit the scope of the fair and equitable treatment obligation. Indeed, this standard seeks to broaden the range of possibilities for foreign investors to challenge decisions made by a host State. Actually, a State may abide by the national treatment or most favored nation treatment, without so entailing that the fair and equitable treatment obligation may not be breached. Under Article 10(5)(3), States wanted to make clear that any breach of other standards, such as national treatment or most favored nation, does not entail a concurrent breach of the fair and equitable treatment standard, or vice-versa. Here, the minimum standard of treatment is complementary to the fair and equitable treatment standard; the former bears the same effects as the latter. In fact, the minimum standard of treatment provides enhanced protection for foreign investors, insofar as abiding by the national treatment or the most favored nation principle does not exclude a violation of the minimum standard. Therefore, after excluding the concurrent breach, it is therein provided that any violation of the fair and equitable treatment should be assessed within the limits of the minimum standard of treatment of aliens.

This section seeks to show that raising the threshold of responsibility aims to provide States with further defensive tools in the context of international regulatory measures adopted by host countries. A higher threshold of breach reduces risks for States in terms of public health and environment events.[141] This reflects the States’ interest in protecting and securing foreign investors’ rights using stricter parameters when reviewing regulatory measures. Accordingly, tying the fair and equitable treatment to the minimum standard of treatment of aliens based on the customary international law does not guarantee that States would not be found responsible; rather, it

141 See Courtney C. Kirkman, “Fair and Equitable Treatment: *Methanex v The United States* and the Narrowing Scope of NAFTA Article 1105” (2002) 34 Law & Pol’y Intl Bus 343 at 392.

provides certainty for the parties to link the proof of responsibility to the demonstration of a breach under the customary rule within the framework of strictness embodied in the international minimum standard. Thus, it is required to prove that a State's non-compliance is sufficiently serious, manifestly gross, egregious or outrageous. In other words, indetermination it is not synonym with unlimited discretion of interpreters.

The next section refers to possible developments regarding accuracy of the fair and equitable treatment, by an Investment Arbitration Center under the aegis of the Union of South America Nations (UNASUR).

2. UNASUR Arbitration Center and the Fair and Equitable Treatment Standard

The objectives pursued by some Latin American countries with the negotiation of the fair and equitable treatment as part of the international minimum standard, may be reinforced through multilateral initiatives aimed at implementing correctives to arbitration failures, as a means to settle disputes among investors and States. At present, there are several projects being developed with the same goal. Most of them seek to introduce procedural changes as opposed to more substantial aspects.

Those multilateral initiatives focus their efforts on overcoming the legitimacy crisis that foreign investment arbitration is facing due to the criticism voiced in relation to arbitral awards. The need to rethink the system has been prompted by the unpredictability of determinations made, the absence of a second instance and precedents, the excessive costs, and the appointment of arbitrators, amongst others. In 2006, the ICSID introduced amendments to the ICSID Rules and Regulations by introducing a paper and working paper for discussion with member States and the civil society.[142] Those amendments – with respect to the parties' will and consent as the cornerstone of arbitration – included, amongst others, provisions regarding publication of awards, public hearings, and filing amicus submissions by non-disputing parties, provided consent of the parties.[143] In August 2018, the ICSID Secretariat launched a consultation process with its member States and the community about the "proposals for Amendment of the ICSID Rules", with the purpose to evaluate the feasibility to update the ICSID

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142 See ICSID Secretariat, "Possible Improvements of the Framework ICSID Secretariat" (22 October 2004), online (pdf): *ICSID* <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>. See also ICSID Secretariat, "Suggested Changes to the ICSID Rules and Regulations" (12 May 2005), online (pdf): *ICSID* <https://icsid.worldbank.org/en/Documents/resources/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf>.

143 See ICSID, "The ICSID Rules Amendment Process" at 1, online (pdf): *ICSID* <https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf>.

Rules.[144]

In 2013, with the aim of responding to the challenges and opportunities of the system, UNCTAD put forward a reform having identified five issues: (1) promoting the use of alternative dispute resolution; (2) tailoring the existing system through individual International Investment Agreements (IIAs); (3) limiting investor access to Investor State Dispute Settlement (ISDS); (4) introducing appeal vehicles; (5) creating a standing international investment court.[145] Furthermore, in 2014, UNCITRAL adopted the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (the Rules on Transparency), which came into force as of October 2017. Currently, UNCITRAL is assessing potential reforms to the Investor-State Dispute Settlement mechanism, aiming at both global adjustments and adjustments on specific subjects.[146] One of the proposals suggests the creation of an appeal mechanism and/or a permanent court of investment, as well as the implementation of the *stare decisis* principle in investment disputes.

A good example of regional initiatives is the proposed creation of a permanent center for dispute settlement under the aegis of the Union of South American Nations (UNASUR). In spite of the current crisis triggered by a decision adopted by some countries to suspend their participation for an indefinite time,[147] the denunciation of the treaty made by Colombia,[148] and the interest of its president to create "PROSUR" with the idea to replace UNASUR,[149] this initiative aims to compile any critiques made on the matter of Investor-State international arbitration. The draft proposal is a regional approach that tackles the most important flaws affecting the mechanism and addresses the considerable asymmetry and imbalance between the parties to the dispute, which skews the scales against States. What is important is the contribution from the region to the global debate around the reform of the Investor-State Dispute Settlement. In that sense, it is important to discuss

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144 See ICSID, "Proposals for Amendment of the ICSID Rules—Synopsis" (2 August 2018), online (pdf): *ICSID* <https://icsid.worldbank.org/en/amendments/Documents/Homepage/Amendments-Vol_1_Synopsis_EN,FR,SP.pdf>.

145 *Reform of Investor-State Dispute Settlement: in Search of a Roadmap*, UNCTAD, 2013, No 2 at 1.

146 See *Possible Reform of Investor-State Dispute Settlement (ISDS)*, UNCITRAL, 39th Sess, UN Doc A/CN.9/WG.III/WP (18 September 2017) 142 at 10. See also *Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS)*, UNCITRAL, 50th Sess, UN Doc A/CN.9/917 (20 April 2017) at 7 para 22—24.

147 See Detlef Nolte & Víctor Mijares, "La crisis de Unasur y la deconstrucción de Sudamérica", *El Espectador* (23 April 2018), online: <https://www.elespectador.com/noticias/el-mundo/la-crisis-de-unasur-y-la-deconstruccion-de-sudamerica-articulo-751730>.

148 See "Unasur sirvió de comodín para una dictadura, Duque al oficializar el retiro" (27 August 2018), online: *Semana* <https://www.semana.com/nacion/articulo/colombia-se-retira-de-unasur-envian-carta-oficial/581024>.

149 See "Unasur cometió errores,"pero taimbién es una historia de éxito" *Semana* (1 April 2019), online: <https://www.semana.com/mundo/articulo/unasur-cometio-errores-pero-tambien-es-una-historia-de-exito/597992>.

in-depth the main proposals of the initiative and its possible implications for the fair and equitable treatment.

The first stage of UNASUR negotiations brought to the forefront the challenges and complexities of a multilateral negotiation.[150]A left-wing group of Latin-American countries (i.e., Bolivia, Venezuela and Ecuador),[151] displeased with the ICSID approach for Investor-State arbitration resolved to withdraw from the ICSID Convention and started to look at other alternatives, such as the creation of the UNASUR Center, an initiative led by Ecuador. In 2010, before the treaty establishing UNASUR came into force on 11 March, 2011,[152] Ecuador put forward the proposal for creating the Center. In 2014, UNASUR delivered the last draft titled "constitutive agreement of investment dispute settlement Center of UNASUR", containing 6 Titles and 41 Articles, 80 percent of which have apparently been approved.[153]

The UNASUR initiative introduces structural changes to the dynamics of arbitration, such as the second instance missing in the ICSID Convention. Given the difficulty in reaching consensus for amending the Convention, the ICSID encourages the amendment of arbitration rules and regulations to thus facilitate its approval.[154] The UNASUR initiative delves into the Center's jurisdiction and the mechanisms of appeal, while promoting transparency. Indeed, such provisions enable to consensus building on core provisions of investment arbitration, such as fair and equitable treatment as part of the minimum standard of treatment.

First, with regard to jurisdiction, building consensus is possible, given that the UNASUR draft gives an opportunity to extend the Center's jurisdiction over States and Investors who are not UNASUR Members. Indeed, the draft allows filing complaints between: (i) two UNASUR member States; (ii) UNASUR member States and a non-member States; (iii) UNASUR member States and nationals from a member State; (iv) a non-UNASUR member

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150 See UNCTAD, "World Investment Report 2013: Global Value Chains: Investment and Trade for Development" (2013) at 103, online: *UNCTAD* < https://unctad.org/en/PublicationsLibrary/wir2013_en.pdf>.

151 See Silvia Karina Fienozzi, "The Challenge of UNASUR Member Countries to Replace ICSID Arbitration" (2011) 2 BLR 134 at 137 [Fienozzi]. On May 2, 2007 Bolivia notified the ICSID Secretariat its withdrawal from the ICSID Convention. On July 6, 2009 the ICSID received the notification of Ecuador.; On January 24, 2012, Venezuela formally denounced the ICSID Convention.

152 See Sara Ross, "UNASUR: The Newest Global Player or Neo-Bolivarian Fantasy" (2014) 30 Conn. J. Int'l L. 29 at 32.

153 Katia Fach Gómez & Catherine Titi, "El Centro de Solución de Controversias en Materia de Inversiones de UNASUR: Comentarios Sobre el Borrador de Acuerdo Constitutivo" (2016) 7:3 Investment Treaty News 1.

154 Most likely, such limitations hinder the amendment to the Rules and Regulations of Arbitration as proposed by ICSID, insofar as the second instance is not included in the agenda. The ICSID Convention addresses the matter of interpretation, revision and annulment of the award (Articles 50 to 52).

State and a national from a UNASUR member State; and, (v) a UNASUR member State and a national of a non-member State.[155] Although the foregoing language links the Center's jurisdiction to the requisite of being a member State, it also leaves room for including nationals from a State (non-governmental entities) or non-member States, thus facilitating the exchange of views and standpoints from different sources, which, consequently, enrich the debate. This improves the arbitrators' decision-making process and the Center's perspective. In fact, decisions made under this administrative framework would not be perceived as an ideological imposition of a regional investment center. The inclusion of several perspectives may confer more legitimacy to decisions adopted by arbitrators.

Second, the appeal remedy and the meaning of precedent may boost consensus building among arbitrators and adoption of coherent determinations. An upper tribunal's review requires that arbitrators be consistent as to the scope and contents of the relevant provisions. On the other hand, this second instance is an incentive for arbitrators to construe such provisions in line with the will of States reflected by the treaty, or thereafter by means of joint interpretations. Accordingly, it would be possible limit inconsistent determinations and interpretations overlooking any provisions of the treaty. This objective is more easily attained if the appeal mechanism is in the hands of permanent members selected from a roster of qualified professionals, with clear and strong limitations on their other professional activities.[156]

In the case of the fair and equitable treatment, the inclusion of the appeal mechanism and the notion of precedent may entail the possibility to expand and enhance the interpretation of this provision holding a high threshold of breach and may also mean the possibility of developing an interpretation of its content which may solve any uncertainty and dissipate speculations thereon. Even though there is not a universal provision of fair and equitable treatment adopted by all states and this provision has been analyzed on a case by case basis, there is a core which can be framed when fair and equitable treatment is tied to a high threshold of breach. The appeal mechanism may delimit and clarify the will of the Contracting Parties, leaving quite clear that when fair and equitable treatment is linked to the minimal standard of treatment there is a deference to the freedom regulatory space of the States, because there are stricter parameters to review regulatory measures. In that sense, the foreign investor shall question whether a non-complying State's conduct is sufficiently serious, manifestly gross, egregious or outrageous. Those interpretations may provide legal consistency and predictability

155 See Fach & Titi, *supra* note 155 at 141.
156 See Gabriel Bottini, "Reform of the Investor-State Arbitration Regime: The Appeal Proposal" in Kalicki & Joubin-Bret, *supra* note 141 at 461—62.

to both States and investors, striking a balance between the State and the Investor where it is possible to know the boundaries of the relationship between both parties.

Finally, on transparency, the *amicus curia*, may provide the opportunity to non-parties in the dispute, such as individuals or legal entities, to submit their points of view permitting to clarify issues relevant to the arbitration.[157] Although the timeframe provided to file submissions is very short – within ten days from the date the tribunal is set up – those submissions provide a valuable input for clarifying the scope and content of standards.

In principle, the initiative of creating a Center may give rise to suspicion of being biased towards the interests of certain countries. However, the Center's success lies in its capacity to promote and create a transparent and consistent environment. These conditions may prompt countries such as Brazil – which is not a party to the ICSID Convention and has not yet ratified any BIT signed during the 1990s – to pioneer the initiative of submitting investment disputes before the UNASUR Center. In addition, a neutral Center according guarantees to all parties may attract not only Latin American countries but other foreign countries and investors. Consistency in arbitral awards may provide coherence to core provisions such as the fair and equitable treatment, therein differentiating an autonomous provision and a standard part of the minimum standard of treatment – depending on the language.

Conclusion

The trend in Latin American countries is to include fair and equitable treatment tied to the minimum standard of treatment. Despite there not being a consensus around its content, what seems to be common regarding the tribunal's interpretations is the requirement of a high threshold of breach, which demands that a State's conduct be sufficiently egregious and shocking. As the minimum standard of treatment is understood to be customary international law, the State behavior rejected by the foreign investor should be proven in terms of State practice and *opinio iuris*. In addition, the limits of the tribunal's discretion and the certainty to Contracting Parties and investors regarding the scope and content of the provision could be complemented through different mechanisms provided by the treaties, like joint interpretations and appellate body. UNASUR could be another interesting initiative to foster consensus around the content and scope of the fair and equitable treatment linked to minimum standard of treatment, but the possibility of implementing the UNASUR initiative not only depends on the political will of its member States, but also on the

157 See *Fienozzi*, *supra* note 153 at 141.

existing will to join efforts and turn UNASUR into a model organization with regional leadership.

The Colombian model provides for fair and equitable treatment as an independent provision with a list of obligations for States quite close to the higher threshold of responsibility under minimum standard of treatment. However, the model excludes the legitimate expectations from the provision. In that sense, if the Colombian model is applied in upcoming treaty negotiations, future disputes might prove instructive as to whether tribunals will assess the State's behavior while giving considerable deference to regulatory measures, in other words by placing a heavy burden of proof on the foreign investor, without making connections to legitimate expectations or making some reference to them, but by finding the State responsible for the list of conducts.

General conclusion

The trend amongst Latin America countries to link fair and equitable treatment as part of the minimum standard of treatment of aliens under customary international law may help regional consensus building. Such consensus may consist of establishing a high threshold of responsibility together with a minimum standard of treatment of aliens, a proposal dismissed by developing countries in colonial-imperial periods, as evidenced in multilateral negotiation processes. This change reflects the fact that, behind the ideological motivation for dismissing this concept, Latin American countries have found an alternative to strike a balance between rights vested upon foreign investors and public interests protected by States. This balance aims to provide more confidence and predictability to States when it comes to identifying a breach of a standard on issues of paramount public interest such as public health, labor rights and the environment.

Linking the fair and equitable treatment to the minimum standard of treatment, as a parameter of international responsibility, is no guarantee of the legality of any measure under international law. However, it makes clear the parties' intent to protect foreign investment with stricter criteria of responsibility when determining whether a State has fulfilled its international obligations. The stricter criteria would lead the foreign investors to weigh their likelihood of success, taking into account the need to adduce sufficient evidence to prove the violation of customary international law. This burden of proof should be mandatory for tribunals and its application should be a source of legitimacy for Investor-State arbitration as it may reflect the commitment of tribunals to exercise their discretion in line with the contracting parties' will.

The trend amongst Latin American countries to tie fair and equitable treatment to the minimum standard of treatment should not necessarily

be disregarded because countries like Colombia have published a model on international investment agreements where the fair and equitable treatment is an independent clause. Even though there is not an express reference to find a breach of the provision with a high threshold of gravity under the parameters imposed by the minimum standard of treatment, the accuracy pursued by the draft is characterized by a list of conducts prohibited for States, and most of them are framed in terms of what is required by the minimum standard of treatment. In other words, the draft provision still imposes a considerable burden of proof on the foreign investor. However, the future will tell us if this draft model will become a trend in the next bargaining process led by Colombia and if this type of wording will be interpreted by parties and tribunals with a high threshold of breach framed into the minimum standard of treatment.

The creation of the Investment Arbitration Center under the aegis of UNASUR may foster regional consensus on the fair and equitable standard of treatment. Consensus implies no imposition of biased criteria as to foreign investment law. The scope of the Center's jurisdiction, the appeal remedies, the meaning of precedents and other transparency mechanisms such as *amicus curiae*, may lead to the development of consistent jurisprudence on core provisions, such as the fair and equitable treatment. Tribunals may unify criteria to identify the content thereof, bearing in mind whether the standard is drafted as independent provision or whether it is tied to the minimum standard of treatment.