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**TECNOLÓGICO
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**THE FAIR AND EQUITABLE TREATMENT AND FULL PROTECTION AND SECURITY AS
INVESTMENT PROTECTION STANDARDS ESTABLISHED IN THE MEXICO-EU BITs.**

DISSERTATION

PRESENTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF:

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I. INTRODUCTION

The level of protection given to an investment in a foreign territory is a significant element to consider when thinking about investing abroad. The most common international practices for the protection of foreign investments are the execution of a Bilateral Investment Treaty (BIT) or the inclusion of an investment chapter in Free Trade Agreements (FTAs). The former type of international agreement is implemented between two states for the reciprocal protection of the investments made by investors of the other contracting Party in their territory.

Consequently, each BIT is different. Nonetheless, international law and the practice of international investment arbitration have identified a number of basic elements that a BIT must contain in order to be considered valid, e.g., the scope of application of the agreement, namely, what is considered as an investment under the agreement and also who is considered as an investor.

In addition, BITs generally contain several basic substantive standards. Among these we can find absolute standards, such as the obligation to grant fair and equitable treatment (FET) and full protection and security (FPS) to all foreign investments made in the host state, and relative standards, such as Most Favored Nation (MFN) and National Treatment (NT).

The execution of BITs and the inclusion of these protection standards may be one of the reasons foreign investment from European Union (EU) Countries in Mexico has grown in the past years.¹ Thus, even while foreign direct investment (FDI) in Mexico experienced a

¹ Other factors to consider are the country's gross domestic product, population, levels of domestic investment, level of political risk, stability, availability of human capital, and degree of market liberalization as well as a company's predictions for immediate profit also play critical roles in affecting an investor's decision to choose a particular country. See Emily A. Alexander, Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law, *Virginia Journal of International Law*, Summer, 2008, 48 Va. J. Int'l L. 817.

decrease of 50.7% in 2009, the flow of investments from EU countries was still important,² amounting to 24.4% of the total of FDI in Mexico, positioned just after the investments of United States' investors.

To this date Mexico has concluded BITs with 15 EU Countries,³ each of them were negotiated individually, due to the fact that the conclusion of treaties regarding foreign direct investment was, at the time, as an exclusive competence to member states.

As a result of this each BIT contains minimum but substantial differences. However, one thing they do have in common is that they all establish the obligation of the state to grant FET as well as FPS to foreign investments. Nevertheless, some BITs connect these obligations to the minimum standard established by customary international law, others to the principles of international law, and others consider FET and FPS as self-contained standards. Each classification involves different rights and obligations for both the investor and the host state.

In the field of international investment law compliance with these standards is essential in the relationship between foreign investors and host states, regardless of the classification they are linked to.

The interest on this particular subject and specially the focus on FPS and FET of this paper are due to the fact that they both constitute absolute standards of investment protection included in all the BITs between Mexico and EU Countries. Also, as causes of action, FET and FPS are common allegations which tribunals have to analyze in almost every case, but that still remain undefined. Accordingly, even while the context of this paper is the Mexico-EU BITs, the analysis made of FET and FPS may serve as a guideline to understand said standards even outside EU BITs.

² Source, Secretariat of economy. General Direction of Foreign Investment. http://www.economia.gob.mx/pics/pages/1175_base/dicE09.pdf. Last visited: on March 2010.

³ The Belgium/Luxembourg Union, Germany, France, Sweden, Spain, The Slovak Republic, United Kingdom, The Czech Republic, Austria, Denmark, Finland, Greece, Italy, the Netherlands and Portugal. Available at: <http://www.sre.gob.mx/tratados/>. Last visited: March 2010.

Consequently, this paper seeks to explain the normative content of the FET and FPS standards included in BITs that Mexico has executed with EU countries, by identifying, what does a determined standard for the protection of foreign investments commit the state to? In other words, what is the consequence of linking an obligation to international law principles as opposed to the minimum standard of customary international law? Which conducts are permitted and which are forbidden? And, what is the consequence of the fact that a standard for the protection of investments is considered as an autonomous concept?

To provide possible answers to these questions, this paper is divided into six chapters and a final section for conclusions.

In the first chapter, the process of negotiation of Mexico-EU BITs is explained. This chapter also addresses the recent modifications made to the Treaty of the European Community, particularly the redistribution of competence to conclude BITs.

Chapter two provides a general understanding of the sources of law. This chapter intends to define the origins of the obligations contained in a BIT, as well as the binding nature of its provisions. This chapter also contains a list of the existing sources of international law, as well as a conceptual definition of each one.

In chapter three, we analyze one of the recognized sources of law, and a reference made by some Mexico-EU BITs: the general principles of law. The purpose of this is to separate general principles of law, explaining their origin in national law and their evolution and development into the international field, from the general principles of procedural law, as merely principles regarding the application of a substantive provision.

This chapter also deals with the “investment principles”, principally FET and FPS, and their true nature as standards for the protection of foreign investment, and procedurally, their roles as causes of action in an investment dispute.

Chapter four also analyzes one of the sources of law, that also constitutes a reference included in some Mexico-EU BITs: international custom. Here, the scope of the minimum

standard is addressed as well as the resolutions in this respect issued by arbitral tribunals and international institutions.

Chapter five, section 1, sets a general notion of FET and its contractual nature. As a first approach to the understanding of the concept, two standpoints are analyzed, the additive and restrictive interpretations. The fundamental elements and relevant interpretations to the standard made by arbitral tribunals are also examined.

Chapter five sections 2, 3 and 4, analyze FET in accordance with each of the classifications given to the standard by the BITs concluded between Mexico and EU Countries, i.e., in accordance to international law principles, in accordance to customary international law, and as a self-contained standard, providing also examples of interpretations by tribunals in several cases.

Also in chapter five, section 5 deals with the relationship between FET and other standards of investment protection.

Chapter six deals with the meaning and content of FPS, and also with the interpretations given to the standard, in accordance with the references made in the Mexico-EU BITs.

Finally, the last section contains the conclusions of this paper.

CHAPTER I: THE NEGOTIATION OF MEXICO-EU BITs.

Previous to the entry into force of the Treaty of Lisbon⁴ on December 1st 2009, the competence to execute BITs belonged to the member states; consequently, Mexico negotiated and concluded 15 separate BITs with EU Countries.

To this date they are all valid, however they all provide for an initial validity of 10 years, after which they will remain in effect pursuant to their respective provisions.⁵ None has been terminated and only the Mexico-Spain BIT was renegotiated in 2006.

Nowadays, article 207 (formerly 133) of the Treaty on the Functioning of the European Union establishes the following:

“The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.”⁶

In accordance with article 207 the competence to negotiate and execute BITs now belongs to the EU, however, this does not compromise in any way the effects and protections granted under the BITs currently in force. Furthermore, they even provide for periods in which investments will still be protected even after the termination of the BIT.

⁴ The Treaty of Lisbon amended the EU's two fundamental treaties, the Treaty on European Union and the Treaty establishing the European Community. The latter is renamed as the Treaty on the Functioning of the European Union. See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. *Official Journal C 306 of 17 December 2007*. Available at: http://europa.eu/lisbon_treaty/full_text/index_en.htm. Last visited: April 2010.

⁵ See Annex 2.

⁶ See *supra* note 4 Art. 207.

There is still not a clear path as to whether Mexico will negotiate a uniform EU BIT or whether the current BITs will remain effective, consequently an analysis of the protections granted by each may still be necessary if a dispute were to arise in the next years.

This paper focuses on the standards of protection as they were established in the Mexico-EU BITs. The main purpose is to classify FET and FPS and discover their elements and scope of application in a particular case, with the objective to serve as general guidelines for the content and scope of the standards, whether they are linked to international law, to customary international law or considered as self-contained standards.

In order to achieve this purpose, the following chapters present a general understanding of the sources of law, with a particular focus on the general principles of law and customary international law. This general introduction is given with the objective to define the criteria that an adjudicator must consider when interpreting and applying a standard with those particular references.

CHAPTER II: THE SOURCES OF INTERNATIONAL LAW

In order for an emerging rule or principle of international law to be considered binding, it must have its origin in a recognized source of law. The establishment of a unified criteria in regard to sources of law guarantees the coherence of any new provision with the preexisting legal system.

The sources of law are methods or ways and procedures by which the rules of international law are created;⁷ usually the concept is split into two dimensions, on one hand the material sources of law and on the other the formal sources of law.

The material source is “the place one looks to actually read a rule on international law”,⁸ and the formal source of law is “the fashion in which international lawyers, judges, and

⁷ Boczek Boleslaw, *International Law, A dictionary*, The Scarecrow Press, Inc. 2005.

⁸ Mark W. Janis, John E. Noyes, *International law, cases and commentary*, p. 27, American Casebook Series, Third Ed., Thompson West 2006.

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jurists agree that international law may be made. The notion of a formal source of international law is related to the ideas in the philosophy of law about rules of recognition and validating norms. For any legal system to function effectively in practice, the participants in that system must agree on what counts as a legal rule and what does not”.⁹

When referring to the formal sources of law, Article 38 of the Statute of the International Court of Justice¹⁰ (ICJ) has been considered to provide a list of sources of international law, nonetheless, it is still believed that “the traditional schema of sources in article 38(1) preserves state control over what is deemed law, but is an incomplete reflection of the realities of contemporary international law-making. Other important modalities of law-making have been identified, for example through the resolutions of international organizations, such as the General Assembly of the UN, the practice of international organizations and international codes of conduct”.¹¹

This idea leads to the belief that in the international field, law is not only a product of the State’s activities, but can also be created through other means. This has a particular significance in the field of investment arbitration, where much attention is paid not only to arbitral awards but also to publications of international organizations such as the Organization for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). Furthermore, in investment arbitration, despite the significance of a customary rule of international law, treaties are still regarded as the traditional source of law.

Therefore, even while BITs cannot constitute a source of law for the international community as a whole, they are regarded as the most important source of law for the

⁹ *Idem*.

¹⁰ Article 38: 1. The Court, whose function is to decide *in accordance with international law* such disputes as are submitted to it, shall apply: a) International conventions, whether general or particular, establishing rules expressly recognized by the contracting states; b) International custom, as evidence of a general practice of the States accepted as law; c) The general principles of law recognized by civilized nations; d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto”. <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> Last visited: March 2010.

¹¹ Dixon & McCorquodale, *Cases & Materials on International Law*, p. 22, Oxford 4th Ed., 2003.

contracting parties, and must be the first legal instrument that the adjudicator considers. In this context, customary rules of law should serve a complementary purpose. This idea is shared by Peter Malanczuk who states that “clearly a treaty, when it first comes into force, overrides customary law as between the parties to the treaty; one of the main reasons why states make treaties is because they regard the relevant rules of customary law as inadequate”.¹²

The sources of international law can also be classified as explained in the following sections.

1. CONSENSUAL SOURCES OF LAW

A consensual source of law is that which needs an evident act by the parties in order to be valid, namely, the signature of a BIT; this means that international legal obligations must always be shown to rest upon some tangible element of consent on the part of the state that is bound by it.¹³ By expressing consent to a treaty a party is expressly accepting said treaty as a formal source of law, and also, tacitly accepting the rules considered to be part of the customary international law. These two are referred to as consensual sources of law, because previous consent by the parties is always required.

One of the first indications of the existence of the idea of a consensual source of law can be seen in a resolution by the Permanent Court of International Justice (PCIJ) in the *Lotus* case, where the Court stated that “international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law”.¹⁴ This is also usually referred to as the consensual theory.¹⁵

¹² Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 56 Seventh revised edition, Routledge, 2002.

¹³ Hersch Lauterpach, *The development of international law by the International Court of Justice*, p. 155-223 London, 1958.

¹⁴ S.S. *Lotus*. (France v. Turkey), 1927 PCIJ, Series A, No. 10. http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/ . Last visited, March 2010.

¹⁵ Malanczuk *supra* note 12 p. 47.

On the other hand, the non consensual sources constitute the generally accepted notions of international law. They help the adjudicator when it comes to interpret a treaty, and if that interpretation is not to be pure discretion, some guidance is needed,¹⁶ and is usually provided by the non consensual sources. Among these are the general principles of law, natural law, *jus cogens* and equity. Their main characteristic is that even though they might not be expressly stated in the treaty an adjudicator can and sometimes should take them into account, since they are part of general international law.

Among consensual and non consensual sources, the former are regarded as stronger since the will of the parties played an active role in its acceptance, and, while there is no formal hierarchal order of sources, in general international law treaties and custom are given the same importance, even though a treaty is only binding to the signatory parties, whilst a rule of customary international law binds all states unless there is some local custom or persistent and effective objection.¹⁷ Still, if there is a clear conflict, treaties prevail over custom and custom prevails over general principles and the subsidiary sources.¹⁸

In the case of investment arbitration, the basic formal source of law would be the BIT or the chapter in a FTA, complemented by customary international law, and, if there is still need to interpret a provision, the non consensual sources of law should be applied by the adjudicator. However, the connection of substantive protections made in some BITs to general international principles or to customary law creates uncertainty and requires the adjudicator to separate each one into two categories, this is, first as sources of law and secondly as merely interpretation guidelines.

2. THE NON CONSENSUAL SOURCES OF LAW

The focus of this segment is to analyze the sources of law that are not within those listed in Article 38, but are still often considered to be the origin of rules of international law,

¹⁶ Janis & Noyes, *supra* note 8 p. 92.

¹⁷ Dixon & McCorquodale, *supra* note 11 p. 37.

¹⁸ Encyclopedia of Public International Law, edited by R. Bernhardt, *Customary International Law*, p. 899, EPIL I, 1992.

such as natural law, equity, *jus cogens*, i.e., the non consensual sources, and also the resolutions of international organizations.

- a. Natural law was commonly considered to include the fundamental principles of law, and was originally regarded as having a divine origin and as an automatic consequence of men living in a society capable of understanding that certain rules were necessary for its survival.¹⁹

The theory of natural law has a long tradition; however, nowadays it is not accepted by many people outside the Roman Catholic Church,²⁰ and it has even been largely replaced by the notion of *jus cogens* or compelling norm.²¹

- b. *Jus cogens* is a concept used to describe a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”;²² *jus cogens* constitutes the only limitation to the will of the parties in an international agreement. No provision that goes against a rule of international law considered to be *jus cogens* can be included in a treaty, and even if it is, it will not be considered valid or binding to any of the parties.
- c. Equity is often used as a synonym of justice, additionally, those who regard equity as a source of international law often appeal to natural justice²³ in order to strengthen their argument. In recent times the meaning of equity has been discussed in mainly two fields, the first one is the application of principles of equity by the ICJ in the delimitation of maritime boundaries between states,²⁴ and the second one is the claim of developing countries for a new international economic

¹⁹ Malanczuk *supra* note 12.

²⁰ Mark W. Janis, *The influence of Religion on the Development of International Law*, 1991.

²¹ Janis & Noyes, *supra* note 8 p. 138.

²² Vienna Convention on the Law of Treaties, Art 53. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations Treaty Series, vol. 1155, p. 331.

²³ M. Akehurst, *Equity and General Principles of Law*, p. 801, ICLQ 25, 1976.

²⁴ L.D.M. Nelson, *The roles of Equity in the delimitation of Maritime Boundaries*, 837-58, AJIL 84, 1990.

order which should be based on equitable principles to achieve a fairer distribution of wealth.²⁵

In any case, notions of equity are often inherent to the drafting and concluding of a treaty, and, in the event that an interpretation and application of its provisions is required, the adjudicator will most likely consider equity, maybe not as a source of law, but generally as a fundamental notion of fairness.

- d. As to the resolutions of international organizations, while they do not constitute a recognized source of law, their resolutions have a *de facto* importance to the international community.

For instance, a resolution of the UN General Assembly can be evidence of a customary rule (since it reflects the practice and *opinio juris* of the member states that voted it, and vice versa, this is, it would probably have the same effect if many states were opposed, namely, its value as a customary rule will be reduced), international organizations often have entities that are not composed of representatives of member states, in this case the practice of this entity can be deemed as constituting a source of international law.²⁶

Moreover, sometimes an international entities, such as the UN Security Council, can be authorized to make decisions binding to other states. The question is whether such decisions should be treated as a separate source of law, because the power to take them is granted by the creating treaty of the organization, e.g., the IMF when taking binding decisions on the maintenance or alteration of exchange rates or depreciation of currency.²⁷

The resolutions of international organizations and arbitral tribunals have a particular importance in the field of investment arbitrations. This is due to the fact that even when

²⁵ Malanczuk, *supra* note 12 p. 56.

²⁶ *Id.* p. 52.

²⁷ Article 4, section 3 of the Agreement of the International Monetary Fund establishes the power of the Fund to “exercise firm surveillance over the exchange rate policies of members, and shall adopt specific principles for the guidance of all members with respect to those policies”
<http://www.imf.org/external/pubs/ft/aa/aa04.htm> Last visited: March 2010

the notion of *stare decisis* is not formally acknowledged, every resolution still needs to be coherent with the preexisting legal system and do not unreasonably contradict a previous award. Furthermore, it has sometimes been considered that “cases are indeed the most important source of modern international investment law”.²⁸

3. THE BINDING NATURE OF INTERNATIONAL AGREEMENTS

When a State decides to take part in an international agreement, it must do so with the understanding that non compliance with any of the obligations established in said agreement will originate the right to the harmed party to seek restitution for any loss or damage the violation to the agreement may have caused.

In international investment law BITs are the most common form of agreements. This type of treaties involve two parties that individually negotiate the rights and obligations that are going to be granted to the investments made in their territory by investors of the other contracting party.

The binding nature of treaties is also stipulated in Article 26 of the Vienna Convention on the Law of Treaties, said article states that, “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.²⁹

In this context, it is not up to the parties to decide which obligations to fulfill and which to disregard; the only way the application of international law can be effective is through the existence of an enforceable instrument, that is going to be interpreted and applied by an organization or ad hoc tribunal, when a party does not comply with the agreement or secondary norms.

In sum, this chapter sets the starting point for the obligations contained in every international agreement and in particular recognize the fact that the establishment of regulated sources of law provide certainty to the international legal system and assure the

²⁸ Gabriel Cavazos Villanueva, *The fair and equitable treatment standard in international investment law: the Mexican experience*, p. 68, VDM Dr. Mueller 2008.

²⁹ See *supra* note 22.

consistency of the juridical protections granted by a BIT, in spite of any geographical boundaries.

The next chapter deals with the general principles of law, as a recognized source of international law and as a guideline for the interpretation of some Mexico-EU BITs. Explaining also the principles of international law, as procedural instruments, and the recognized standards for protection of investments as causes of action in investment arbitration.

CHAPTER III. GENERAL PRINCIPLES OF LAW

The general principles of law constitute a source of law, pursuant to article 38 of the ICJ statute. It is considered that their main purpose is “to fill gaps in treaty law and customary law”.³⁰

As to the content of this source of law, there are two distinctive directions the first establishes that it refers to the general principles of international law; the second one establishes that it means general principles of national law. However, there is no reason why it should not mean both; the greater the number of meanings which the phrase possesses, the greater the chance of finding something to fill the gaps in treaty and customary law.³¹

However, if we refer to the first concept (general principles of international law), then, they are not so much a source of law, but a method to use and interpret existing sources, extending rules by analogy, inferring the existence of broad principles from more specific rules by means of inductive reasoning. According to the second definition (general principles of national law), gaps in international law may be filled by borrowing principles

³⁰ Malanczuk, *supra* note 12 p. 56.

³¹ *Id.* p. 48.

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³⁰ Malanczuk, *supra* note 12 p. 56.

³¹ *Id.* p. 48.

which are common to all or most national systems of law, specific laws may vary from one country to another, however, general principles will remain the same.³²

One example of the first interpretation was conducted in the *Plama Consortium v. Bulgaria*³³ case, where the tribunal considered that the investor had acted contrary to the principle of good faith, the principle of *nemo auditor propriam turpitudinem allegans* (nobody can benefit from his own wrong) and the principle of international public policy. Here, the tribunal considered the principles as general conducts expected from a subject of international law, as opposed to a source of law.

In any case, most of these principles will be based on natural justice common to most legal systems, e.g. the principle of good faith, estoppel, proportionality, and may also refer to *jus cogens*.³⁴ Nonetheless, a real transplantation of domestic law principles to the international level will be limited to a number of procedural rules, such as the right to a fair hearing, *in dubio pro reo*, denial of justice or exhaustion of local remedies,³⁵ the mechanism by which such transformation takes place goes through the mind of the international judge or arbitrator who decides in a particular case.³⁶

Also, when a party decides to rely on a general principle of law as a source of law, it must be proven that this principle is common to most or all legal systems. This can be achieved by two methods; the first would be by “comparativism” which involves a major comparative analysis testing common principles from as many domestic legal systems as possible, e.g., in the *Case Concerning Right of Passage over Indian Territory*, Portugal researched over 64 state’s domestic legislatures trying to establish a general principle of

³² *Idem*.

³³ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, award of August 27, 2008, at. 144.

³⁴ K. J. Partsch, *International law and municipal law*, EPIL II, 1995. Cited by Malanczuk *supra* note 12.

³⁵ S. Verosta, *Denial of Justice*, EPIL I, 1992. Cited by Malanczuk *supra* note 12.

³⁶ Malanczuk *supra* note 12 p. 49.

law.³⁷ However, this kind of analysis raises too many methodological questions to be deemed as effective.

Another approach would be the “categorist” view, which rejects the comparative project, and instead proposes to invoke as general principles those domestic norms that are, in the eye of the decision-maker, inherently good and necessary ingredients of ant functioning legal system.³⁸

In any case, it can be assumed that a general principle of law would already exist, whether in treaty or customary norms, in which case they would already be sources of law, therefore, the more plausible, useful and hence widely accepted understanding of general principles ties this concept to basic legal principles commonly found on domestic legal systems.³⁹

1. GENERAL PRINCIPLES OF LAW AND PRINCIPLES OF INTERNATIONAL LAW

Mexico-EU BITs contain provisions which refer to the principles of international law as applicable law when interpreting the treaty,⁴⁰ therefore, a common question is whether the general principles of law are equal to the principles of international law.

This matter was addressed in the case of *Gulf of Maine*, where the ICJ stated that, “the association of the terms rules and principles is no more than the use of a dual expression to convey one and the same idea, since in this context ‘principles’ clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term ‘principle’ may be justified because of their more general and more fundamental character”.⁴¹

³⁷ *Right of passage over Indian territory* (Portugal v. India), 1960 ICJ Rep, 6 at 11-12 (Portuguese final submissions).

³⁸ John H. Currie, Craig Forcese & Valerie Oosterveld, *International Law, Doctrine, Practice and Theory*, P. 150, Irwin Law, 2007.

³⁹ *Id.* p. 145.

⁴⁰ E.g. the Mexico-Germany BIT. “Article 18. *Applicable Law*. A tribunal established under this Section shall decide the dispute in accordance with this Agreement and applicable rules and principles of international law.” <http://treaties.un.org/Pages/showDetails.aspx?objid=080000028008ae06> Last visited: March 2010.

⁴¹ ICJ Reports (1984), pp. 246, 288-289 (para. 79).

This means that whatever language is used to refer to the principles of law, they must still be understood as containing the same elements, even while the concept is referred to as general principles or general principles of law or just principles of international law.

However, even while the lexical differences may not create a separate set of principles if we consider them as sources of law, as we explain in the following section, the majority of Mexico-EU BITs refer to principles of law as applicable law, which entails that those BITs not only recognize the character of the principles as sources of law, but also acknowledge their procedural aspect.

2. THE PRINCIPLES OF INTERNATIONAL LAW AS APPLICABLE LAW

Almost all⁴² of the BITs concluded between Mexico and EU Countries contain a provision that deems the rules and principles of international law as applicable law when solving a dispute, for example, the Mexico-United Kingdom BIT,⁴³ which states the following:

“ARTICLE 17. Applicable Law. 1. A tribunal established in accordance with this Section shall decide the submitted issues in dispute in accordance with this Agreement and the applicable rules and principles of international law.”

At first, this would seem to imply that, regardless of the reference made to FET or FPS in a particular BIT, a tribunal must consider them in accordance with the applicable principles of international law, which would mean that no standard is ever to have an autonomous interpretation.

However, this type of provision should only be considered to refer to the principles deemed as procedural principles.

⁴² The only exception is the México-Netherlands BIT, which establishes that “a tribunal established under this Schedule shall decide the submitted issues in dispute in accordance with this Agreement and the applicable rules of law”, this is, this BIT does not set any parameters as to what would be included and what would not. http://www.unctad.org/sections/dite/jia/docs/bits/netherlands_mexico.pdf Last visited: March 2010.

⁴³ http://www.unctad.org/sections/dite/jia/docs/bits/UK_Mexico.pdf Last visited: March 2010.

This is, even while every article should be an integral part of the agreement, this particular one sets a condition for its applicability, this is, the existence of a dispute, meaning that the rules and principles of international law are applicable law only when a dispute arises, but not as a “tool” to construe substantive standards. In other words, the principles of international law should not be used as sources of law but as procedural basic conducts.

In order to analyze this idea, the following section addresses the differences between a general principle of law and a principle of procedural law.

3. DISTINCTION BETWEEN GENERAL PRINCIPLES OF LAW AND GENERAL PRINCIPLES OF PROCEDURAL LAW

The purpose of this section is to identify the differences between a general principle of law, i.e., a principle which contains substantial elements, and a general principle of procedural law, namely, a principle which only refers to the procedural aspect of the law, e.g., those mentioned in section 2, which are explained later in this section.

The first task is to define a general principle of law, which is a general normative proposition considered to be expressive of the ratio of a series of more detailed rules,⁴⁴ therefore, a principle expresses an idea of general legal value, without referring to the conditions of its applications or its legal effects.⁴⁵ Thus, clearing the path for the existence of general procedural principle, which will refer to the conditions to apply the substantive elements contained in a general principle.

In the same context, a general principle constitutes a source of law, and due to its general character it allows for a single principle to be the origin of one or more rules, e.g. the principle of good faith, which can be a derivation of *pacta sunt servanda*, normative acquiescence, abuse of discretion, abuse of procedure, etcetera.⁴⁶

⁴⁴ R. Kolb, *Les Maximes Juridiques en Droit International Public: questions historiques et théoriques*, pp. 407-434, RBDI 32, 1999. Cited by Zimmerman A, Tomuschat C, Oellers-Frahm K, *The Statute of the International Court of Justice, A Commentary*, Oxford, 2006.

⁴⁵ Zimmerman, Tomuschat & Oellers-Frahm, *supra* note 44 p. 794.

⁴⁶ *Id.* p. 795.

As for the concept of general principles of procedural law, in its most generic sense, this notion covers all types of judicial, arbitral and quasi-judicial proceedings. In this section the focus is centered on the procedural principles applicable before the ICJ, without any judgment as to their applicability before any other institution or before an *ad hoc* tribunal.

The procedural principles applicable in the sphere of the ICJ are divided into three categories, the first one refers to structural and constitutional principles, such as, the equality of the parties or proper administration of justice; the second category refers to the principles *strictu sensu*, this is, the division of work between the parties and the Court, such as, burden of proof, free choice of evidence presented and free assessment of the evidence, among others; and a third category relates to the substantive principles applicable to the proceeding, the most common are *res judicata*, the principle to state the reasons upon which the decision is based, as well as some other principles of international law applicable to procedural matters.

These principles describe the fundamental behavior expected from the parties engaged in a judicial or arbitral procedure, and emerge from their general duty of good faith owed to one another when engaging in judicial proceedings.⁴⁷ Consequently, those will be the applicable international procedural principles established in most of the Mexico-EU BITs.

4. PRINCIPLES OF INTERNATIONAL INVESTMENT LAW: THE STANDARDS OF PROTECTION TO FOREIGN INVESTMENT

Mexico-EU BITs also contain specific mentions as to the treatment expected from the state to foreign investment. It has been usually considered that in the field of international investment some concepts constitute the basic substantive standards of protection to foreign investment. Among these are NT, MFN, FET, non denial of justice, FPS, the prohibition of unreasonable, arbitrary or discriminatory measures and expropriation.⁴⁸

⁴⁷ *Id* p. 799.

⁴⁸ In the case of *Rumeli Telekom v. Kazakhstan* the tribunal refers to fair and equitable treatment, denial of justice, full protection and security, no unreasonable, arbitrary or discriminatory measures and

Pursuant to this perspective, a distinction can be made between general treatment standards, this is, standards relating to all aspects of the existence of a foreign investment in a host country, and specific treatment standards that address particular issues.⁴⁹

Within the category of general standards of treatment, a further differentiation can be made. First, there are “absolute standards” of treatment, also called non-contingent, this means that they shall apply to investments in a given situation without reference to standards that are applicable to other investments or entities; they establish the treatment to be accorded to the investment without referring to the manner in which other investments are treated.⁵⁰ FET and FPS are examples of absolute standards.

In the case of FET, it constitutes a general standard included in all of the BITs concluded between Mexico and EU Countries. The purpose of this stipulation is to provide the criteria by which the treatment given to an investment made by an investor of the other contracting party will be deemed acceptable or not.

A second category relates to the “relative standards” of treatment. They define the required treatment to be granted to investment by reference to the treatment accorded to another investment. NT and MFN are always regarded as relative standards.⁵¹

Compliance with both relative and absolute standards is essential to the relationship between an investor and the host state. The following section deals with the most common guidelines to interpret the content of an absolute standard.

expropriation as international standards to which the claimant had access through a MFN clause, since the Turkey-Kazakhstan BIT does not explicitly grants FET, subsequently, the tribunal made an individual assessment of each element. Said BIT also establishes the obligation to the state to guarantee treatment “in accordance with due process of law”, (ArticleIII(1)). ICSID Case No. ARB/05/16, Award July 29 2008. at. 567. Also Stephan W. Schill, refers to FET both as a standard of substantive investment protection and as a principle of investment protection, p. 66 *The Multilateralization of International Investment Law*, Cambridge University Press, United Kingdom, 2009.

⁴⁹ Kenneth J. Vandeveld, *U.S. International Investment Agreements*, Oxford 1992.

⁵⁰ UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in investment rulemaking*. United Nations, New York and Geneva, 2007. http://www.unctad.org/en/docs/iteiia20065_en.pdf Last visited: March 2010.

⁵¹ *Idem* .

5. THE INTERPRETATION OF ABSOLUTE STANDARDS: ADDITIVE AND RESTRICTIVE APPROACHES

A common issue when trying to define the scope of protection of an absolute standard, such as FET or FPS, is whether the standard is above the obligations contained in the minimum standard of treatment to aliens or if it is just a part of it. This debate even led to the issuance of a binding interpretation of FET made in 2001 by the NAFTA Free Trade Commission (FTC), after the cases of *SD Myers*⁵² and *Pope & Talbot*,⁵³ which restricted the normative content of FET to the minimum standard of customary law. However, outside the NAFTA context, the two approaches are still subject to much debate.

First, the restrictive interpretation argues that absolute standards of treatment merely affirm the minimum standard⁵⁴ and do not impose obligations to the state beyond those generally acknowledged under customary international law.

Nevertheless, if FET and FPS were part of the international minimum standard of treatment, the test whether these standards have been breached would entail an objective test and the scope of the standards may have to be based on the existing body of customary international law of state responsibility for injury to aliens.⁵⁵ This interpretation would also mean that there is no scope for creating new categories of violation of these standards by tribunals, outside the existing customary international law.⁵⁶

On the other hand, under the additive interpretation, also called the plain meaning view,

⁵² *S.D. Myers, Inc. v. The Government of Canada*. NAFTA Chapter 11 Arbitration Tribunal. UNCITRAL Rules.

⁵³ *Pope & Talbot Inc. v. The Government of Canada*. NAFTA Chapter 11 Arbitration Tribunal. UNCITRAL Rules.

⁵⁴ Stephen Vasciannie, *The fair and equitable treatment standard in international investment law and practice*, p. 104, 70 BYIL 99, 1990.

⁵⁵ See UNCTAD *supra* note 50.

⁵⁶ M. Sornarajah, *The international law on foreign investment*, p. 332. Cambridge University Press, United Kingdom 2004.

the standards will be considered as independent, separate from the minimum standard, imposing obligations and granting rights on their own.⁵⁷

By this approach, FET would be understood as a standard of equity or fairness based on the plain meaning of the term. This means that the test to determine whether the host country has breached the obligation would therefore be to a greater extent subjective than in the case of the international minimum standard. However, following this purely semantic interpretation of the standard could entail the establishment of a low threshold for breaching the obligation.⁵⁸

Interpreting the FET standard according to its plain meaning can also have more than one significant implication. For example, the violation of any other obligation included in the BIT would also mean that the host country has somehow mistreated the foreign investor, which can consequently constitute a violation of the FET standard.⁵⁹

Under this approach, tribunals may also take into account all that should be considered equitable in an investor-state relationship when resolving a dispute; which constitutes a significant difference from a restrictive interpretation that would only consider equity as a background norm.⁶⁰

⁵⁷ Theodore Kill. Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations, Michigan Law Review, March 2008. 106 Mich. L. Rev. 853.

⁵⁸ See UNCTAD *supra* note 50.

⁵⁹ One interpretation that reflects this view was done by the tribunal in *Metalclad v. Mexico* by stating that: "99. Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA", and "101. The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105." *Metalclad v. United Mexican States*, ICSID case no. ARB(AF)/97/1, award of August 30 2000, at. 99 – 101.

⁶⁰ Theodore Kill *supra* note 57.

A third path would be to combine the two interpretations, and to conclude that the protections afforded under an additive interpretation are equal to those under the minimum standard of treatment of aliens under customary international law; however, this interpretation overstates the substance of the latter standard and should not be considered to represent an accurate depiction of customary law in investment disputes.⁶¹

This debate was particularly addressed in the case of *Azurix Corp. v. Argentina*,⁶² pursuant to the Argentine-USA BIT, which connected FET to international law. Since the BIT did not include a definition of FET the tribunal had to analyze whether it meant the minimum standard required by customary law or whether it represented an independent, self-contained standard, which must be given its plain meaning pursuant to the general principle for interpreting treaties in accordance to Article 31 of the Vienna Convention.⁶³

The claimant argued that FET is a separate obligation from the minimum standard and based its arguments, among others, on a position paper issued by UNCTAD on the meaning of FET, which reached the conclusion that “these considerations point ultimately towards fair and equitable treatment not being synonymous with the international minimum standard. Both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but 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. Where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and inequitable.”⁶⁴

In the end, the tribunal considered that the text of the BIT reflected a positive attitude towards investment, using words such as “promote” and “stimulate” foreign investment, in addition to the fact that the parties to the BIT recognized the role that FET played in

⁶¹ Ian Brownlie, *Principles of Public International Law*, p. 502-503. 6th ed. 2003.

⁶² *Azurix Corp. v. The Argentine Republic* ICSID case ARB/01/12, Award 14 July 2006.

⁶³ *Id.* At. 324.

⁶⁴ UNCTAD, *Fair and Equitable treatment*, p. 40, New York and Geneva, 1999 . Available at: <http://www.unctad.org/en/docs/psiteiitd11v3.en.pdf>. Last Visited March 2010.

maintaining a stable framework for investment and maximum effective use of economic resources, therefore FET could not be constricted to the obligations enclosed by the minimum standard of treatment to aliens. The Tribunal also concludes that the wording of the BIT “permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law.”⁶⁵

However, there is still not a uniform criteria, some tribunals have disagreed with this view and have considered that the content of FET is limited to the minimum standard of treatment established by customary law, as we are going to explain in chapter VI section 3.

In sum, a clear path does not already exist, nonetheless, any extreme divergence into the restrictive or additive approach would mean the impairment of the rights of one for the parties. Therefore, a middle ground seems to be the more rational approach, nonetheless, widely dependent on the specific nature of the dispute.

6. AN ABSOLUTE STANDARD OF PROTECTION AS A CAUSE OF ACTION IN INTERNATIONAL INVESTMENT LAW

Although FET and FPS are often referred to as “principles of international investment law”,⁶⁶ the word principles, as it was previously stated in section 1, denotes a superior hierarchy in a legal system than that afforded to FET and FPS.

FET and FPS are also referred to as “standards”⁶⁷ of investment protection; this gives a whole other meaning and content to the concept. In our view, a standard is merely a

⁶⁵ *Azurix supra* note 62.

⁶⁶ The UNCTAD World Investment Report 2009, in its second part, chapter V, page 189, refers to the principle of fair and equitable treatment as a core provision in most IIAs.
http://www.unctad.org/en/docs/wir2009pt2_en.pdf Last visited: March 2010.

⁶⁷ *PSEG v. Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007 at. 238 “The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate.” Also in the case of *Rumeli Telekom A.S. v. The Republic of Kazakhstan* the tribunal refers to FET and FPS as “international standards”, ICSID Case No. ARB/05/16, award July 29, 2008 at. 567. In the case of Mexico, only two BITs link substantive standards to international law, however, the Mexico-France BIT refers to “international law principles”, while the Mexico-Sweden BIT refers to “relevant international law standards”.

“parameter” or a “threshold”. The main purpose of a standard is to set the limits as for a determined amount of action or inaction required, in this case from the host country, to conduct itself in a manner that always remains between the boundaries set by such standards.

Furthermore, another characteristic of FET and FPS is that they constitute causes of action;⁶⁸ this means, an investor can support a claim on the basis of a breach to said standards of protection.

A principle, on the other hand, constitutes a preexisting legal notion which must be considered impervious to change, such as the principle of good faith or *pacta sunt servanda*. Also, an investor would not be able to base a claim on the violation of a principle of law, since this does not constitute a recognized cause of action.

Thus, a new categorization should be made regarding FET and FPS, since in the scenario of investment arbitration they are clearly standards of protection, not principles, given that not only most claims are based on the breach of a standard, but also their content and fundamental elements are constantly being redefined by arbitral tribunals’ decisions.

Consequently, in our opinion FET and FPS constitute absolute standards of investment protection and as such the content and scope of each largely depends on the particular case and circumstances surrounding the investment.

7. THE RELATIONSHIP BETWEEN EQUITY AND THE GENERAL PRINCIPLES OF LAW

Although equity does not constitute a source of law according to the ICJ statute, it is still regarded as a fundamental notion by the international community, and often classified as a principle of international law.

As such, it has a procedural aspect as well, e.g., in the case of time frames for the compliance with procedural rights and obligations by the parties once the dispute has been taken before an adjudicator, this is, both parties are given the same amount of time

⁶⁸ M. Sornarajah *supra* note 56.

to file their pleadings, consequently, equality is formal only in the sense that the parties are given equal procedural opportunities. Secondly, equity can also be regarded as a constitutional principle of procedure, because “it may indeed require so much as a departure from the rules contained in the constitutive instruments which would, if applied create an improper inequality and affect the fairness of proceedings”.⁶⁹

Furthermore, equity can also be understood as a flexible concept within international law. In Common Law an equity writ usually includes at least two discretionary legal concepts; the first is equity as a background norm, or general principle of law that informs an adjudicator on how to apply the relevant legal norms. The second is equity as a legal norm, or rule of decision. This is a rule that directly controls the outcome of a given dispute. Equity in the former sense should be taken into account in every dispute.⁷⁰ In any case, it generally plays a role in the application of international law, and even the absence of an express authorization to apply it, does not forbid an international tribunal from it.⁷¹

Procedurally, equity can also be applied in three different ways; first, *infra legem*, this is, the application of equity to adapt the law to the facts in a specific case; secondly, *praeter legem*, meaning the use of equity to fill the gaps in the law, or third, *contra legem*, this is, equity as a reason to refuse to apply an unjust law.⁷²

In any case, the fact that tribunals often refer to equity does not mean that it constitutes a formal source of law; adjudicators will only refer to considerations of equity and justice when the law is uncertain.⁷³

As for the third classification, namely, the possibility to decide a dispute solely in accordance to equity or *contra legem*, it is also often referred to as a decision *ex aequo et bono*. This practice is meant to solve complex and long term disputes⁷⁴ that the existing

⁶⁹ Zimmerman, Tomuschat & Oellers-Frahm, *supra* note 44 p. 800.

⁷⁰ Theodore Kill *supra* note 57.

⁷¹ M. Akhrurts, *Equity and General Principles of Law*, p. 801, 25 ICQL 1976.

⁷² *Idem*.

⁷³ Dixon & McCorquodale, *supra* note 11 p. 45.

⁷⁴ Leon Trakman, *The environment and trade: Ex Aequo et Bono: Demystifying an Ancient Concept*, Chicago Journal of International Law, Winter, 2008, 8 Chi. J. Int'l L. 621.

legal instruments and institutions have not been able to solve. However, the authorization to let the adjudicator decide *ex aequo et bono* needs to come from all the parties involved, this is, it is not possible to force a party to comply with a decision arising from a procedure that did not consider the relevant choice of law, previous consent and to some extent substitution of the law, is necessary.

In sum, even while in the field of investment arbitration a decision based purely on equity or *contra legem* would not be possible, equity as a principle and as a general notion of fairness should always be considered when a tribunal analyzes any substantive right of either party.

In the following chapter, the matter of the content of customary international law is addressed, as well as its elements and the normative content and evolution of the minimum standard of treatment to aliens. This analysis is also made in order to define the considerations that will be made by an adjudicator when facing the interpretation of a BIT that restricts the scope of substantive standards to customary international law.

CHAPTER IV. CUSTOMARY INTERNATIONAL LAW

As a source of law, custom constitutes a basic element in the origin of bilateral relations between subjects of international law; Rosenne considers that customary law "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way",⁷⁵ therefore customary law arises from the practices of the states revealed through actions taken by them when dealing with international matters, according to several predetermined rules that constitute the international minimum standard of customary law.

⁷⁵ Shabtai Rosenne, *Practice and Methods of International Law*, p. 55, Oceana Pubns, 1984.

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⁷⁵ Shabtai Rosenne, *Practice and Methods of International Law*, p. 55, Oceana Pubns, 1984.

1. ELEMENTS OF CUSTOMARY LAW

Custom is constituted by two elements, the first is that it must constitute a general practice, and second, that said practice must be accepted as law. This second element is also named *opinio juris* and it refers to the conviction felt by states that a certain form of conduct is required by international law;⁷⁶ these elements were confirmed by the ICJ in the *Nicaragua* case, where it was stated that “the mere fact that states declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law ... the Court must satisfy itself that the existence of the rule in the *opinio juris* of the states is confirmed by practice”.⁷⁷

The existence of these two elements must always be proved when trying to rely on a customary rule of international law.

In other words, the practice of the states has to be proven to be general, but not necessarily unanimous, this is, a state can be bound by a general practice of other states even against its wishes if it does not protest against the emergence of the rule and continues persistently to do so (persistent objector).⁷⁸

As for the second element, in the case of permissive rules, the existence of *opinio juris* can be proved by showing that some states have acted in a certain way, or have not protested that such acts are illegal; in the case of rules that impose duties to the states, it is not enough to show that a State has acted in a certain manner, and that other states have not expressed their opposition, it is necessary to prove that the states regard the action as obligatory.⁷⁹

It has also been emphasized by the ICJ that a claimant state that seeks to rely on a customary rule must prove that the rule has become binding on the defendant state,⁸⁰ as

⁷⁶ Malanczuk *supra* note 12 p. 44.

⁷⁷ *Nicaragua v. USA* (Merits), Judgment of 27 June 1986, at. 184.

⁷⁸ Henry J. Steiner, Philip Alston, Ryan Goodman, *International human rights in context: law, politics, morals*, p. 76, Third Edition, Oxford, 2008.

⁷⁹ Malanczuk *supra* note 12 p. 44.

⁸⁰ *Asylum* case (Colombia v. Peru) ICJ Rep. 1950, 276-7.

a consequence the problem arises when trying to identify when does a determined customary rule becomes binding on a determined state? In this case, it would be necessary to prove that the defendant state has recognized the rule in its own state practice, although recognition for this purpose may amount to no more than failure to protest when other states have applied the rule in cases affecting the defendant's interests.⁸¹

One example of this was the *Fisheries* case, where the ICJ found that a certain rule was not generalized, because the defendant state had never recognized it, the Court held that "the rule would appear to be inapplicable as against Norway, inasmuch as she has always opposed any attempt to apply it to the Norwegian coast".⁸²

Evidence of customary law cannot only be found in the practice of the states, but also in the publications of international lawyers, and in judgments of national and international tribunals. In the case of BITs, the treaty itself cannot be considered as evidence of customary law, even if it contains a provision that is so habitual that it should be regarded as a rule of customary law. If it already existed as a rule of customary law, states would not bother to include it in their treaties. And, even more, the mere existence of identical BITs does not support a corresponding norm of customary law.⁸³

2. WHEN DO PRECEDENTS BECOME A CUSTOMARY RULE OF LAW?

A single precedent cannot be considered to establish a rule of customary law. In an attempt to solve this matter the ICJ in the *Asylum* case suggested that "a rule of customary law must be based on a constant and uniform usage".⁸⁴

Again, in the *Nicaragua* Case, the ICJ held that, "it is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force

⁸¹ Malanczuk *supra* note 12 p. 48.

⁸² *Fisheries* case (UK v. Norway), ICJ Rep. 1951, 116 ICJ, Judgment of 18 December 1951, at 131.

⁸³ Malanczuk *supra* note 12 p. 40.

⁸⁴ *Asylum* *supra* note 80, at. 277.

or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of the States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule".⁸⁵

From this interpretation we can conclude that, in order for the formation of a customary rule to be "blocked" the practice of states must be consistently against the rule that is intended to become a customary rule, in other words, major inconsistencies in the practice prevent the creation of a customary rule.⁸⁶ This was also confirmed by the Court in the *Fisheries Case*, where it was stated that minor inconsistencies do not prevent the creation of a customary rule.⁸⁷

Now, when the practice of states has reached the level of a customary rule of law, it becomes immediately enforceable against those states that recognized such practice as law, and the adjudicator must abide by it when solving a specific case, this is, "when a clearly defined custom exists or a rule established by the continual and general usage of nations, which has consequently obtained the force of law, it is also the duty of a judge to apply it".⁸⁸

3. THE MINIMUM STANDARD OF TREATMENT TO ALIENS

The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing

⁸⁵ *Nicaragua v. USA (Merits)*, ICJ Rep. 1986, at 98, at. 186.

⁸⁶ Malanczuk *supra* note 12 p. 42.

⁸⁷ See *Fisheries case supra* note 82 at. 138.

⁸⁸ Baron Deschamps, *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists*, p. 322, 1920.

with aliens and their property. Some Mexico-EU BITs specifically links the protections afforded under the agreement to the minimum standard.

The international minimum standard sets a number of basic rights established by international law, that a State must always grant to aliens, independent of the treatment accorded to their own citizens; a violation of this norm engenders the international responsibility of the host State and may open the way for international action on behalf of the injured alien provided that the alien has exhausted local remedies.⁸⁹

The American Law Institute in its Second Restatement of Foreign Relations Law of the United States, establishes the content of the minimum standard as follows: “The international standard of justice is the standard required for the treatment of aliens by: a) The applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles and, b) Analogous principles of justice generally recognized by States that have reasonably developed legal systems.”⁹⁰

From this interpretation it can be understood that the minimum standard of customary law may seek to also include the protections granted by international custom, and other sources of law, making for a wide sphere of protection and that much harder for arbitral tribunals to define and identify in a specific case.

Previous arbitral resolutions have dealt with defining the scope of the international minimum standard, and have considered, among others, that the minimum standard includes the following notions:

- a) The administration of justice in cases involving foreign nationals usually linked to the notion of denial of justice;
- b) The treatment of aliens under detention;

⁸⁹ OECD. *Fair and equitable treatment standard in international investment law*, working paper on international investments No. 2004/3, September 2004.

⁹⁰ The American Law Institute’s Restatement (Second) of Foreign Relations Law of the United States, par. 165.2, 1965.

c) Full protection and security; and

d) The way the right of expulsion is carried out⁹¹

As we have stated, on July 21st, 2001 the NAFTA FTC⁹² issued an interpretation which restricted the scope of the FET standard to customary international law,⁹³ furthermore, some other international documents as the 2004 US Model BIT,⁹⁴ and the US Free Trade Agreements with Australia, Central America, Chile, Morocco and Singapore⁹⁵ also restrict the scope of the FET standard.

The UNCTAD noted that an unintended side-effect of such an approach may be that those BITs that allow for an unqualified FET will be interpreted as providing for the “plain meaning” approach on the basis that if the contracting parties had intended something different, they would have explicitly stated that the FET standard does not grant investment protection beyond customary international law.⁹⁶

4. THE *NEER* CASE

In investment arbitration a common reference made by arbitral tribunals to define the content of the minimum standard is the 1926 *Neer v. Mexico* case,⁹⁷ where the

⁹¹ See OECD *supra* note 89.

⁹² Available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en>.

⁹³ Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

⁹⁴ www.state.gov/e/eb/rls/prsr/2004/28923.htm. Last visited: March 2010.

⁹⁵ “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. For greater certainty [the previous paragraph] prescribes the customary international minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments ...”.

⁹⁶ See UNCTAD *supra* note 50.

⁹⁷ United Nations, *Reports of International Arbitral Awards*, 1926, IV, pp. 60ff. *Neer Claim United States v. Mexico*, General Claims Commission 1926.

Commission had to deal with the issue of the international minimum standard. This claim was presented to the US Mexico Claim Commission by the United States on behalf of the family of Paul Neer, who had been killed in Mexico in obscure circumstances, the claim held that the Mexican Government had shown lack of diligence in prosecuting those responsible, the Commission found that the Mexican government did not directly violated the international minimum standard, stating the following:

“the propriety of governmental acts should be put to the test of international standards, the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial”

The *Neer* decision has been referenced in many contemporary cases as the basis for defining what actions or omissions can be considered to be a violation of the FET standard.

This however is widely criticized, mainly because the standard, as set in *Neer*, constitutes in most cases a highly unreachable stage.

Nonetheless, some tribunals still continue to apply the *Neer* test as the measurement to determine a violation of the minimum standard according to customary international law,⁹⁸ however, several others do consider that the standard has evolved.⁹⁹

One example of the use of the *Neer* standard is the case of *ELSI*,¹⁰⁰ where the ICJ concluded that “Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum*

⁹⁸ *Glamis Gold Ltd. v. United States of America*, UNCITRAL, award 14 May 2009.

⁹⁹ *Mondev International Ltd v. United States*, Award, ICSID Case No ARB(AF)/99/2; IIC 173 (2002).

¹⁰⁰ *Ellettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*. Judgment of July 20 1989.

case, when it spoke of "arbitrary action" being "substituted for the rule of law" (*Asylum, Judgment, I.C.J. Reports 1950*, p. 284). It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light".¹⁰¹

Nonetheless, in the case of *Pope and Talbot*¹⁰² the tribunal noted that the ICJ in the *ELSI* case had moved away from the *Neer* formulation by leaving out the requirement that "every reasonable and impartial person be dissatisfied" among other things. This highlights the evolution towards a higher threshold of investor protection against state conduct.

Following this approach, the tribunal in *Mondev v. U.S.A.*¹⁰³ rejected the standard as formulated in the *Neer* case and stated that "the content of the minimum standard today cannot be limited to the content of customary international law as recognized in arbitral decisions in 1920s".

Moreover, it cannot be concluded that the *Neer* tribunal intended to provide a definitive statement on the normative content of FET, the decision constitutes merely an interpretation of what was considered fair and equitable in that particular case at that particular time. In the *Neer* case the U.S. Mexican Mixed Claims Commission focused their efforts on the concept of denial of justice and made no statement on fairness or equity in its resolution, this is, the *Neer* interpretation does not constitute a decision on FET in the investment field.¹⁰⁴

¹⁰¹ *Id.* at 128.

¹⁰² See *Pope & Talbot supra* note 53.

¹⁰³ *Mondev International Ltd. v. United States of America*. ICSID case ARB(AF)/99/2, award October 11, 2002

¹⁰⁴ See *Saluka v. Czech Republic, Partial Award, PCA-UNCITRAL Arbitration Rules; IIC 210 (2006), March 17, 2006*: "The *Neer* formula ... reflects the traditional, and not necessarily the contemporary, definition of the customary minimum standard, at least in certain non-investment fields" *Investment Claims- IIC, 210 2006*, Oxford University Press 2010, at. 295.

Also, the fact that Tribunals are considering elements not envisioned in the time of the *Neer* decision, such as the intention of the investor¹⁰⁵ as well as his legitimate expectations,¹⁰⁶ constitutes evidence to the idea that the concept has evolved and what was considered a violation of FET back then cannot be the standard currently applicable, the conduct deemed as a violation to FET may not be outrageous, however that does not mean that the host state has lived up to its obligations, today an underhanded measure can cause even bigger damage than an evident breach of a BIT.

However, in the case of *Glamis v. U.S.A.*¹⁰⁷ the tribunal found that the claimant had failed to discharge the burden of proving that the customary international law standard had evolved since it was articulated in the *Neer* case. It determined that proving a violation of the FET standard “requires an act that is sufficiently egregious and shocking, a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or manifest lack of reasons”.¹⁰⁸

In conclusion, there is still not a clear and universal criteria regarding the content of the minimum standard. Also the notion of *opinio juris* still continues to be unresolved and raises some questions. For example, in the case of Mexico, would it be possible to assert that the binding interpretation of FET made by the NAFTA FTC constitutes an expression of *opinio juris*? And in that case, would it be possible to then, interpret all the obligations contained in the BITs in which Mexico is a part of as restricted to customary law standards?

The following chapter constitutes the first approach to FET. Initially, a concept for the standard is provided, followed by an analysis of FET under the principles of international law, then under customary law, and finally as a self-contained standard.

¹⁰⁵ *Azinian et al v. United Mexican States*, ICSID case ARB(AF)/97/02, Award of November 1st 1999.

¹⁰⁶ *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB (AF)/99/2) (NAFTA), Award 11 October 2002, at 116-117, 125. *Mondev* at 125 cited in *Azurix supra* note 61, at 368; *Siemens AG v. Argentina* (ICSID Case No. ARB/02/8) (Germany/Argentina BIT) Award 6 February 2007 at. 295.

¹⁰⁷ *Glamis supra* note 98.

¹⁰⁸ *Id* at. 22.

CHAPTER V. THE FAIR AND EQUITABLE TREATMENT STANDARD

SECTION A. GENERAL NOTION OF THE STANDARD

FET has evolved throughout the development and evolution of international investment arbitration and currently constitutes a fundamental concept within the investment protection field,¹⁰⁹ every BIT concluded between Mexico and EU Countries contains a provision relating to FET and the kind of treatment expected from the host state to foreign investment.

Investment arbitration has also grown in the past years. In December 2008, Mexico had 18 claims against it before the ICSID, making it the second highest, just after Argentina.¹¹⁰ Adding to this, the uncertainty as to the content of FET could impose a considerable burden for the state, since it may not be clear if its actions are within the parameters of the obligations set by the standard in a BIT.

A survey made by UNCTAD¹¹¹ of the existing BITs identified the following seven different categories for the interpretation of the FET standard:

1. The FET standard without any reference to international law or any further criteria;
2. The FET clause that sets national treatment or most favored nation treatment as the minimum standard for FET;

¹⁰⁹ This idea is shared by Christoph Schreuer in Standards of Investment Protection, 21 September 2007, stating that: "The pivotal position, once occupied by protection from expropriation, has been taken over by fair and equitable treatment (FET). For the period since the beginning of 2006 I have been able to make out 13 awards dealing with fair and equitable treatment. In eight of these the claimants have successfully convinced the tribunals that there had been indeed violations of that standard. It's clear that FET is currently the most promising standard of protection from the investor's perspective. In an investment dispute the burden of proof for an investor to demonstrate a violation of FET is lighter than to establish an expropriation. Not to invoke FET where it is available under an applicable treaty would probably have to be considered as amounting to malpractice." <http://www.univie.ac.at/intlaw/93.pdf> Last visited: March 2010.

¹¹⁰ UNCTAD (2009), Latest developments in Investor-State Dispute Settlement IIA MONITOR No. 1, http://www.unctad.org/en/docs/webdiaeia20096_en.pdf Last visited: March 2010.

¹¹¹ See UNCTAD *supra* note 50, p. 30-33.

3. The FET obligation that appears in the same clause as the duty to abstain from impairing the investment through unreasonable or discriminatory measures;
4. The FET standard that is linked to the principles of international law;
5. The FET standard that is linked to international law but contains instances of conduct that is an impediment to that standard;
6. FET that makes the standard contingent on the domestic legislation of the host country; and
7. The FET standard that refers to the minimum customary international law standard.

For the purposes of this paper, and taking into consideration the BITs concluded between Mexico and EU countries, we will concentrate on numbers 1, without any reference to international law or any further criteria; number 4, linked to the principles of international law; and number 7, linked to the minimum customary international law standard.

1. FET AS A TREATY CLAUSE

The obligation to grant FET to investment is one of the most common clauses included in BITs and constitutes a basic right to the investor and often a burden to the Host State when the time comes to prove that no violation to the standard has existed, due to the low threshold the standard has been held to.

In a recent study published by UNCTAD it was stated that “Fair and Equitable Treatment remains the most relied upon and successful basis for a treaty claim. In all 13 decisions on the merits rendered in 2008, a claim based on FET was addressed by the tribunal”.¹¹² And even international organizations such as the Multilateral Investment Guarantee Agency

¹¹² See UNCTAD *supra* note 110, p. 8.

(MIGA) require that the host state provides FET to investments before guaranteeing an investment.¹¹³

But despite the frequent use of the concept in BITs, it remains unclear and it is still subject to a wide variety of interpretations, which can vary due to several elements.

Arbitral tribunals have taken upon themselves the task to identify elements or conducts that must be regarded and protected by the FET standard. The following sections establish the elements of FET as identified by several tribunals.

2. ELEMENTS OF FET

Some commentators have recognized that the most important elements resulting from the FET standard are transparency, stability and the investor's legitimate expectations, as well as compliance with contractual obligations, procedural propriety due process, good faith and freedom from coercion and harassment.¹¹⁴

Another element that has been suggested by authors,¹¹⁵ and even considered by arbitral tribunals¹¹⁶ when analyzing FET is the conduct of the investor. The intended consequence of this is that both, the consideration of the conduct of the host state and the conduct of the investor, generate a balance between the rights of the investor against the rights of the state as a sovereign entity.

¹¹³ The Multilateral Investment Guarantee Agreement (MIGA), article 12(d) states that MIGA must be satisfied that the host country provides fair and equitable treatment and legal protection for the investment before it will provide investment guarantees.

¹¹⁴ Christoph Schreuer, *Fair and Equitable treatment*, Zurich, 7 March 2008. http://www.univie.ac.at/intlaw/pdf/99_fair_equit_treatm_zuerich.pdf Last visited: March 2010.

¹¹⁵ Peter Muchlinski *Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, 55 ICLQ 527, 2006. He provides the following classification of the investors' obligations: a) A duty to refrain from unconscionable conduct; b) a duty to invest with an adequate knowledge of risk; and c) a duty to conduct business in a reasonable manner. Cited by Gabriel Cavazos Villanueva in *The fair and equitable treatment at*. 80-81.

¹¹⁶ In the case of *Azinian. v. Mexico* the tribunal considered the investor's conduct and misrepresentation towards the Mexican government in their award. See *supra* note 105 at. 104.

At any rate, FET is a concept that is constantly evolving and as such it needs to be assessed on a case by case basis.¹¹⁷ Due to its nature “it is sometimes not as precise as would be desirable, yet, it clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards”.¹¹⁸

The most important effort to define and categorize the elements of the standard has been made by the arbitral tribunals in charge of the interpretation of investment treaties. Their resolutions shed some light into the standard and into what can be deemed to contravene it. The next section establishes some of the elements of FET contained in their awards.

3. THE CONTENT OF THE STANDARD AND LIMITATIONS TO FET MADE BY ARBITRAL TRIBUNALS

The existence of a violation to FET is one of the most common claims addressed by arbitral tribunals¹¹⁹, therefore, many have attempted to define the scope of the standard in order to determine whether the host state has breached or not an international agreement containing this provision.

Recently, in the case of *Biwater v. Tanzania*,¹²⁰ the tribunal found that public announcements denigrating the investor’s performance were in violation of the FET standard. The tribunal stated that the investor “still had a right to the proper and unhindered performance of the contractual termination process [and] the Republic’s public statements at this time constituted an unwarranted interference in this”.¹²¹

In the case of *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*, the tribunal noted that the FET standard includes, among others, the following ideas:

¹¹⁷ In the case of *Edf Limited v. Romania*, the tribunal stated that “Fair and equitable treatment is an objective legal standard, the observance of which is heavily fact-dependent and case-specific”, ICSID Case No. ARB/05/13, Award October 8, 2009.

¹¹⁸ *PSEG v. Turkey*, *supra* note 67, at. 239.

¹¹⁹ See UNCTAD *supra* note 110.

¹²⁰ *Biwater Gauff Limited v. Tanzania*, ICSID case No. ARB/05/22, award of July 24, 2008.

¹²¹ *Id* at. 627.

- (a) The state must act in a transparent manner;
- (b) The state is obliged to act in good faith;
- (c) The state's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;
- (d) The state must respect procedural propriety and due process, and;
- (e) The investor's reasonable and legitimate expectations".¹²²

However, despite several awards making reference to the host state's obligations to maintain a stable and predictable legal framework and to protect the investor's legitimate expectations, a few tribunals have taken steps to clarify, and sometimes limit these obligations.¹²³

For example, in the case of *Duke Energy et al. v. Ecuador*¹²⁴, after acknowledging that the investor's expectations and the stability of the legal and business framework constitute elements of FET, the tribunal emphasized the following limitation:

"To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment.¹²⁵ The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest".¹²⁶

¹²² *Rumeli Telekom supra* note 48 at. 609.

¹²³ *See UNCTAD supra* note 110.

¹²⁴ *Duke Energy et. al. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, award of August 18, 2008.

¹²⁵ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* ICSID case ARB (AF)/00/2, award of May 29, 2003, at. 155.

¹²⁶ *Duke Energy, supra* note 124 at. 340.

Also, in the case of *Continental Casualty Co. v. Argentina*,¹²⁷ the tribunal listed the following factors to be included in the concept of legitimate expectations under the FET standard:

- (a) The specificity of the undertaking allegedly relied upon;
- (b) General legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*;
- (c) Unilateral modification of contractual undertakings by governments, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve more scrutiny, in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance; and
- (d) Centrality to the protected investment and impact of the changes on the operation of the foreign owned business in general including its profitability is also relevant.¹²⁸

However, it has to be considered that all investment treaties are different in several aspects, but still, the same substantive rights are almost always included, regardless of the background of the contracting parties.

For example, all the BITs concluded between Mexico and EU Countries include the obligation to provide FET to all the investments made by the other contracting party, making it fundamental in the investor-state relationship. Furthermore, those BITs also often include other non-discrimination provisions, such as NT and MFN treatment, they

¹²⁷ *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008.

¹²⁸ *Id.* at. 261.

require FPS, contain restrictions on direct and indirect expropriation, and grant free transfer of capital in the context of foreign investment activity.¹²⁹ And while the writing might not be similar, the idea behind them seems to be the same.

Nevertheless, commentators and tribunals continue to emphasize that specific attention has to be paid to the differences in the wording.¹³⁰ One example of this is the Tribunal in the case of *AES Corporation v. Argentina*, which stressed that the “striking similarities in the wording” of BITs should not lead to a reference to the interpretation of other treaties that “dissimulates real differences in the definition of some key term concepts ... or for the precise definition of rights and obligations for each party”.¹³¹

In the case of the Mexico-EU BITs, FET is not understood in the same way, because the concept is linked to at least three different ideas, namely, the principles of international law, the minimum standard of treatment and FET as a self-contained standard. The reference made in each case will be transcendental when the adjudicator evaluates whether a breach has existed or not.

Thus, analyzing FET under each of the references made by the BITs concluded between Mexico and EU Countries seems necessary, in order to distinguish subtle differences that could mean that a conduct of the state may be deemed as illegal under a determined BIT but within the law under another.

SECTION B. FET IN ACCORDANCE TO INTERNATIONAL LAW PRINCIPLES

In order to have a better understanding of the intended meaning behind the connection of FET to international law principles we must first conceptualize and understand international law. One interpretation is, that international law is “a body of legal rules governing the conduct of States and public or intergovernmental international organizations in their mutual relations, as well as –in rather exceptional circumstances– the conduct of other persons, including in particular individuals, who, for certain specific

¹²⁹ Stephan W. Schill *supra* note 48 p. 74.

¹³⁰ *Id* p. 70.

¹³¹ *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of April 26, 2005, at. 25.

purposes, may be conferred rights or impose duties directly under international law¹³². Also, the American Law Institute has stated that international law “consists of rules of general application dealing with the conduct of States and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or judicial”.¹³³

In the case of investment treaties, although formally executed by the States, they do recognize the investor as a subject of international law, and as the recipient of rights and obligations. To this day, only the Mexico-Sweden BIT¹³⁴ and the Mexico-France BIT connect FET to the principles of international law. The former, however, refers to FET “in accordance with the relevant international standards under International Law”, this constitutes yet another scenario where the concepts “principles” and “standards” appear to be interchangeable.

In the Mexico-France BIT, FET is connected to international law principles, reading as follows:

*“Article 4. Protection and treatment of investments. 1. Each Contracting Party shall undertake to accord in its territory and maritime zone just and equitable treatment, in accordance with the principles of international law, to the investments made by investors of the other Party and to ensure that the exercise of the right so granted is not impeded either de jure or de facto”.*¹³⁵

This approach for the interpretation of FET seems to widen the range of the standard, since it does not restrict its content but allows for the consideration of all sources of international law. This is, when interpreting FET in accordance to international law, an adjudication should also consider customary international law, general principles of

¹³² Boczek Boleslaw *supra* note 7.

¹³³ Restatement (third) by the American Law Institute of the Foreign Relations Law of the United States, para. 101.

¹³⁴ http://www.unctad.org/sections/dite/ia/docs/bits/mexico_sweden.pdf Last visited: March 2010.

¹³⁵ http://www.unctad.org/sections/dite/ia/docs/bits/mexico_france.pdf Last visited: March 2010.

international law, and every other consensual and non consensual source, since they are all part of general international law.

In this case, the FET standard under international law is, like the minimum standard of treatment of aliens, an absolute standard, however, unlike FET the minimum standard applies as a binding obligation on states under customary international law. States therefore have an obligation to meet the international minimum standard independent of their treaty obligations under BITs or other international instruments.¹³⁶

Several tribunals have also considered that this reference includes, among others, duties imposed on Host States in accordance with State practice, judicial or arbitral case law and other sources of international law.¹³⁷

1. CASES DEALING WITH THE INTERPRETATION OF FET IN ACCORDANCE TO INTERNATIONAL LAW

One case solved by an ICSID tribunal dealing with the scope of FET in accordance with international law was *CMS v. Argentina*.¹³⁸

Article 11(2)(a) of the USA-Argentine Republic BIT provides that:

“Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law”

In this case the claimant asserted that Argentina had violated the standard by failing to provide stability and predictability of the investment environment, with particular

¹³⁶ Ian Brownlie, *Principles of Public International Law* 502-03 (6th ed. 2003).

¹³⁷ *Mondev v. United States*, ICSID case ARB(AF)/99/2, Award of October 11, 2002, at. 119; cited in *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, (NAFTA), Award 9 January 2003, at. 184. Both *ADF* and *Mondev* cited in *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB (AF)/00/3, (NAFTA), Final Award 30 April 2004, at. 96.

¹³⁸ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID case No. ARB/01/8, Award May 12, 2005.

reference to the *CME*¹³⁹ case where it was held that “[The Government] breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest.”

Therefore, tribunal had to define the scope of FET, and in doing so, it also considered the objective of the BIT, and held that “a stable legal and business environment is an essential element of fair and equitable treatment”¹⁴⁰ and also that the standard is “inseparable from stability and predictability”.¹⁴¹

Again, linking FET to international law principles extends the reach for its interpretation, allowing for any norm or provision considered to be a part of the international legal system to constitute a reference point when analyzing FET.

Another case dealing with the interpretation of FET in accordance to international law was *Metalclad v. Mexico*,¹⁴² pursuant to NAFTA Article 1105(1) “each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security”. It is important to point out that the award on this case came out before the binding interpretation from the NAFTA Free Trade Commission, therefore FET was interpreted in accordance to the international law principles.

In this case the investment of *Metalclad*, an American investor, was damaged by the host state’s interference with the development and operation of a hazardous waste landfill in San Luis Potosí, Mexico. The interference was basically the denial of a municipal construction permit citing environmental impact considerations, which prevented *Metalclad* from continuing its activities.¹⁴³

¹³⁹ *CME Czech Republic B.V, v. The Czech Republic*, UNCITRAL Rules, 2001. <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>, at. 611. Last visited: March 2010.

¹⁴⁰ *CMS supra* note 138 at. 274.

¹⁴¹ *Id.* at. 276.

¹⁴² See *Metalclad supra* note 59.

¹⁴³ *Id.* at. 47-51.

In this case the tribunal holds that transparency is a fundamental notion of FET and states that this notion includes “all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement¹⁴⁴” therefore when Mexico denied the municipal permit it “failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment”¹⁴⁵

After the award was issued Mexico challenged it in Vancouver, Canada, the place where the arbitration took place. The British Columbia Supreme Court concluded that the breaches of FET found by the arbitral tribunal, based on lack of transparency, were beyond the scope of the submission to arbitration, since lack of transparency is neither a violation to customary international law nor a violation to NAFTA Chapter 11.¹⁴⁶

After this decision by the Supreme Court, the NAFTA FTC issued its binding interpretation of FET.

In sum, when the treaty makes an express reference to international law principles, it allows for the adjudicator to consider every rule that pertains to the international field. In this respect, even interpretations of legal bodies foreign to a particular jurisdiction, such as the case of the NAFTA FTC¹⁴⁷ in the context of Mexico-EU BITs, can be argued as applicable since it not only can be considered to reflect the opinion of Mexico as to the content of FET, but because also, as a binding resolution issued by a recognized subject of international law, it forms part of general international law.

¹⁴⁴ *Id.* at. 76.

¹⁴⁵ *Id.* at. 99.

¹⁴⁶ Gabriel Cavazos Villanueva *supra* note 28 p. 8.

¹⁴⁷ *See NAFTA FTC Interpretation supra* note 92.

SECTION C. FET LINKED TO CUSTOMARY INTERNATIONAL LAW

Four¹⁴⁸ BITs concluded between Mexico and EU Countries connect FET to customary international law, one example is the Mexico-United Kingdom BIT, which provides the following:

“ARTICLE 3. Minimum Standard of Treatment in Accordance with Customary International Law. 1. Investments of investors of each Contracting Party shall at all times be accorded treatment in accordance with customary international law, including fair and equitable treatment and full protection and security, in the territory of the other Contracting Party”.

As it was previously stated in chapter II, customary law is considered to provide a set of rules of general application. In contrast with the rules of international law, in order to apply the principles of customary international law explicit consent is not always necessary, as it is understood that when a party enters a treaty it does so with the promise of compliance with not only the explicit but the implicit obligations as well.¹⁴⁹

Customary law includes all the rules generally practiced and accepted as law by the international community, and, as we have referred to, it is not easy for a practice to reach the level of a customary rule.

In order for a conduct to be considered as a rule of customary law, it needs to be generally practiced and accepted as law by most states. This concept of customary law has been used for over a century; one of the first resolutions based on customary law arose from a decree issued by the District Court of the United States for the Southern District of Florida condemning two fishing vessels and their cargoes as prize of war.¹⁵⁰ In the case of *The Paquete Habana*, Justice Gray delivered the opinion of the U.S. Supreme Court and stated that the exception of coastal fishing vessels from capture as prizes of war began as “an

¹⁴⁸ The Mexico-Spain BIT, The Mexico-Slovak BIT, The Mexico-Czech Republic BIT and the Mexico-United Kingdom BIT.

¹⁴⁹ Janis & Noyes, *supra* note 8.

¹⁵⁰ U. S. Supreme Court, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900).

ancient usage among civilized nations” and then “gradually ripened into a rule of international law”. This interpretation by the United States Supreme Court reflects the general understanding of customary law that has prevailed to this day.

Therefore, this approach would seem to restrict the scope of the standard, since only those norms widely practiced and accepted by law can serve as an interpretation reference to FET.

This approach also requires that the interpretation of FET is made in accordance with the minimum standard of treatment owed to aliens under customary international law.

However, the statement that FET is equivalent to the minimum standard of treatment of aliens significantly disregards the origin and evolution of the standard as an autonomous legal concept. The simple addition of the standard to a particular BIT proves that it is not part of the minimum standard, but an independent obligation that can be acquired by the State, even more, a norm of customary international law automatically imposes obligations to the State, but a provision such as the obligation to afford FET to foreign investments is negotiated and arises only from the express consent of the parties in a BIT.¹⁵¹

Accordingly, tribunals have found that FET provisions in BITs require governments to maintain transparency, due process, judicial propriety, nonarbitrary conduct, good faith, and, most commonly, fulfillment of legitimate investor expectations and maintenance of a stable legal and business framework in their relations with investors. In our view, these duties extend well beyond a state's obligations towards aliens under customary international law.

¹⁵¹ Theodore Kill *supra* note 57.

❖ **CASES DEALING WITH THE INTERPRETATION OF FET IN ACCORDANCE TO
CUSTOMARY INTERNATIONAL LAW**

Most of the examples of cases where tribunals have had to analyze FET in accordance to customary law have taken place in the context of NAFTA, after the FTC binding interpretation.

One example was *Waste Management v. Mexico*.¹⁵² This claim arises from a concession for the provision of waste disposal services in Acapulco, Guerrero, granted to Acaverde, a Mexican company created in 1994, and a wholly owned subsidiary of Waste Management Inc.

The concession agreement provided that the city would not grant to any other company or person any right or concession inconsistent with the exclusive rights of the concessionaire.

In addition to providing collection services, Acaverde would build and operate a permanent solid waste landfill for the city, which would allow for the closure of two existing temporary sites, the city was responsible for providing a site for this new landfill, and pending the construction of the permanent landfill Acaverde would be given, free of charge, access to one of the existing sites.¹⁵³ The city also received a line of credit from Banobras, a Mexican bank in order to pay for Acaverde's services.

However, before Acaverde began its activities under the agreement, the city issued a regulation for the Rendering of the Public Cleaning Service Concession, which established exclusivity of waste collection services, prohibited dumping of rubbish in the area and provided for enforcement by way of fines.

Waste Management's claim was based among others, on a breach of NAFTA articles 1105, the minimum standard of treatment and 1110, the prohibition to expropriation. The

¹⁵² *Waste Management supra* note 137.

¹⁵³ *Id.* pp. 40-55.

claimant argues that the city failed to comply with the payments and granted permits to third parties that violated the terms of the concession agreement.

The tribunal analyzed FET in accordance to the FTC interpretation, this is, in accordance to the minimum standard of customary international law, and held the following:

“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 candour 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.”¹⁵⁴

This definition establishes two preconditions for a conduct to constitute a violation to FET, first that the conduct is undoubtedly attributable to the state, and second that said conduct translates into an actual damage to foreign investment.

Also, the tribunal holds that a conduct violates FET when is arbitrary, grossly unfair, unjust or idiosyncratic, this elements encompass a wide variety of actions. In other words, each one can be extended beyond its wording, for example, the concept of idiosyncrasy contains the prohibition to violate an international agreement alleging domestic law, and the concept of an arbitrary, grossly unfair, unjust conduct contains elements of not only absolute, but relative standards of treatment that can constitute a violation of FET.

When a BIT links FET to customary law it limits the references for its interpretation to only those rules that have actually reach this rank. This at first would seem to benefit a state since it would only be obligated to abide by the recognized rules of customary international law, which entail very specific and sometimes difficult requirements for their

¹⁵⁴ *Id.* 137 at. 98.

existence. However, interpretations by arbitral tribunals seem to indicate the contrary, concepts such as arbitrariness (which has been defined by the ICJ as a "willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety")¹⁵⁵ and unfairness have been used as a mark to analyze a conduct and whether it violates FET or not, giving a certain advantage to the investor since these concepts can very well be broaden and encompass many elements that can cause a tribunal to consider that the state has breached its obligations under the BIT.

SECTION D. FET AS A SELF-CONTAINED STANDARD

Several BITs concluded between Mexico and EU Countries consider FET as a self-contained autonomous standard. These are the Mexico-Germany BIT, the Mexico-Belgium/Luxembourg Union BIT, the Mexico-Austria BIT, the Mexico-Denmark BIT, the Mexico-Finland BIT, the Mexico-Greece BIT, the Mexico-Italy BIT, the Mexico-Netherlands BIT, and the Mexico-Portugal BIT. As an example, this last one states the following:

“ARTICLE 2. Promotion and Protection of Investments. 1. Each Contracting Party shall promote and encourage, as far as possible, within its territory investments made by investors of the other Contracting Party and shall admit such investments into its territory in accordance with its laws and regulations. It shall in any case accord such investments fair and equitable treatment”.

To consider FET as a self-contained standard constitutes an approach that does not provide a guideline for its interpretation. Nonetheless, the general rules for interpreting treaties, including investment treaties, are set out in article 31 of the 1969 Vienna Convention on the Law of Treaties,¹⁵⁶ this is, in good faith and in accordance to the ordinary meaning of its words to be given to the terms of the treaty in their context and in the light of its object and purpose.

¹⁵⁵ See *Elettronica Sricula supra* note 100.

¹⁵⁶ See Vienna Convention *supra* note 22, art. 31.

Some tribunals have referred to the ordinary meaning of the words when interpreting FET as a self-contained standard, but as the tribunal in *MTD* found by quoting the *Concise Oxford English Dictionary*, “In their ordinary meaning, the terms “*fair and equitable*” [. . .] mean “*just*”, “*even-handed*”, “*unbiased*”, “*legitimate*”, these definitions do not take one very far because they replace “*fair*” and “*equitable*” with terms of almost equal vagueness.¹⁵⁷

Therefore, when applying this type of interpretation the analysis of the object of the treaty also becomes fundamental. This has led many tribunals to hold that the object and purpose of the treaty in question was to promote foreign investment and to create a stable framework for investment and effective use of economic resources, and consequently any action that is not coherent with this, should be considered illegal.¹⁵⁸

The reference to FET as a self-contained standard also means that an arbitral tribunal must decide on its own what is fair and equitable in a specific circumstance; in this situation a number of tribunals have resorted to the view of Dr. F.A. Mann.¹⁵⁹

He stated that, “...the terms ‘fair and equitable treatment’ envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A Tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by any other words is likely to be material. The terms are to be understood and implied independently and autonomously”.

¹⁵⁷ *Saluka supra* note 104 at. 297.

¹⁵⁸ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile ICSID Case No. ARB/01/7*, para 113; *Siemens v. Argentina*, Award, para 289; *Azurix v. Argentina supra* note 61 p. 360.

¹⁵⁹ F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. YB Int’l L. 241, 244 (1981). His view was shared by the tribunals in *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) Award 12 May 2005, para 284; *Azurix v. Argentina supra* note 61, at. 361; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, (ICSID Case No. ARB/03/19), Award August 2007, at 7.4.8. It was also echoed by UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in Int’l Investment Agreements, 1999, “where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and inequitable” and Stephen Vascianne, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BYIL 99, 144, 1999.

Also, it is considered unlikely for a treaty to use an expression such as FET to denote a well-known concept such as the minimum standard of treatment in customary international law.

If the parties to a treaty want to refer to customary law, it must be presumed that they will refer to it as such rather than using a different expression.¹⁶⁰ Rudolph Dolzer and Margaret Stevens also support this view, stating that “the fact that the parties to BITs have considered it necessary to stipulate this standard as an express obligation rather than relied on a reference to international law and thereby invoked a relatively vague concept such as the minimum standard, is probably evidence of a self-contained standard. Furthermore, some treaties refer to international law in addition to FET, thus appearing to reaffirm that international law standards are consistent with, but not complementary to, the provisions of the BIT”.¹⁶¹

These views are examples of additive interpretations of FET, which also deny the idea that FET is already contained by the minimum standard.

Tribunals outside of the NAFTA context have not adopted a definitive position on whether FET is an autonomous standard or merely reflects customary international law. Rather, they have interpreted the relevant provisions on BITs on the basis of their respective wording.¹⁶² However, some governments have expressed concern that this gives a tribunal too much discretion making the process resemble a decision *ex aequo et bono*. Consequently, it has been considered that the typically vague treaty formulation of FET, which does not refer to the customary international law standard, gives a tribunal considerable discretion in determining the principles that breach the obligations.¹⁶³

Interpreting FET in accordance with the plain or ordinary meaning of the term could make it a more subjective approach than the customary international law approach, since it

¹⁶⁰ Christoph Schreuer, *Fair and equitable treatment in arbitral practice*, the journal of world investment and trade, June 2005.

¹⁶¹ R. Dolzer & M. Stevens, *Bilateral Investment Treaties*, p. 58 Brill, Leiden, 1995.

¹⁶² Christoph Schreuer *supra* note 60.

¹⁶³ Malik Mahnaz, *Foreign investment for Sustainable Development Program*, Best Practices Bulletin #3, International Institute for Sustainable Development, September 2009.

allows a tribunal considerable discretion in assessing if the state's conduct amounts to a violation of fairness and equity.¹⁶⁴ However, when FET is considered as a non-contingent standard, it presents certain advantages, namely that the treatment it prescribes is determined beforehand, and, thus, presumably does not fall below the minimum standard.¹⁶⁵ This is, a non contingent standard sets by itself a number of predetermined obligations to the state, without the necessity to any complementary reference.

❖ CASES DEALING WITH THE INTERPRETATION OF FET AS A SELF-CONTAINED STANDARD

The tribunal in the *EDF v. Romania* case, had to interpret FET in accordance to the UK-Romania BIT,¹⁶⁶ which does not connect FET neither to international law principles nor to customary law, therefore, as the tribunal noted “there is no definition in the BIT of “fair and equitable treatment” (FET), nor is there a general consensus on the meaning of this phrase by ICSID tribunals”,¹⁶⁷ hence, FET had to be considered as an absolute self-contained standard.

In their interpretation however, the tribunal did acknowledged the existence of several fundamental elements of FET, such as transparency, stability and the protection of the investor's legitimate expectations, good faith, freedom from coercion and harassment, and compliance with contractual obligations, as well as the generally accepted view that the standard is independent of legality or illegality under domestic law.¹⁶⁸

In this case, the Tribunal held that the conduct of Romania with regard to *EDF's* investments violated its obligation under the BIT to provide FET, not to impair the maintenance, use or enjoyment of the investment by unreasonable or discriminatory

¹⁶⁴ *Idem*.

¹⁶⁵ A. A. Fatouros, *Government Guarantees to Foreign Investors*, Columbia University Press, 1962.

¹⁶⁶ “Article 2. Promotion and Protection of Investment (2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.” http://www.unctad.org/sections/dite/iia/docs/bits/uk_romania1996.pdf Last visited: March 2010

¹⁶⁷ *EDF v. Romania supra* note 117 at. 215.

¹⁶⁸ *Id.* at. 104.

measures, to observe its contractual agreements, and to compensate investors for expropriation.

Another case was the *Saluka v. Czech Republic*,¹⁶⁹ in accordance to the Czech Republic-Netherlands BIT.¹⁷⁰ Said instrument states the following:

“Article 3. 1) Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.”

The claimant argued that FET was a specific and autonomous standard and it should be interpreted broadly. To support this view, *Saluka* relied upon the decision on the *Pope & Talbot*¹⁷¹ case where the tribunal held that even when the treaty provision containing the standard makes no particular reference, the protection afforded by it cannot be considered as existing only against conduct that is “egregiously unfair”, but to guarantee “the kind of hospitable climate that would insulate them from political risks or incidents of unfair treatment”.¹⁷² The claimant also argues that the BIT provision does not refer to any high threshold of unreasonableness or flagrancy of the conduct constituting a breach, and it must be considered broadly enough to provide real and effective protection, which would encourage investors to participate in the economy of the host state.¹⁷³

On the other hand, the respondent argues that FET is only a part of the minimum standard and its content must be defined in accordance to customary international law. The respondent relies on the *Genin*¹⁷⁴ award, where the tribunal found that FET was a minimum standard and held that “acts that would violate this minimum standard would

¹⁶⁹ *Saluka supra* note 104.

¹⁷⁰ http://www.unctad.org/sections/dite/ia/docs/bits/czech_netherlands.pdf Last visited: March 2010

¹⁷¹ *Pope & Talbot supra* note 53.

¹⁷² *Idem*.

¹⁷³ <http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-210-2006.pdf> Last visited: March 2010

¹⁷⁴ *Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 award 25 June 2001.

include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith”.¹⁷⁵

This constituted a case where the tribunal had to decide whether the treaty established the standard as autonomous, or, while no reference was expressly made in the BIT, if FET constituted a part of the minimum standard, and as such it had to be interpreted in accordance to customary international law.

Both possibilities were analyzed. The tribunal concluded that that since customary rules are immediately binding upon states, the conduct of the state would have to reflect a higher degree of incompatibility with the BIT to constitute a violation. However, the existence of a BIT that includes FET cannot be considered as a reflection of customary law, since the BIT itself does not established it, and the tribunal would be overreaching its power if it decided to interpret FET in accordance to customary international law. Therefore, in the present case, a low degree of incompatibility from the State’s conduct with the BIT could constitute a violation to the standard.¹⁷⁶

The award also states that the *Genin* tribunal did acknowledged FET as a minimum standard but not as “the” minimum standard, therefore, FET must be interpreted autonomously and in accordance to the Vienna Convention. The tribunal also acknowledges the existence of essential elements of the standard and in that regard states that the legitimate expectations of the investor constitute a dominant element of FET,¹⁷⁷ and held that a foreign investor under the BIT was entitled to expect the other party to act in a way that is not manifestly inconsistent, non-transparent, unreasonable or discriminatory.

In sum, when the FET standard is analyzed as an autonomous provision it allows for the tribunal itself to unveil its content, within the boundaries established by the Vienna Convention for the interpretation of treaties. This, even while seemingly dangerous due to

¹⁷⁵ *Id.* at. 367.

¹⁷⁶ *Saluka supra* note 104 p. 285-295.

¹⁷⁷ *Id.* at. 302.

its high of discretionary power, allows for a wider view of the external circumstances surrounding the claim, in other words, the consideration of the context of the investment and the possible reasons for the state's conduct, all this, while remaining aware and vigilant of the elements of FET already acknowledged to be contained by the standard.

❖ THE TECMED CASE

The *Tecmed*¹⁷⁸ case constitutes one of the most important cases for Mexico in the field of investment arbitration, and to this date the only concluded arbitration between Mexico and an investor from an EU Country.

Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States was a case solved in accordance with the 1996 Mexico-Spain BIT. For the resolution of this case Tribunal considered that FET deserved an autonomous interpretation,¹⁷⁹ and as such, it provided no less favorable treatment than that defined by the minimum standard, which also acknowledges the FPS obligation as one of its main elements.¹⁸⁰ The tribunal determined that FET should be analyzed according to its ordinary meaning and the good faith principle recognized by international law. The interpretation made by the tribunal also considered FPS as a non-contingent standard and consequently, beyond the notion of a minimum standard.

The Tribunal also stated that an element to consider when analyzing a breach of FET, is whether the measure affects or not the basic expectations that were taken into account by the foreign investor when the investment was made, and more importantly, it connected the notion of legitimate expectations to the requirement of transparency by stating that “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”.¹⁸¹ Another element that the *Tecmed* tribunal considered was the proportionality between the weight imposed on the foreign investor and the purpose of the expropriatory

¹⁷⁸ *Tecmed supra* note 125.

¹⁷⁹ *Id* at. 155.

¹⁸⁰ See OECD *supra* note 89.

¹⁸¹ *Tecmed supra* note 125, at. 154.

measure. In this respect, a distinction was made between a compensable indirect expropriation and a non-compensable regulation.¹⁸²

With respect to FPS, the Tribunal concluded that “the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it”,¹⁸³ however, the host State is obliged to exercise due diligence. This assertion was made by citing the resolution of the tribunal in *Wena*,¹⁸⁴ which stated that: “*The obligation incumbent on the [host State] is an obligation of vigilance, in the sense that the [host State] shall take all measures necessary to ensure the full enjoyment of protection and security of its investments and should not be permitted to invoke its own legislation to detract from any such obligation*”.¹⁸⁵

In any case, *Tecmed* constitutes a landmark case for Mexico not only due to treatment to FET and the elements identified by the tribunal, but also because, since the original 1996 BIT contained a clause that stated its validity to up to 10 years, in 2006 the BIT was renegotiated and FET was linked to customary international law.

To this date, a new claim¹⁸⁶ against Mexico in accordance to the 2006 Spain-Mexico BIT has been submitted to the International Centre for Settlement of Investment Disputes (ICSID). In this new case, the interpretation and scope of FET should be considered only in the context of customary international law.

¹⁸² Gabriel Cavazos Villanueva *supra* note 28 p. 89.

¹⁸³ *Tecmed supra* note 125, at. 177.

¹⁸⁴ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID case No. ARB/98/4.

¹⁸⁵ *Id*, at. 84.

¹⁸⁶ *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, filled on December 11, 2009.

SECTION E. RELATIONSHIP BETWEEN FET AND OTHER STANDARDS OF INVESTMENT PROTECTION

Some tribunals have suggested that FET is no more than an overarching principle that embraces the other standards granted to foreign investors in treaties,¹⁸⁷ and at the same time there is evidence that the FET standard also interacts with other standards of protection,¹⁸⁸ one of the most important ones is the FPS standard. Some tribunals have equated the FET and FPS standards; however, others emphasize the separateness of the two.¹⁸⁹

All the BITs concluded between Mexico and EU Countries contemplate FET, NT and MFN, and all but one contemplate FPS, this is a proof that the commonly used standards of protection are each established individually in these instruments.

Nonetheless, the connection of FET, an absolute standard, to a relative one such as MFN or NT could lead to a problem when a tribunal has to define the normative content and scope of each one, mainly because of the applicable exceptions and limitations that, for example, MFN as a relative standard may permit, such as a limitation of subject matter or political and economic exceptions, which could lead to an interpretation that would conclude that MFN could impose a limitation or exception to FET.

However, some tribunals have emphasized the independence of FET from standards such as MFN or NT, for example, the tribunal in *UPS* stated that “those obligations [NT and MFN] are relative. They depend simply and solely on the specifics of the treatment the Party accords to its own investors or investors of third states. [NAFTA] Article 1105 [FET], by contrast, states a generally applicable minimum standard which, depending on the circumstances, may require more than the relative obligations of article 1102 and 1103.”¹⁹⁰

¹⁸⁷ *Petrobart v. The Kyrgyz Republic*, Stockholm Chamber of Commerce, Award 29 March 2005.

¹⁸⁸ August Reinish, *Standards of Investment Protection*, Oxford University Press 2008.

¹⁸⁹ *Azurix supra* note 62 at. 407- 408.

¹⁹⁰ *United Parcel Service of America v. Canada (UPS)*, Award of 22 November 2002. at. 80.

While this resolution arises from a claim within the NAFTA context, the notion and reasons for the separateness that should exist between a relative and an absolute standard are clear.

1. THE RELATIONSHIP BETWEEN FET AND THE MFN STANDARD

Some¹⁹¹ BITs specifically link FET to the Most Favored Nation Standard (MFN), one example of this is the Mexico-Portugal BIT, which provides the following:

“ARTICLE 3. National and Most Favored Nation Treatment 1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party, as well as the returns there from, shall be accorded treatment which is fair and equitable and not less favorable than the one the latter Contracting Party accords to the investments of its own investors or investments of investors of any third State”.

This type of clause merges into one single provision the FET Standard, an absolute standard of protection, with the national treatment and MFN treatment standards, which are considered relative standards of treatment. This, should also serve as a confirmation that by linking these two kinds of standards and by providing that FET shall in no case be less favorable than NT or MFN treatment, the contracting parties also indicate that they do not wish to see FET limited to the international minimum standard.¹⁹²

The MFN treatment standard means that investments or investors of one contracting party are entitled to treatment by the other contracting party that is no less favorable than the treatment the latter grants to investments or investors of any other third country.

¹⁹¹ In the context of México-EU BITs only the Mexico-Portugal links FET directly to MFN, however other examples are the Chile-Portugal BIT and the Chile-Brazil BIT.

¹⁹² See UNCTAD *supra* note 50.

One example of a case dealing with an MFN claim linked to FET was the case of *Maffezini v. Spain*¹⁹³ based on the Argentina-Spain BIT. The treaty provided that investors had to exhaust all domestic judicial remedies before submitting an arbitral claim. *Maffezini* argued that he could bypass this precondition by invoking the MFN clause. Here, the MFN clause was intended to give access to less stringent procedural provisions established in the Chile-Spain BIT, which does not have the same precondition. The tribunal agreed, and held that, the MFN clause of the Argentina-Spain BIT, could give access to the investor to the procedural benefits of the Chile-Spain BIT.¹⁹⁴

Another example was the case of *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*,¹⁹⁵ based on the Albania-Greece BIT¹⁹⁶ which contained a MFN and a NT clause. In this case the treaty did not explicitly promise investors FET, however, the Claimant still asserted an entitlement to such treatment under two arguments; first, that the treaty as an instrument of international law encompasses such standard, and second, that article 3 of the BIT promised MFN treatment, thus they were entitled to FET.

However, the tribunal did not make a full analysis since the claimant agreed that he could not prove that more favorable treatment existed whether towards nationals or other foreign investors, therefore, it was not possible to assert FET from the MFN or NT clauses.

A third case dealing with the application of a MFN clause to assert FET was the case of *Renta 4 v. Russia*¹⁹⁷ in accordance with the Spain-Russia BIT. Said instrument contained MFN clause connected to FET in the following terms:

¹⁹³ *Emilio Agustín Maffezini v. The Kingdom of Spain*. ICSID Case No. ARB/97/7 Decision on Jurisdiction (25 January 2000), 5 ICSID Reports 396 (2002).

¹⁹⁴ Gabriel Cavazos Villanueva *supra* note 28 p. 144.

¹⁹⁵ *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009.

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1133_En&caseId=C113 Last visited: March 2010.

¹⁹⁶ http://www.unctad.org/sections/dite/ia/docs/bits/greece_albania.pdf Last visited: March 2010

¹⁹⁷ *Renta 4 S.V.S.A et al. v. Russian Federation*, SCC No. 24/2007 (Spain/Russia BIT).

“Article 5. Treatment of Investments. 1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other contracting Party. 2. The treatment referred to in paragraph 1 above shall be no less favorable than that accorded by either Party in respect to investments made by investors of any third State ...”

In this case the claimant argued that, since the Spain-Russia BIT limited the range of causes of action to base a claim on, the tribunal should assert jurisdiction by extending the benefits of the Russia-Denmark BIT that contained a more liberal arbitration clause.

Russia objected to this argument, by stating that the claimant failed to include in its request for arbitration its desire for an expanded jurisdiction through MFN, thus, forfeiting this possibility. Moreover, it asserts that the Tribunal must regard the expansion of jurisdiction as inadmissible because otherwise this would prejudice the respondent’s right to “challenge unfounded assertions of jurisdiction”.¹⁹⁸

The Tribunal dismissed the respondent’s arguments, stating that the claimant was entitled to request an extension of jurisdiction through a MFN clause. However, the question was whether the benefits of a MFN clause refer to substantial or procedural issues. In this respect, the tribunal refers to the dichotomy of primary/secondary rules,¹⁹⁹ namely, considering issues referring the treatment of the investment as primary or substantive rules, apart from procedural or secondary rules.

In this case, the tribunal acknowledges that MFN covers only matters of FET, since the same article states this limitation. And, since FET is a substantive standard of treatment, Russia argues that access to arbitration is not an inherent part of FET, given that this would constitute a procedural right.

¹⁹⁸ *Id.* at. 70.

¹⁹⁹ The classification of primary/secondary rules does not have a normative origin. However, it has been the classification by which the International Law Commission determined its field of work on State responsibility. *“The law relating to the content and the duration of substantive State obligations is as determined by the primary rules. The law of State responsibility as articulated in the Draft Articles provides the framework –those rules, denominated “secondary”, which indicate the consequences of a breach of an applicable primary obligation. (James Crawford, The International Law Commission’s Articles on State Responsibility 16 (2002.)”*

In this respect, the tribunal believes that the possibility of access to international arbitration does not *per se* mean a higher degree of FET. It concludes that “the specific MFN promise contained in Article 5(2) of the Spanish BIT cannot be read to enlarge the competence of the present Tribunal ... the terms of the Spanish BIT restrict MFN treatment to the realm of FET as understood in international law. This relates to normative standards and does not extend to either (i) the availability of international as opposed to national law or (ii) “more” rather than “less” arbitration...”.²⁰⁰ The following chapter provides an analysis of the FSP standard and the relevant references made by the Mexico-EU BITs with respect to this standard.

CHAPTER VI. THE FULL PROTECTION AND SECURITY STANDARD

FPS is considered to provide a general obligation to the host state to exercise due diligence in the protection of foreign investment, as opposed to strict liability, which would make the state liable even for damage to the investment caused by third parties.²⁰¹

The opinions of tribunals are still divided, while some consider FPS as an element of FET and almost equivalent to it, others do acknowledge the separation and independence of these two standards.²⁰² In the case of the Mexico-EU BITs, a clear majority separates the two as independent concepts. Among those, only one exception appears, this is the Mexico-Sweden BIT²⁰³ which does not make any reference to FPS but does, in its article 2 subsection 3, connect the obligation to grant FET to the “relevant international standards of international law”.

One example of FPS not being considered as a separate standard from FET was the *PSEG v. Turkey*²⁰⁴ case, which originated in 1994 after PSEG applied for and was granted by the

²⁰⁰ *Renta 4 supra* note 197 at. 119.

²⁰¹ Dolzer and Stevens, *Bilateral Investment Treaties*, p. 61, International Centre for Settlement of Investment Disputes, 1995.

²⁰² *Azurix supra* note 62, at. 407-408.

²⁰³ http://www.unctad.org/sections/dite/ia/docs/bits/mexico_sweden.pdf Last visited: March 2010.

²⁰⁴ *PSEG v. Turkey supra* note 67, at. 258-259.

In this respect, the tribunal believes that the possibility of access to international arbitration does not *per se* mean a higher degree of FET. It concludes that “the specific MFN promise contained in Article 5(2) of the Spanish BIT cannot be read to enlarge the competence of the present Tribunal ... the terms of the Spanish BIT restrict MFN treatment to the realm of FET as understood in international law. This relates to normative standards and does not extend to either (i) the availability of international as opposed to national law or (ii) “more” rather than “less” arbitration...”.²⁰⁰ The following chapter provides an analysis of the FSP standard and the relevant references made by the Mexico-EU BITs with respect to this standard.

CHAPTER VI. THE FULL PROTECTION AND SECURITY STANDARD

FPS is considered to provide a general obligation to the host state to exercise due diligence in the protection of foreign investment, as opposed to strict liability, which would make the state liable even for damage to the investment caused by third parties.²⁰¹

The opinions of tribunals are still divided, while some consider FPS as an element of FET and almost equivalent to it, others do acknowledge the separation and independence of these two standards.²⁰² In the case of the Mexico-EU BITs, a clear majority separates the two as independent concepts. Among those, only one exception appears, this is the Mexico-Sweden BIT²⁰³ which does not make any reference to FPS but does, in its article 2 subsection 3, connect the obligation to grant FET to the “relevant international standards of international law”.

One example of FPS not being considered as a separate standard from FET was the *PSEG v. Turkey*²⁰⁴ case, which originated in 1994 after PSEG applied for and was granted by the

²⁰⁰ *Renta 4 supra* note 197 at. 119.

²⁰¹ Dolzer and Stevens, *Bilateral Investment Treaties*, p. 61, International Centre for Settlement of Investment Disputes, 1995.

²⁰² *Azurix supra* note 62, at. 407-408.

²⁰³ http://www.unctad.org/sections/dite/ia/docs/bits/mexico_sweden.pdf Last visited: March 2010.

²⁰⁴ *PSEG v. Turkey supra* note 67, at. 258-259.

government of Turkey an authorization to conduct a feasibility study into the building of a coal-fired power plant, only to later revoke it under pressure from the World Bank and the IMF to make its energy sector more competitive by abandoning the BOT model. However, by this time, PSEG had spent a considerable sum of money, on an initial feasibility study, follow-up studies, as well as negotiations with several government agencies.

PSEG was an American company with a wholly owned Turkish subsidiary. The claimants invoked the protections granted by the USA- Republic of Turkey BIT.²⁰⁵

The claimant argued that a violation of FET, in accordance with article II(3) had occurred. Said article states that, “investments shall at all times be accorded fair and equitable treatment . . . in a manner consistent with international law”. PSEG also referred to several cases in order to assert violations to its legitimate expectations,²⁰⁶ arbitrary conduct by the respondent²⁰⁷ and lack of transparency.²⁰⁸ With respect to PFS, two separate claims were submitted, first that FPS includes the adverse effects of the amendments of the law or administrative actions on the investment, and second that the breach of FET automatically entails the absence of FPS.

The tribunal however, even while acknowledging a breach of FET, did not considered that FPS constituted a separate standard capable of producing separate liability to the state. In its resolution the tribunal stated that it did “not find that there has been any question of physical safety and security, nor has any been alleged. Neither does the Tribunal find that there is an exceptional situation that could qualify under this standard as a separate heading of liability. The anomalies that have been found are all included under the standard of fair and equitable treatment. This heading of liability is accordingly dismissed”.

²⁰⁵ http://www.unctad.org/sections/dite/ia/docs/bits/us_turkey.pdf Last visited: March 2010.

²⁰⁶ *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of May 25, 2004.

²⁰⁷ *Tecmed supra* note 125.

²⁰⁸ *See Metalclad supra* note 59.

The drafting of the Mexico-Sweden BIT seems to indicate that the parties agree with the *PSEG v. Turkey* tribunal, and consider that a specific reference to the protection of investments in the host states is not necessary, since the obligation to protect such investments is already contained in the FET standard, as well as in the other relevant standards of international law.

However, it is impossible to assume that the two standards, which appear separately in a BIT, have the same content and purpose. FET consists mainly of obligations to the state to abstain from a course of action, however, by promising FPS the state assumes the obligation to actively create a framework for investments that grants factual and legal security also against third persons,²⁰⁹ this is, FET constitutes a *negative*²¹⁰ right to the investor, since the fundamental purpose of the standard is to command the state to abstain from any wrongdoing to foreign investment, while FPS constitutes a *positive* right, this is, the mere restraint from the state from harming an investment does not assure compliance, the state must actively prevent damage to that investment.

As for the content of the standard, ICSID Tribunals have found breaches to the FPS obligation whenever the Host State has not taken reasonably expected measures to prevent damages to foreign investments,²¹¹ although aimed mainly at physical property damages, it can also entail other protections. For example, in the case of *Goetz V. Burundi*²¹² the Tribunal held that the withdrawal of a government authorization, vital to the operation of the investor could amount to a violation to the FPS owed to the investor. Another example was the *Azurix* case, where the Tribunal considered that the FPS

²⁰⁹ Christoph Schreuer, *Fair and Equitable treatment*, Zurich, 7 March 2008.

²¹⁰ A negative right entitles its recipient to non-interference, while a positive right entitles its recipient to active protection from the state. Jan Narveson, *The Libertarian Idea*, Peterborough, Ontario: Broadview, 2001.

²¹¹ *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID case no. ARB/87/3, Award June 27, 1990.

²¹² *Antoine Goetz and others v. Republic of Burundi*, ICSID case no. ARB/95/3, Resolution of February 10th, 1999. Para. 124-125.

obligation “it is not only a matter of physical security; the stability afforded by a secure environment is as important from an investor’s point of view”.²¹³

In sum, while FPS is not often referred to as a single standing provision, and almost always connected to FET or subsumed by the prohibition to expropriate, this standard can entail separate and additional obligations and an active and continuous effort from the state to prevent damage to foreign investment.

1. FPS LINKED TO CUSTOMARY INTERNATIONAL LAW

Only the Mexico-UK BIT connects FPS to the minimum standard of customary law. Like FET, when FPS is linked to customary law, its content should only be constituted by and interpreted in accordance to those norms and practices widely accepted as law by the general international community.

Also, when FPS is granted, as required by customary international law, it has been considered to contemplate the protection of the investment against private as well as public action, that is, it requires that the host state should exercise reasonable care to protect investment against injury also by private parties.²¹⁴

This idea enhances the scope of FPS and can make the state liable for damages indirectly caused by it, such as the failure of the state to control private parties that have harmed foreign investment.

2. FPS AS A SELF-CONTAINED STANDARD

Most²¹⁵ of the BITs between Mexico and EU Countries consider FPS as a self-contained standard, one example is the Mexico-Germany BIT, which states the following:

²¹³ *Azurix supra* note 62 at. 408.

²¹⁴ *See UNCTAD supra* note 50 p. 55.

²¹⁵ The Mexico-Germany, The Mexico-Austria, The Mexico-Denmark, The Mexico-Spain, The Mexico-Slovak, The Mexico-Finland, The Mexico-France, The Mexico-Greece, The Mexico-Italy, The Mexico-Netherlands, The Mexico-Portugal, The Mexico-United Kingdom, The Mexico-Czech Republic, The Mexico-Sweden and the The Mexico-Belgium/Luxembourg Union.

“Article 2 . Promotion, Admission and Protection of Investments. (2). Each Contracting State shall grant to the investments made by nationals or companies of the other Contracting State under its laws and regulations, full protection and security.”

When the FPS standard is considered as an autonomous provision its range of protection will be broaden to include not only express obligations but reasonably expected actions or inactions that a State must take in protection of that investment. Also, just like the FET standard, an autonomous interpretation of FPS includes the consideration of the object of the treaty as well as the circumstances surrounding the investment. Therefore, both FET and FPS have been considered as contextual standards, which entails that the realities of an individual country will determine the expectations of FPS, FET, and other substantive obligations, this means that the requirements of international investment law will thus be based on a sliding scale. More developed countries with greater capacity to protect investments will be held to a higher standard. Conversely, a developing country less capable of providing protection will have its behavior judged against a standard based on its own development.²¹⁶ The consideration of the factual background in our opinion serves two purposes, first, not to require impossible and unreachable standards from developing countries, and second to require from those countries who are able to provide it, more specific and regulated investment protection policies. This, consequently, creates a sense of balance in the investment arbitration system.

This has a special effect on the content and obligations arising from the FPS standard, since a politically and economically stable country will be more able to prevent damage to an investment than a developing country. In other words, due to the fact that FPS entails a preventive measure a developed country will be able to foresee a possible damage and consequently take the necessary measures to prevent or correct it.

²¹⁶ Emily A. Alexander, Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law, Virginia Journal of International Law, Summer, 2008, 48 Va. J. Int'l L. 817.

CONCLUSIONS

Lately it seems to be even more common for two states to embrace the benefits of foreign investments, this has led to what has been referred to as the “treatification” of international investment law,²¹⁷ which as a consequence has led to the desire to establish uniform standards of investment protection.²¹⁸

Mexico-EU BITs are highly important, not only because they provide a uniform understanding of the fundamental level of protection that must be afforded to all foreign investment, but also because the negotiation, drafting and conclusion of each BIT constitutes a systematic formation of the international investment law that shall govern the investor state relationships between Mexico and EU Countries.

At the same time, they all provide the obligation from the state to comply with certain substantive standards for protection, with a specific normative reference in some cases and autonomously in others. And while there is no general rule, the reference linked to the standard can limit or expand its contents, this is, the state’s conduct can sometimes be legal according to a specific BIT and illegal under another.

We conclude that FPS and FET constitute evolving standards for investment protection and that are able to change and adapt to a specific case. Consequently, we believe that the reference of FET and FPS as investment principles can raise some questions, therefore, we believe it is more practical to refer to them as standards.

In this context, the fact that a tribunal is able to limit or redefine the content of FPS or FET denotes that they are not principles but merely standards, and moreover, dynamic ones that need to adjust to the circumstances of each claim. In this respect, we also believe that the notion of a “variable general standard” would be oxymoronic.²¹⁹

²¹⁷ Stephen W. Schill *supra* note 48 p. 25.

²¹⁸ *Id.* p. 69.

²¹⁹ *Renta 4 supra* note 197 at. 108.

A fairer and widely dominant approach to FET and FPS among Mexico-EU BITs seems to be the understanding of the standards as autonomous, since this interpretation allows for the consideration of not only the law but factual matters as well, which provides for a more equal and balanced analysis of the particular case.

We believe that, while the consideration of the context of the investment helps balance the scale, an arbitral tribunal must be careful and not let the political and economical circumstances of the host country become an excuse not to comply with a BIT. A host country must prove that its lack of compliance is due to its underdevelopment in technological or legal areas, and even so, the context of the investment should be considered as a complementary factor but not a decisive one when determining whether a violation has existed or not.

At any rate, we believe that even while a particular standard may be considered as autonomous it is still part of the general international law system and can in some cases constitute also a reflection of a customary norm. Therefore, its content does not need to be bound by a specific reference, which should not only serve as a starting point for its interpretation, but also as a unifying stage, in other words, regardless to its reference, FET and FPS constitute provisions consistently intended for the protection of foreign investment against arbitrary and unfair measures by the host state, therefore its content will vary, depending on the context of the investment, however, its main purpose will always remain the same.

LIST OF ABBREVIATIONS

- BIT: Bilateral investment treaty
- FET: Fair and equitable treatment
- FPS: Full protection and security
- FTA: Free trade agreement
- ILC: International Law Commission
- ICJ: International court of justice
- PCIJ: Permanent court of international justice
- NAFTA: North America free trade agreement
- FTC: Free trade commission
- MFN: Most favored nation
- NT: National treatment
- AJIL: American journal of international law
- FDI: Foreign direct investment
- EU: European Union
- UN: United Nations
- IMF: International monetary found
- EPIL: Encyclopedia of public international law
- RBDI: Revue Belge de Droit International
- ICSID: International Center for the Settlement of Investment Disputes
- UNCTAD: United Nations conference on trade and development
- UNCITRAL: United Nations commission on international trade law
- BYIL: British yearbook of international law
- OECD: Organization for Economic Cooperation and Development
- MIGA: Multilateral investment guarantee agency
- IIC: Interamerican Investment Corporation

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6. *Metalclad v. United Mexican States*, ICSID case No. ARB(AF)/97/1.
7. *PSEG v. Turkey*, ICSID case No. ARB/02/5.
8. *Nicaragua case, (Nicaragua v. United States of America)*, ICJ, 1986.
9. *Fisheries case (United Kingdom v. Norway)*, ICJ, 1951.
10. *Asylum case (Colombia v. Peru)*, ICJ, 1950.
11. *Neer Claim (United States of America v. Mexico)*, General Claims Commission, 1926.
12. *Glamis Gold Ltd v. United States of America*, UNCITRAL Rules, award of 14 May 2009.
13. *Mondev International Ltd v. United States*, Award, ICSID Case No ARB(AF)/99/2
14. *Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, ICJ, 1989.
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28. *CME Czech Republic B.V, v. The Czech Republic*, UNCITRAL Rules, 2001.
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Country	Reference made to FET	Reference made to FPS	Entry into force	U.N. Treaty Series	Dispute Resolution Institution
GERMANY	Self contained standard	Self contained standard	02/23/2001	Vol. 2140 p. 393	ICSID
AUSTRIA	Self contained standard	Self contained standard	03/26/2001	Vol. 2160 p. 69	ICSID
FRANCE	The principles of international law	Self contained standard	10/11/2000	Vol. 2129 p. 175	ICSID
DENMARK	Self contained standard	Self contained standard	09/24/2000	Vol. 2453	ICSID
GREECE	Self contained standard	Self contained standard	10/03/2002	Vol. 2449	ICSID
UNITED KINGDOM	Customary International Law	Customary International Law	07/27/07	Not Found. Registration Number 44684	ICSID
CZECH REPUBLIC	Customary International Law	Customary International Law	03/13/2004	Vol. 2449	ICSID
SLOVAKIA	Customary International Law	Customary International Law	04/08/2009	Not Found. Registration Number 46762	ICSID
SWEDEN	The principles of international law	*Does not contain an explicit reference of FPS	07/01/2001	Vol. 2160 p. 3	ICSID
PORTUGAL	Self contained standard	Self contained standard	09/04/2000	Vol. 2454	ICSID
NETHERLANDS	Self contained standard	Self contained standard	10/01/1999	Vol. 2159 p. 393	ICSID
SPAIN	Customary International Law	Customary International Law	04/03/2008	Not Found. Registration Number 45554	ICSID
ITALY	Self contained standard	Self contained standard	12/05/2002	Vol. 2160 p. 139	ICSID
BELGIUM-LUXEMBOURG Unión	Self contained standard	Self contained standard	03/18/03	Vol. 2223 p. 3	ICSID
FINLAND	Self contained standard	Self contained standard	08/20/00	Vol. 2122 p. 63	ICSID

BIT	Initial Term	Termination form
Spain	10 years	Article XXIII. Duration and Termination. This Agreement shall have a validity of ten years. After, it will continue in force until twelve months after the date in which one of the Contracting Parties has given the other notice of termination. The provisions of this Agreement in respect to investments made prior to its termination will remain in force for a further period of ten years.
Netherlands	10 years	<p>Article 13</p> <p>Entry into Force and Termination</p> <p>(1) The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that their constitutionally required procedures have been complied with, and shall remain in force for a period of ten years.</p> <p>(2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least twelve months before the date of expiry of the current period of validity.</p> <p>(3) In respect of investments made before the date of the termination of the present Agreement the foregoing Articles shall continue to be effective for a further period of fifteen years from that date.</p> <p>(4) Subject to the period mentioned in paragraph (2) of this Article, the Kingdom of the Netherlands shall be</p>
Sweeden	10 years	<p>Article 21</p> <p>Entry into Force, Duration and Termination</p> <p>(1) The Contracting Parties shall notify each other when the constitutional requirements for entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the first day of the second month following the date of receipt of the last notification.</p> <p>(2) This Agreement shall remain in force for a period of ten years. Thereafter it shall remain in force until the expiration of twelve months from the date that either Contracting Party in writing notifies the other Contracting Party of its decision to terminate this Agreement.</p> <p>(3) In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 20 shall remain in force for a further period of ten years from</p>

ANNEX 2

Portugal	10 years	<p>ARTICLE 21 Entry into force and Duration</p> <p>1. This Agreement shall enter into force 30 days after the Contracting Parties notify each other in writing that their respective internal constitutional or legal procedures have been fulfilled.</p> <p>2. This Agreement shall remain in force for a period of 10 years, which shall be extended for equal periods, unless, 12 months before the expiration of the period, either Contracting Party notifies the other in writing of its intention to terminate this Agreement.</p> <p>3. In respect of investments made prior to the date of termination of this Agreement, the provisions of Articles 1 to 20 shall remain in force for a further period of 10 years from the date of termination of this Agreement.</p>
Czech Republic	10 years	<p>ARTICLE 25 Entry into Force, Duration and Termination</p> <p>(1) The Contracting Parties shall notify each other in writing on the compliance with their constitutional requirements in relation to the approval and entry into force of this Agreement.</p> <p>(2) This Agreement shall enter into force thirty (30) days after the date of the final notification, through diplomatic channels used by both Contracting Parties to notify the fulfillment of the requirements referred to in paragraph (1).</p> <p>(3) This Agreement shall remain in force for period of ten (10) years and shall remain in force thereafter for an indefinite period of time, unless either of the Contracting Parties gives to the other Contracting Party written notice of its intention to terminate the Agreement, through diplomatic channels, with twelve (12) months in advance.</p> <p>(4) In respect of investments made prior to the termination of this Agreement, the provisions of this Agreement shall continue to be effective for a period of ten (10) years from the date of termination.</p> <p>(5) This Agreement may be modified by mutual consent of the Contracting Parties and the agreed modification shall come into effect in conformity with the procedures</p>
Austria	10 years	<p>ARTICLE 30 Duration and Termination</p> <p>(1) This Agreement shall be in force for an initial period of ten years and shall remain in force thereafter for an indefinite period of time, unless terminated in accordance with paragraph (2).</p> <p>(2) Either Contracting Party may terminate this Agreement at the end of the initial ten years period or at any time thereafter, by given a twelve months written notice to the other through diplomatic channels.</p> <p>(3) With respect to investments made before termination of this Agreement, its provisions shall continue to be effective with respect to such investments for a period of ten years after the date of termination</p>

ANNEX 2

Belgium-Luxembourg Unión	10 years	Article 22. Entry into force and duration 1. This Agreement shall enter into force one month after the date of exchange of the instruments of ratification by the Contracting Parties. The Agreement shall remain in force for a period of ten years. Unless notice of termination is given by either Party at least six months before the expiry of its period of validity, this Agreement shall be tacitly extended each time for a further period of ten years, it being understood that each Contracting Party reserves the right to terminate the Agreement by notification given at least six months before the day of expiry of the current period of validity. 2. Investments made prior to the date of termination of this Agreement shall be covered by this Agreement for a period of ten years from the date of termination.
Finland	10 years	Article 24 Entry into Force, Duration and Termination 1. The Contracting Parties shall notify each other when their constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the thirtieth day following the date of receipt of the last notification. 2. This Agreement shall remain in force for a period of ten (10) years and shall thereafter remain in force on the same terms until either Contracting Party notifies the other in writing of its intention to terminate the Agreement in twelve (12) months. 3. In respect of investments made prior to the date of termination of this Agreement the provisions of Articles 1 to 23 shall remain in force for a further period of ten (10) years
France	10 years	ARTICLE 13 Duration and termination The Agreement shall be in force for an initial period of ten years. It shall remain in force thereafter, unless one of the Contracting Parties gives one year's written notice of termination through diplomatic channels. The Present Agreement will be reexamined by both Contracting Parties, if an Agreement pursuing the same purpose is adopted by the Contracting Parties on a multilateral basis. In case of termination of the period of validity of this Agreement, investments made while it was in force shall continue to enjoy the protection of its provisions for an additional period of fifteen years.

ANNEX 2

Germany	10 years	<p>Entry into Force, Duration and Expiration.</p> <p>1. This agreement shall be subject to ratification. Such instruments shall be exchanged as soon as possible.</p> <p>2. This Agreement shall enter into force one month after the date in which the instruments of ratification have been exchanged. It shall remain in force for a period of ten years and shall be binding in force unless terminated by any of the Contracting States by giving a written notice twelve months before the expiration date. If the period of ten years has elapsed, the Agreement may be terminated at any time, by giving a written notice twelve months before the expiration date. If the period of ten years has elapsed, the Agreement may be terminated at any time, by giving a written notice twelve months in advance.</p> <p>3. With respect to investments made whilst this Agreement is in force, its provisions shall be binding with respect to such investments for a period of 15 years after the date of termination.</p>
Greece	10 years	<p>ARTICLE 21</p> <p>Entry into Force - Duration - Termination</p> <p>1. This Agreement shall enter into force thirty days after the date on which the Contracting Parties have exchanged written notifications informing each other that the procedures required by their respective laws to this end have been completed. It shall remain in force for a period of ten years from that date.</p> <p>2. Unless notice of termination has been given by either Contracting Party at least one year before the date of expiry of its validity, this Agreement shall thereafter be extended tacitly for periods of ten years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least one year before the date of expiry of its current period of validity.</p> <p>3. In respect of investments made prior to the date of termination of this Agreement, the foregoing Articles shall continue to be effective for a further period of ten years from that date.</p>
United Kingdom	10 years	<p>ARTICLE 27</p> <p>Duration and Termination</p> <p>This Agreement shall remain in force for a period of 10 years. Thereafter it shall continue in force until the expiration of 12 months from the date on which either Contracting Party shall have given written notice of termination to the other. The provisions shall continue in effect with respect to investments for a period of 15 years after the date of termination and without prejudice to the application thereafter of the rules of general international law.</p>

ANNEX 2

Slovak Republic	10 years	<p>ARTICLE 32 Entry into Force, Duration and Termination</p> <p>1. The Contracting Parties shall notify each other in writing through diplomatic channels the fulfillment of their constitutional requirements in relation to the approval and entry into force of this Agreement.</p> <p>2. This Agreement shall enter into force 90 days after the date of the latter of the two notifications referred to in paragraph 1 above. 3. This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of 12 months from the date on which either Contracting Party shall have given written notice of termination to the other. 4. This Agreement shall continue to be effective for a period of ten years from the date of termination only with respect to investments made prior to such date.</p>
Italy	10 years	<p>ARTICLE 12</p> <p>Duration and expiry of the Agreement</p> <p>1. This Agreement shall remain in force for ten (10) years from the date on which the procedures provided by Article 11 of this Agreement have been performed, and shall be extended for subsequent periods of five (5) years thereafter, unless one of the two Contracting Parties denounces it in writing at least one year before each expiry date.</p> <p>2. With regard to investments made before the expiry dates of this Agreement, the provisions of Articles 1 to 10, inclusive, shall remain in force for ten (10) years</p>
Denmark	10 years	<p>Article 23</p> <p>Duration and Termination</p> <p>(1) This Agreement shall remain in force for a period of ten years. It shall remain in force thereafter until either Contracting Party notifies in writing the other Contracting Party of its intention to terminate this Agreement. The notice of termination shall become effective one year after the date of notification.</p> <p>(2) In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 12 shall remain in force for a further period of ten years from that date</p>