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The 'Minimum Standard of Treatment' in International Investment Law

The Fascinating Story of the Emergence, Decline and Recent Resurrection of a Concept

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1 Introduction

This chapter examines the story of how the concept of the 'Minimum Standard of Treatment' (MST) first emerged, its subsequent decline and also its recent 'resurrection'.

The concept of MST crystallised as a rule of custom in the mid-twentieth century,[1] but in the 1960s and 1970s, Newly Independent States (NIS) began to challenge its existence. While the Standard ultimately survived these events, this opposition had another more subtle consequence: both developing and developed States now perceived the MST as ineffective in providing basic legal protection to foreign investors.[2] It is in this historical context that these States began frenetically signing bilateral investment treaties (BITs) for the promotion and protection of investments, which provided clearer rules on investment protection. I will argue in this chapter that States started to use the expression 'fair and equitable treatment' (FET) in their BITs because of the ambiguities surrounding the concept of the MST and the fact that many States had contested its legitimacy in the past. By the end of the 1990s, only a very small minority of BITs actually referred to the MST. By then, the concept had clearly lost its once prevailing importance as a source of investment protection for foreign investors. The MST's glory days were long gone.

[1] This is indeed the position taken by writers in the 1950s: RR Wilson, *The International Law Standard in Treaties of the United States* (HUP 1953) 103–4; G Schwarzenberger, *International Law*, Vol 1 (3rd edn, Stevens and Sons 1957) 206–7. See also M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 64–7, 83 ff; JE Alvarez, 'Bit on Custom' (2009) 42 NYUJIntlL&Pol 39.

[2] JW Salacuse, *The Law of Investment Treaties* (OUP 2010) 45–6.

The dynamics suddenly changed, however, when arbitral tribunals started to give a broader interpretation to FET clauses, thereby providing foreign investors with treatment protections *above and beyond* the traditional MST.[3] It was only then that States started to explicitly mention in their new BITs that the treatment offered to investors under the FET clause was, in fact, the same that was extended to all foreign investors under the MST under custom. The concept of the MST, which had almost been forgotten by States in the 1990s, was now centre stage in their quest to limit investors' rights under investment treaties. States' objectives were now to prevent future tribunals from developing their own idiosyncratic interpretations of the FET standard. In this respect, the most interesting and innovative FET clause is certainly Article 8.10 of the Canada–European Union Comprehensive Economic and Trade Agreement (CETA), which contains a closed list of elements that are considered by the parties to embody the standard.[4] States have thus somewhat 'rediscovered' the usefulness of the MST. The concept has now regained the prevalence that it had lost in the past decades as an important source of investment protection.

[3] A good illustration is *Pope & Talbot Inc v Canada* (Award on the Merits of Phase II, 10 April 2001) UNCITRAL [105–18].

[4] The final text of the agreement was released, following legal review, on 29 February 2016: Canada–European Union Comprehensive Economic and Trade Agreement (CETA) (Canada & EU) (adopted 30 October 2016, provisionally entered into force 21 September 2017) Article 8.10. The provision (entitled 'Treatment of Investors and of Covered Investments') reads as follows:

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
   (a) denial of justice in criminal, civil or administrative proceedings;
   (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
   (c) Manifest arbitrariness;
   (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
   (e) Abusive treatment of investors, such as coercion, duress and harassment; or
   (f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialized Committee), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

2 The Emergence of MST as a Rule of Customary International Law

Section 2.1 will define the concept of MST and examine its historical foundation. Section 2.2 will analyse the subsequent challenges to the MST's customary status, which was led by developing States in the 1960s and 1970s and eventually resulted, in the 1990s, in the new phenomenon of 'treatification'.

2.1 The Historical Foundation of the Minimum Standard of Treatment

Despite some disagreement between States on the existence of the MST in the last few decades (a point further examined below), the concept is now well recognised by States, tribunals and scholars as a rule of customary international law.[5] What is more controversial is determining the actual *content* of the standard. The MST is an *umbrella concept* that in *itself* incorporates different elements.[6] Based on an analysis of case law and reports by the Organisation for Economic Co-operation and Development (OECD) and United Nations Conference on Trade and Development

4. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to physical security of investors and covered investments.
6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.
7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

[5] See, numerous States' pleadings, awards and work of scholars mentioned in P Dumberry, 'Fair and Equitable Treatment: Its Interaction with the Minimum Standard and its Customary Status' (2017) 1(2) BRP Int ILA 1, 5–7.

[6] A number of NAFTA tribunals have also endorsed this description: *Glamis Gold, Ltd v United States* (Award of 8 June 2009) UNCITRAL, *Ad Hoc* Tribunal [618]; *Cargill, Inc v Mexico* (Award of 18 September 2009) ICSID Case No ARB(AF)/05/02 [268]; *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada* (Decision on Liability and on Principles of Quantum of 22 May 2012) ICSID Case No ARB(AF)/07/4 [135]. See also, A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009) 236.

(UNCTAD),[7] it may be observed that the MST encompasses (at the very least) an obligation for host States to prevent denial of justice and arbitrary conduct and also to provide investors with due process and 'full protection and security'.[8]

The historical aspects surrounding the emergence of the MST have already been the subject of substantial scholarship.[9] Suffice it to note that its origin is grounded in the international law doctrine of State responsibility for injuries to aliens.[10] It is rooted in a due diligence obligation for States to respect the rights of foreigners within their country. Before the twentieth century, there was a prevailing view that individuals conducting business in another State should be subject to the law of that State.[11] Several States, especially in Latin America, adopted this position to counter the so-called gunboat diplomacy and other types of interferences by Western States in their internal affairs that were often made under the pretext of protecting the interests of their nationals abroad.[12] It is in this context that many States rejected the idea of the existence of any obligation under international law to accord a 'minimum' level of protection to foreigners.

Despite this opposition, the MST gradually emerged in the early twentieth century.[13] The development of this standard of treatment stemmed from capital-exporting States' concern that many host States receiving investments lacked the most basic measures of protection for aliens and

[7] OECD, *International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives* (OECD Publishing 2005) 82; UNCTAD, 'Fair and Equitable Treatment' (*UNCTAD Series on Issues in International Investment Agreements II*, 2012) UN Doc UNCTAD/DIAE/IA/2011/5, 44 (referring to OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (2004) *OECD Working Papers on International Investment 2004/03*, <http://dx.doi.org/10.1787/675702255435> accessed 10 May 2021).

[8] P Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013) 25–8.

[9] Paparinskis (n 1) 39–83; T Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Martinus Nijhoff 2013). See also, more recently, M Pinchis-Paulsen, 'The Life and Death (and Re-Birth) of "Fair and" "Equitable Treatment": A Historical Examination of Twentieth Century International Trade and Investment Law Treaty-Making and Political Decision-Making' (PhD Thesis, King's College London 2017).

[10] H Dickerson, 'Minimum Standards' [2013] MPEPIL 845 [2].

[11] This period is examined in detail in Weiler (n 9) 337 ff.

[12] Weiler (n 9) 345, providing a number of examples of such interventions and referring to 'no fewer than one hundred instances of "protection by force" between 1813 and 1927 by the United States alone, including two dozen in the Twentieth century'.

[13] Weiler (n 9) 351; Paparinskis (n 1) 64, noting that at the time it focused almost exclusively on the non-discriminatory aspects of the treatment and on preventing denial of justice.

their property.[14] They argued that all governments were bound under international law to treat foreigners with at least a minimum standard of protection,[15] because the existing standard in many countries was considered too low.[16] The reasons for establishing such a standard were explained by the US Secretary of State, Mr Elihu Root, in an article published in 1910[17] and were reiterated some ninety years later by the North American Free Trade Agreement (NAFTA) *SD Myers* Tribunal.[18] International jurisprudence slowly developed the concept of a minimum standard of protection. While a number of cases have had a significant impact on the emergence of this standard, the best known is certainly the *Neer* case of 1926.[19]

The question of whether or not any customary rule in the field of investment arbitration had firmly crystallised after the Second World War is controversial.[20] However, it is safe to say that the MST was an established rule of custom at the time.[21] Section 2.2 examines a number of dramatic developments that occurred in the decades following the Second World War.

[14] MA Orellana, 'International Law on Investment: The Minimum Standard of Treatment (MST)' (2004) 3 TDM 1.

[15] C Schreuer & R Dolzer, *Principles of International Investment Law* (OUP 2008) 12–13.

[16] Salacuse (n 2) 47; JC Thomas, 'Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators' (2002) 17(1) ICSID Rev 26.

[17] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 AJIL 521.

[18] *SD Myers Inc v Canada* (Partial Award of 13 November 2000) UNCITRAL [259]: 'The inclusion of a "minimum standard" provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The "minimum standard" is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner'.

[19] *USA (LFH Neer) v Mexico* (Award of 15 October 1926) 4 RIAA 60. The Commission held that the 'propriety of governmental acts should be put to the test of international standards' and that 'the treatment of an alien, in order to constitute an international delinquency, should amounts to an outrage, to bad faith, to wilful 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' (ibid 61–2). For a critical assessment of the influence of this case, see *Railroad Development Corporation (RDC) v Guatemala* (Award of 29 June 2012) ICSID Case No ARB/07/23 [216]; *Mondev International Ltd v United States* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [115]; SM Schwebel, 'Is Neer Far from Fair and Equitable?' (2011) 27(4) Arb Intl 555, 555–61; J Paulsson & G Petrochilos, 'Neer-ly Misled?' (2007) 22(2) ICSID Rev 242–57.

[20] P Juillard, 'L'évolution des sources du droit des investissements' (1994) 250 RdC 76.

[21] Paparinskis (n 1) 64–7, 83 ff. On the contrary, AC Blandford in 'The History of Fair and Equitable Treatment Before the Second World War' (2017) 32(2) ICSID Rev 294 ff argues that in the period before the Second World War the MST that emerged was originally based on the concept of 'general principles recognised by civilized nations' (which are found in the *domestic laws* of States), and therefore, *not* based on customary international law.

2.2 *Newly Independent States Challenging the MST*

In the 1960s and 1970s, NIS revived opposition towards the existence of any customary rules in the field of investment law. They openly contested the *legitimacy* of the existing CIL and demanded a revision of these 'outdated' rules that did not take into account the fundamental changes that had occurred in the international community since the end of the colonisation period.[22] According to Abi-Saab, these States '[did] not easily forget that the same body of international law that they [were] now asked to abide by, sanctioned their previous subjugation and exploitation and stood as a bar to their emancipation'.[23]

Specifically, these States rejected having the obligation to provide any minimum standard of protection to foreign investors under CIL.[24] They insisted that they were bound to provide foreign investors only with the level of treatment existing under their domestic law.[25] They also contested the existence of any international law norms requiring compensation for expropriated foreign properties and supported a less stringent compensation requirement than the Hull formula.[26] At the time, developing States took the debate to the United Nations General Assembly where they represented the majority of States.[27] They used their status within the international body to advance their interests by way of resolutions and declarations,[28] which included Resolution 3171 adopted in 1973[29] and the 1974 *Charter of Economic Rights and Duties*

[22] AT Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38(4) VaJIntlL 64; Juillard (n 20) 76.

[23] G Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 HowLJ 100. See also SN Guha-Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 AJIL 866.

[24] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, CUP 2004). See, for instance, ILC, 'Report on the Fourth Session of the Asian-African Legal Consultative Committee (Tokyo, February 1961), by FV Garcia Amador, Observer for the Commission' (30 May 1961) UN Doc A/CN4/139, 78, 82–4.

[25] SM Schwebel, 'Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASIL Proc 27.

[26] Guzman (n 22) 647; UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking' (*UNCTAD*, 2007) UN Doc UNCTAD/ITE/IIA/2006/5, 48.

[27] Juillard (n 20) 84ff.

[28] M Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 41.

[29] UNGA, 'Permanent Sovereignty Over Natural Resources' (17 December 1973) UN Doc A/RES/3171(XXVIII).

of States.[30] Given the division between the developed and the developing States, the *Charter of Economic Rights and Duties of States* could hardly be considered a reflection of existing international law at the time.[31] Another question is whether or not the effect of the attack by new States was to *destroy* the few rules of custom that existed after the Second World War. A number of writers believe this was the case.[32] Without specifically taking a position on the impact that the contestation may have had on custom, the International Court of Justice (ICJ) in the famous *Barcelona Traction* case of 1970 simply noted that *no rule* of customary international law existed in the field of international investment law.[33]

The more established position is that some customary rules (including the MST) *already existed* at the time the developing States started opposing them.[34] In the 1990 *Elettronica Sicula S.p.A.* (*ELSI*) case, the ICJ indeed referred explicitly to the existence of a 'minimum international standard'.[35] In fact, while it seems that the MST survived the assault by the developing States, it did not do so without some casualties. Thus, as noted by one writer, the strong contestation of a large segment of States has 'served to undermine the solidity of the traditional international legal framework for foreign investment'.[36] Thus, while the developed States held the view that

[30] UNGA, 'Charter of Economic Rights and Duties of States' (12 December 1974) UN Doc A/RES/3281(XXIX).

[31] Schwebel (n 25) 28; C Brower & J Tepe, 'The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?' (1975) 9(2) IntlLaw 295; D Carreau & P Juillard, *Droit international économique* (LGDJ 1998) 464; Salacuse (n 2) 75.

[32] Carreau & Juillard (n 31) 464–5; Sornarajah (n 24) 19–20, 89–93, 213; A Akinsanya, 'International Protection of Direct Foreign Investments in the Third World' (1987) 36 ICLQ 58; A Al Faruque, 'Creating Customary International Law Through Bilateral Investment Treaties: A Critical Appraisal' (2004) 44 IJIL 312, 312–13; J d'Aspremont, 'International Customary Investment Law: Story of a Paradox' in T Gazzini & E de Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012) 14.

[33] *Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain)* (Judgment) [1970] 3 ICJRep 46–7, noting that 'it may at first sight appear surprising that the evolution of the law [on foreign investments] has not gone further and that no generally accepted rules in the matter have crystallized on the international plane'.

[34] See, Paparinskis (n 1) 83 ff; Alvarez (n 1) 39; JE Alvarez, 'The Public International Law Regime Governing International Investment' (2009) 344 RdC 292.

[35] *Elettronica Sicula SpA (ELSI) (USA v Italy)* (Judgment) [1989] 15 ICJRep 111 ("The primary standard laid down by Article V is "the full protection and security required by international law", in short, the "protection and security" must conform to the minimum international standard').

[36] Salacuse (n 2) 45–6, 75; Al Faruque (n 32) 294–5.

customary rules existed, they also acknowledged that their effectiveness was limited as a result of the vehement opposition of a large number of States.[37] In fact, both the developed and the developing States perceived these rules as ineffective in providing basic legal protection to foreign investors.

It is in this historical context that, in the 1990s, States began signing numerous BITs providing clearer rules on investment protection (a new phenomenon referred to as 'treatification'). At the time, a new consensus emerged regarding the necessity to offer better legal protections to foreign investments in order to accelerate economic development. Yet, there was still great uncertainty surrounding the types of legal protections that existed for foreign investors under custom. As explained by two scholars, Dolzer and von Walter, it is due to the fact that 'customary law was deemed be too amorphous and not be able to provide sufficient guidance and protection' to foreign investors that capital-exporting and developing States started frenetically concluding *ad hoc* BITs.[38] According to both Schreuer and Dolzer, as a result of the new climate of international economic relations of the 1990s, 'the fight of previous decades against customary rules protecting foreign investment had abruptly become anachronistic and obsolete'.[39] Consequently, by the 1990s, 'the tide had turned', and developing States were no longer opposed to the application of a minimum standard of protection under custom. Instead, they granted 'more protection to foreign investment than traditional customary law did, now on the basis of treaties negotiated to attract additional foreign investment'.[40]

Section 3 examines how this new phenomenon of 'treatification' was marked by the emergence of the FET standard and the decline of the MST as a source of investment protection for foreign investors.

3 The Emergence of the FET Standard in Investment Treaties

From the 1990s and onwards, States have included the FET standard in an overwhelming majority of BITs. I have explained elsewhere that less than 5%

[37] The member States of the OECD certainly believed at the time that these customary rules existed. See OECD, 'Draft Convention on the Protection of Foreign Property' (1967) 7 ILM 117, Notes and Comments to Article 1 (further discussed in Section 3).

[38] R Dolzer & A von Walter, 'Fair and Equitable Treatment – Lines of Jurisprudence on Customary Law' in F Ortino, L Liberti, A Sheppard & ors (eds), *Investment Treaty Law: Current Issues II* (BIICL 2007) 99. The same conclusion is reached by many writers, see long list in Dumberry (n 5) 18.

[39] Schreuer & Dolzer (n 15) 16.

[40] ibid.

of the BITs which I have examined do not include any formal and binding FET obligation for the host State of investments.[41] One of the most controversial questions discussed in scholarship is why States first began including the term FET in their BITs throughout the 1960s and 1970s, and why they have continued to do so (almost) uniformly thereafter in the 1990s.[42]

According to one view, Western States incorporated the concept of FET in their BITs to simply reflect the MST that existed under international law.[43] This approach has been endorsed by a number of writers.[44] These writers typically refer to the 1967 OECD Draft Convention[45] as representative of the position of developed States at the time on matters of protection of foreign investments.[46] This is because the OECD's Commentary to the 1967 Draft Convention indicated that the concept of FET flowed from the 'well established general principle of international law that a State is bound to respect and protect the property of nationals of other States'.[47] The Drafting Committee also added that the phrase FET refers to 'the standard set by international law for the treatment due by each State with regard to the property of foreign nationals' and that 'the standard required conforms in effect to the minimum standard which forms part of customary international law'.[48] The same position was also taken by OECD member States in 1984[49] and is confirmed by the practice of some

[41] P Dumberry, 'Has the Fair and Equitable Treatment Standard become a Rule of Customary International Law?' (2016) 8(1) JIDS 155, 155–78, examining 1,964 BITs that were available on the UNCTAD website at the time (February 2014). Yet, it should be added that even when a BIT does not contain an FET clause, it may be that an investor will be able to invoke the MFN clause contained in that treaty to rely on provisions found in *another* treaty entered into by the host State that provide for a 'better' treatment. This is because a BIT containing an FET clause arguably provides (at least in theory) foreign investors with a 'better' treatment than a treaty without such a provision. See, P Dumberry, 'The Importation of the Fair and Equitable Treatment Standard Through MFN Clauses: An Empirical Study of BITs' (2016) 17 ICSID Rev 229, 229–59.

[42] See, discussion in Dumberry (n 8) 31–5.

[43] See, analysis in Newcombe & Paradell (n 6) 268; Thomas (n 16) 44, 47; Carreau & Julliard (n 31) 454.

[44] See, for instance, JR Picherack, 'The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?' (2008) 9(4) JWIT 264; Paparinskis (n 1) 160–3; S Montt, *State Liability in Investment Treaty Arbitration* (Hart 2009) 69; Blandford (n 21) 302.

[45] OECD (n 37) Notes and Comments to art 1.

[46] S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70(1) BYBIL 99, 112–13; UNCTAD (n 7) 8; OECD (n 7) 4.

[47] OECD (n 37) 119.

[48] ibid.

[49] Thomas (n 16) 48 referring to: OECD, 'Intergovernmental Agreements Relating to Investment in Developing Countries' (*OECD*, 27 May 1984) OECD Doc No 84/14, 12 [36] ('[a]ccording to all Member countries which have commented on this point, fair and

Western States.[50] This narrative has, however, been subject to dissent by many scholars.[51] While it is possible that the OECD commentary reflected what their member States (all developed States) *themselves* viewed to be the CIL at the time, they were certainly not representative of what the developing States believed were their legal obligations in the 1960s.[52] In any event, as explained by two scholars, Newcombe and Paradell, the use of a 'different and more politically neutral term [FET] might be explained by the historical political sensitivities regarding the minimum standard of treatment', which was 'historically viewed with suspicion because of the legacy of gun-boat diplomacy and imperialism'.[53] This is also the position endorsed by Judge Nikken in his separate opinion in the *AWG Group v Argentina* case.[54] In sum, for these writers the concept of the FET 'may simply have been viewed as a convenient, neutral and acceptable reference' to the MST.[55]

A more convincing approach has been adopted by a number of other writers who suggest that the growing use of the term FET by Western States in their BITs was intended to counter the assertion made by developing States about the inexistence of any MST under international law.[56] Thus, Western States started including references to the FET standard *because* of the ambiguities surrounding the concept of the MST.[57] They started using this term as a result of the challenge mounted by developing States against the MST. Weiler provides a detailed account explaining how the United States started using the expression FET after the War and concluded that US negotiators embraced the term in the 1960s because the MST 'controversy had otherwise poisoned the well for treaty drafters'.[58]

equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated').

50 See, examples examined by Newcombe & Paradell (n 6).

51 T Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations' (2008) 106 MichLRev 853, 876–7; M Klein Bronfman, 'Fair and Equitable Treatment: An Evolving Standard' (2006) 10 Max Planck YrbkUNL 615.

52 Kill (n 51) 879.

53 Newcombe & Paradell (n 6) 263–4.

54 *AWG Group v Argentina* (Decision on Liability of 30 July 2010) UNCITRAL, Separate Opinion of Arbitrator Pedro Nikken [14–15].

55 Newcombe & Paradell (n 6) 263–4. See also, Montt (n 44) 69–70.

56 See analysis in Thomas (n 16) 48. *Contra*: Paparinskis (n 1) 163.

57 Weiler (n 9) 199, 211–12, 216, 227, 239–40; Vasciannie (n 47) 157–8.

58 Weiler (n 9) 199 ff, 215. See also: K Vandevelde, *United States International Investment Agreements* (Kluwer 2002) 263.