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# The concept of fair and equitable treatment: Toward host country is not only vague but also created uncertainty as to what to be expected of private foreign investors (TNC)

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**Abstract**
The Article demonstrates the understanding of the concept of Fair and Equitable Treatment (FET) in foreign investment. This Article examines the vagueness in FET standard which is the core problem that creates a precarious position for Transnational Corporation and Host State in its operation. This Article points alert the meaning of Fair and Equitable Treatment' in context of international investment law and examine the relationship of Fair and Equitable Treatment and Customary International Law, with pinpointed by analysing international and judicial and arbitral cases that will assist in coming out of precarious penumbra encircled to the concept of FET; host state and investor role in deciding the scope of FET and recent surge in case-law as to investor-state disputes. This Article suggest possible solution and balancing approach to come out of the penumbra created due to excessive interpretation, for the private foreign investor and Host State.

**Keywords:** demonstrates, understanding, investors (TNC)

## Introduction

Fair and Equitable Treatment (FET) is one of the vital key core concepts in international investment law. The concept of fair and equitable standard treatment is invoked in almost every international treaty. Most BITS' and other investment treaties provide for FET of foreign investment [1]. Many treaties refer to 'FET' to be accorded to the nationals of the contracting parties in different version which varies between a plain prescription of FET and a combination of the standard with an explicit reference to international or customary international law, this phrase is nebulous and is open to different interpretation while protecting the interest of the private foreign investors [2].

Generally, in modern investment treaties, a FET standard clause provides investor (Private Foreign Investor (TNC)) and investment assurance of minimum standard and full protection and security. By and large, claimants are emphasising on this standard of treatment in litigation, due to very broad interpretations in a number of arbitral decisions it has created vagueness and uncertainty in understanding the real rationale of FET toward the private foreign investor apropos international law, in light of the text of Article 1105 of NAFTA and for some treaties which specifically undertake to accord FET to each other's nationals as an expression of obligation [3], to act in good faith, or to refrain from abuse or arbitrariness [4].

Tribunal in numerous interpretations has given different prospective. There are two dominant general views- *first*- FET does not add anything more to the international law but merely affirms it [5]: *second* - that the fair and equitable standard expands the scope of the international minimum standard by allowing future tribunal to create new standards when the situation demands so that justice may be done for the foreign investor who suffers the unfair treatment at the hands of the host state [6]. Nonetheless, dominant views and chaotic interpretations recur on and about the concept of "fair and equitable treatment" that has in fact scattered the concept from coherent theory, it has also created more indistinctness in treaty practice specifically in the areas of obligation to apply; self-standing standard; relationship with international standard; and relationship with customary international law.

Few countries are inclined toward adopting optional approach toward private foreign investor by offering optional formula of fair treatment because of excessive interpretations of 'FET standard' [8]. However, the vagueness in FET standard is the core problem, which creates a precarious position for TNC and Host State in its operation; to address this issue, I shall, in first place, give a brief account of the concept of fair and equitable treatment by critically examining - the historical background-development of the concept of FET (Part I), in second place, examine the 'Meaning of Fair and Equitable Treatment' in context of international investment law (Part II), in third place, describe the relationship of Fair and Equitable Treatment and Customary International Law, with the analysis of the main international [7] and judicial and arbitral cases that might assist in coming out of precarious penumbra encircled to the concept of FET; host state and investor role in deciding the scope of FET and recent surge in case- law as to investor-state disputes. (Part III), and *lastly*, I conclude by offering possible solution and balancing approach to come out of the penumbra created due to excessive interpretation, for the private foreign investor and Host State.

## Part- I Historical Background

*Pre-90's*

FET attended standard – by peculiar history. It came to attention after world war-II. The evolution of FET and origin of the clause can be traced from the period of Treaties on Friendship, Commerce and Navigation [9], the Abs-Showcase Draft Convention on Investment Abroad- which first time referred to the concept [10], but real 'just and

equitable standard' appeared as a standard clause in Article 11(2) of Havanna Charter of 1948 [11], but as a drawback, both of these charters never entered into force and consequently, they failed [12]. Thereafter, the OECD draft convention on the Protection of Foreign Property of 1967 [13] - included the standard clause on FET.

*Post- 90's*

The OECD Draft Negotiating Text of Multilateral Agreement on Investment of 1998 – accorded the principal of FET and clarified it shouldn't be less favourable than required by the international law [14]. Few treaties like the Free Trade Agreements between the Chile [15], United States and Australia [16], Central America [17], Singapore [18], said that treatment to be in accordance with customary international law [19]. Other treaties, the 1992 World Bank Guidelines on Treatment of Foreign Direct Investment stipulate FET as an obligation for States to provide FET [20]. The North American Free Trade Agreement (NAFTA) of 1992 recognised the concept of FET principal in its Article 1105(1) [21]. Later the Energy Charter Treaty of 1994 also recognises the concept of fair and equitable treatment [22], but in a fiddly fashion. However, some treaties (*for example* Art. 1105 NAFTA) state the concept of FET to be in accordance with international law, *per contra* other treaties (*for example* Chile [23], United States and Australia [24], Central America (CAFTA) [25], Singapore) categorically states FET to be accordance with customary international law; this phenomenon creates penumbra, further analysis on this aspects is discussed in later portion with the relevant cases in their proper context in part III.

## 1. the 'Meaning of Fair and Equitable Treatment' in Context of International Investment Law

FET is termed as a legal standard. It is also refereed as absolute standard. The word "fair" is defined by the *Concise Oxford Dictionary* as "just, unbiased, equitable, in accordance with rules" [26]. *Black's Law Dictionary* defines it as "fairness impartiality; even-handed dealing the body of principles consulting what is fair and right", thus, fairness connotes, among other things, equity [27]. The word "equity" is defined by the *Black's Law Dictionary* as "impartial; just; equitable; free from prejudice", *Concise Oxford Dictionary* defines "equity" as fairness and impartiality. Therefore, I see to a large extent this concept of "fair" and "equity" is compatible, as the concept of equity is not uniform.

Few scholars explain this FET as concept of "equitableness" they define it as "a general principle that commands an equitable application of the law in order to avoid, in practice, absurd or unreasonable results" [28]. The concept of "equity", we are reminded, that it was originally employed to remedy defects of the common law 'on grounds of conscience and natural justice', with an ecclesiastic chancellor acting as 'Keeper of the King's Conscience' [29]. *Holdworth* argues that equity should follow the law [30]. Here I agree with *Holdworth* that equity should follow the law. But, the concept of FET is to a large extent compatible in its practical application. In addition, *Schreuer* emphatically states in his scholarship that it is a concept as a legal concept [31]. However, recently this concept has been altered and described as "technical legal content of its own and the two notions composing it have only a limited direct effect on its meaning" [32].

The most comprehensive definition can be culled from *Tecmed* v. *Mexico* [33] tribunal award says: FET standard is an expression of the bona fide principle that is present in international law [34] In *MTD* v. *Chile* [35] the tribunal said: 'fair and equitable should be understood to be treatment encompassed such fundamental standards as good faith, due process, non- discrimination, and proportional'. In *Maffezini* v. *Spain* [36], tribunal notes, despite its seeming reference to equity and its apparent lack of precision, it is a legal concept and not a reference to decision *ex aequo et bono* (in equity and good conscience). But, in fact, Art 1105 of NAFTA and some treaties clearly does not allow a tribunal to decide *ex aequo et bono*. However, in the dictum of *Tunisia-Libya Continental Shelf Case* [37], the International Court of Justice (ICJ) held that: "Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the parties agree. Withal, the Court observed that it is bound to apply equitable principles as part of international law and to balance up the various considerations which it regards as relevant in order to produce an equitable result" [38].

In this context, *Georg Schwarzenberger* apparently argues if international organs act in a quasi- judicial capacity, that is/are authorised by the parties to a dispute to decide *ex aequo et bono* – they are entitle to modify and override international law [39]. Conversely, *S.Schill* argues that "although, fair and equitable treatment undoubtedly constitutes a legal standard, not an empowerment of tribunals to render decisions *ex aequo et bono*, tribunals often do not display a conceptually clear vision of what limitations fair and equitable treatment entails for state measures affecting foreign investors" [40]. *C.Schreuer*, argued ahead that the lack of precision is not application. Like other broad principles of law FET is susceptible of specification through judicial practice [41]. I am sceptical of *Schill's* suggestion but at the same time I agree with *Professor Schwarzenberger's* views on application of *ex aequo et bono*, his argument is convincing, I see persuasive force in his way of explaining the rationale and practical application of the principle – even in the case of a dispute submitted to the tribunal are unfettered by legal or ethical norms- the presumption is that the parties accept the complete freedom of organ, it can indeed be very considerable to apply the principles of equity.

One crucial question that arises is whether the standard actually contains two standards, namely 'fair' and 'equitable', with independent meaning of each concept. The general assumption appears to be that 'fair and equitable' must be considered to represent a single, unified standard. Indeed, it has been opined that there is no difference between 'equitable' and 'fair and equitable [42]. Here reliance on *Saluka Investments BV* v. *Czech Republic* [43], tribunal *dicta* says "in explaining the 'ordinary meaning' of the 'FET' standard can only be defined by terms of almost equal vagueness".

But, to an astonishing degree, I see no difference in both the word fair and equitable; to sum up this section, and to come out of penumbra, I have to argue that only a conceptual line could be drawn between 'fair and equitable' that it does not have a different meaning than equitable and appropriate reasonable, inter alia it is robust term. To make it apparent it should be read along with *Pacta sunt servanda* [44] which is an obvious application of the stability requirement which is central to the FET standard. Nonetheless, tribunals have diluted this phenomenon more by interpreting the *pacta sunt servanda* clause in totally conflicting ways and the different reasoning of the tribunal has created more confusion than

clarity [45] *Schwarzenberger* delineates and defines the standard and refers its source follows not only from its judicial character and treaty basis, but from its individual member [46]. It has been used in many treaties [47] and it is also frequently used by tribunals in several cases [48]. I would argue it as an increasing isomorphism in defining the meaning of 'fair and equitable' treatment.

## 2. Fair and Equitable Treatment and Customary International Law

As we have already seen the glimpse of complexities in above discussion apropos the different treaties referring to international law and customary international law within their standard treatment clause. An astounding, penumbra revolves around FET which can be sub- divided into following sensitive issues:

- What is international minimum standard?
- Whether the FET standard merely reflects the international minimum standard, as contained in customary international law?
- Does it offer an autonomous standard that is additional to general international law?

The above questions have been the subject of some debate in recent past. It has received particular attention in the ICSID cases brought under the NAFTA, where the two standards are expressly linked. Although not all NAFTA decisions have interpreted the FET obligation consistently, the view has been gaining dominance that for a breach to be found, a State's conduct must be "egregious" or "shocking" from an international perspective (high liability threshold) [49].

First to address the complexities of autonomous standard- *Dolzer and Steve* in their scholarship, emphatically stated that FET constitutes an independent treaty standard that goes beyond a mere restatement of customary international law [50]. *Vasciannie*, argues that FET is an autonomous standard. He argues after minutely examining that "bearing in mind that the international minimum standard has itself been an issue of controversy between developed and developing States for a considerable period, it is unlikely that a majority of States would have accepted the idea that this standard is fully reflected in the fair and equitable standard without clear discussion."

But, *per contra*, the OECD draft convention on the Protection of Foreign Property of 1967 [51] points out that the FET standard is set by customary international law. In *AAPL* v. *Srilanka* [52], - I quote passage phrase from the dissenting opinion of arbitrator Dr.K B Asante- "*The phrase 'fair and equitable treatment', customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals……The standard required conforms in effect to the 'minimum standard' which forms parts of customary international law*" [53]. Interestingly, by far most of the exhaustive discussion around the relationship of FET and customary international law has taken place in the context of Art 1105 (1) NAFTA [54]. There are two prominent noticeable features of text *first* refer to "Minimum Standard of Treatment" in the heading – as obvious reference to customary international law, *second* in reference to FET standard qua international law. Apparently, *Dulzor and Schreuer* argues that NAFTA tribunal in *catena of decision* [55] has accepted that the FTC interpretation apropos Article 1105(1) NAFTA – reflects the customary international law minimum standard and does not require treatment in addition to or beyond that which is required by the customary international law [56].

In contrast, *C. Schreuer,* wryly argues that NAFTA tribunal did not regard FET in Article 1105(1) as restricted to customary international law [57] Here I agree (*heartily*) with *Schreuer* on this phenomenon, withal, he moves ahead by critically examining tribunal award in *S.D.Myers* v. *Govt. of Canada* [58], and *Pope & Talbot* v. *Canada* [59], and argues that the fairness element in Art 1105 did not reflect customary international law but were additional to the requirement of international law. My views diverge sharply, I would argue that the question is slightly different with regard to BITs dealing standard FET clause. *Schreuer* strongly states that in BITs the meaning of a clause providing for fair and equitable treatment will ultimate depend on its specific wording. The fact that the host state has breached a rule of international law will be a strong evidence of a violation of the fair equitable treatment standard, but that is not the only conceivable from of its breach. I agree, however, on one theme in my perspective the dogmatic approach is often adopted by tribunal in catena of interpretations, typically these tribunal do not use the term minimum standard but so often refer to customary international law. In *Occidental* v. *Ecuador* [60] - the issue arose whether the fair and equitable treatment mandated by the treaty is a more demanding standard than that prescribed by customary international law…tribunal opined that in the instant case the Treaty standard is not different from the required under international law concerning both stability and predictability of the legal business framework of the investment. To this extent the Treaty standard can be equated with that under international law as evidenced by the opinions of the various tribunals cited above [61]. At this juncture, it becomes vital to understand the meaning of *what is international minimum standard*?

To come out of penumbra and the complexities that stick around international minimum standard. The most precise clear definition is defined by *A.H Roth* who defines it as a set of rules, correlated to each other and deriving from one particular norm of general international law [62] *Orellana* in his scholarship argues that minimum standard treatment is a norm of customary law which governs relations between host state and foreign investors, which Host States must adhere regardless of their own domestic laws. The development of the standard as an absolute minimum came about as a result of the dissatisfaction of foreign investors and their home states the national treatment given to locals which they considered to be uncivilized, arbitrary or unable to ensure the rule of law [63] I see more of turn round in his argument, it can be safely argued that any violation of this standard as suggested by *Orellana* will attract international responsibility of the host state, and upon the collapse and exhaustion of local remedies, may lead to action by the home state on behalf of the investor through diplomatic protection.

In *Waste Management* v. *Mexico* [64] the tribunal said that 'the standard is to some extent a flexible one which must be adapted to the circumstances of cases' – this observation has been often adopted by the tribunals [65] and scholars. As discussed above *Schreuer* also draws his analogy parallel to the observations of the tribunal in *Waste Management case*,

he advocates that FET will ultimately depend on its specific wording in BITs and a strong reason of evidence. Turning back to *AAPL case*, Judge Dr. Asante, notes that juxtaposition of "fair and equitable treatment" with "full protection and security" [66]. Dr. Asante stressed that the fair and equitable standard conformed to the international minimum standard [67]. But, in *Azurix* v. *Argentina* [68] tribunal interpreted Article II(2)(a) of the Argentina –US BIT – which provides for FET not less than required by international law. Tribunal said it is necessary to regard FET as standard that is separate and higher than the one under international law. But the tribunal have also indicated that the difference between FET and the customary minimum standard "when applied to the specific facts of a case, may well be more apparent than real" thus, in a particular case, FET may well overlap with or even become identical with the minimum standard required by international law [69].

Similarly, the view that FET is a treaty standard that is independent of other standards under customary international law has been expressed also by the Tribunal in *PSEG v. Turkey* [70] The Tribunal, interpreting the BIT between Turkey and the US, in its clear dicta said "…it clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards. This role has resulted in the concept of fair and equitable treatment acquiring a standing on its own, separate and distinct from that of other standards, albeit many times closely related to them, and thus ensuring that the protection granted to the investment is fully safeguarded [71]. To sum up this section, I quote *Laviec* [72], who delineates that a reference to FET should not be read as a reference to international minimum standards. If the intention is to assimilate the two concepts, this should be made explicit in the text. Otherwise, the fair and equitable treatment standard should stand on its own. At this juncture, I agree to an extent with *Laviec*, and *Schreuer* they share the similar view that FET standard should stand on its own. *Schreuer* advocates further on that the insistence that FET is identical with customary international law may well have an effect that is the opposite of what is intended by those who advocate this identity. It will not restrain the development of the FET standard. More likely, the consequence of that position will be to accelerate the development of customary law through the rapidly expanding practice on FET clauses in treaties [73].

Further, I see the opaque in relationship of FET and customary international law as is it not based on *opinio juris sive necessitatis*- it means 'transform of a practice or usage into a rule of international customary law, so a change in this *opinion* always lead to a modification or nebulous abrogation to this rule.' I draw my analogy from tribunal decision in *Teco Guatemala Holdings, Llc* v. *The Republic Of Guatemala* [74], tribunal in its *dictum* unequivocally said customary international law must be established through State practice, not through decisions of arbitral tribunals. Decisions of arbitral tribunals that discuss State practice might be relevant as evidence of State practice, but they can never be a substitute for State practice as the source of customary international law [75].

## 3. Balancing Factors and Concluding Remarks

At this juncture, it becomes crucial to discuss the balancing factor sought from host state and private foreign investor that might lend a hand, in balancing investor and host country interests- in the background of the concept of FET which is still shrouded with considerable penumbra. It has been vehemently argued that to balance between host country and investor concerns can be achieved by reference to international minimum standards of treatment as an integral part of the FET [76]. However, some critical voices do not agree with this proposition of refer to minimum standard as an integral part of FET. Nonetheless, to strike a balance between the protection of investors and the inherent right of a State can be achieved by regulating the economic and financial affairs within its borders in transparent manner. Investors should have a duty to use local remedies as an aspect of good corporate citizenship and good management practice, in return for the host country providing proper and effective means of redress, with international dispute settlement remaining available, as an option of last resort, to determine whether essential due process standards have been observed at the national level [77]. High-quality investment climate is required to motivate an investor protection prospective. On the other side, investors should not participate in any dishonest practice including any anticompetitive practice, and must provide full disclosure of their activities (host country may have an obligation to ensure the truth of any material representations made by the investor as to their competence, financial resources and any other relevant matters pertaining to the investment) [78] that are required by national law of the host state. In addition, firms should facilitate development objectives through assisting in technology/skill transfer [79] and in observing national development policies. While critically assessing various issues of international investment and striking a balance *Muchlinski*, refers to *Feldman v Mexico* [80] and suggests that a host country may have an obligation to ensure the truth of any material representations made by the investor as to their competence, financial resources and any other relevant matters pertaining to the investment. Host state may have threats from influential TNC'S to influence the socio-economic conditions. In the recent scholarship it has been reported that "52 of the top 100 economies around the world today are transnational corporations rather than nation-states [81]. However, at this point it is important to bear in mind that TNC have a duty to conduct a business in a responsible manner; investor should act with general company law duties toward shareholder but with a corporate responsibility to act and in the best interest of host state and its economic development. Negotiator can bring balance by focusing these issues in IIAs & BITs.

## Summing up

There is variety of way the concept of FET is formulated. It's a concept of diverse nature which is associated with numerous technical issues. It's an autonomous standard which walks parallel with international law. However, it will need further clarification by the future tribunal in striking a balance between host country representation and those made by investors. At this stage it would be inappropriate to establish a definitive interpretation of the "fair and equitable treatment" standard. However, it is suggested tribunal should adopt comparative approach, this would help to justify and apply FET various context- in specific field of economic activity and social differences.

## References

1. See, UNCTAD series on Issue in International Investment Agreement, Fair and Equitable Treatment (1999)22; also See, R Dolzer and Christoph Schreuer, Principals of International Investment Law, 2008, 117-118.
2. See R Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39 International Lawyer 87, 90 see also UNCTAD, Fair and Equitable Treatment, 1999. 10 et seq, available at 〈http://www.unctad.org/en/docs/psiteiitd11v3.en.pdf 〉 (Accessed on 05/12/19)
3. Infra note 6; also see R. Dolzer and M. Stevens, Bilateral Investment Treaties, ICSID, 1995; Dolzer and Stevens state that "the fact that parties to BITS have considered it necessary to stipulate this standard as an express obligation rather than rely on a reference to international law and thereby invoke a relatively vague concept such as the minimum standard is probably evidence of a self-contained standard. Further, some treaties refer to international law in addition to the fair and equitable treatment, thus appearing to reaffirm that international law standards are consistent with, but complementary to, the provision of the BIT".
4. See, F.A. Mann, The Legal Aspects of Money With special reference to Compartice Private and Public International Law, 5th Ed, Clarendon press, (1992) p. 510, as quoted by J.C. Thomas op. cit.n..10 p. 58. [Mann notes "In some cases, it is true, treaties merely repeat, perhaps in slightly different language, what in essence is a duty imposed by customary international law; the foremost example is the familiar provision whereby states undertake to accord fair and equitable treatment to each other's nationals and which in law is unlikely to amount to more than a confirmation of the obligation to act in good faith, or to refrain from abuse or arbitrariness".]
5. Stephen Vasiciannie, 'The Fair and Equitable Standard in International Investment law and Practice' (1999)70 BYIL 99 at 104; or see M Sornarajah, 'The International Law on Foreign Investment' 2nd Ed, 2005, 332.
6. Ibid at Pg. 333
7. See UNCTAD, Bilateral Investment Treaties in the Mid 1990s, 1998. Also see A. A. Fatouros, "Government Guarantees to Foreign Investors", Columbia University Press (1962), pp. 135-141, 214- 215; Catherine Yannaca-Small, Fair and Equitable treatment Standard in International Investment Law, 2(Working paper on International Investment 2004/2003, OECD, 2004).
8. See, SADAC Model Bilateral Investment Treaty (Available at http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf) (Accessed on 10/12/13)
9. See, RR.Wilson, US Commercial Treaties and International Law, (1960) 113,120. Also see, Article I(1), of the 1954 Treaty between Germany and The United states reads: 'Each party shall at all the time accord fair and equitable treatment to the nationals and companies of the other party and to their property, enterprises and other interest'. Also see, supra note. Rudolf 1 at 120.
10. See, UNCTAD, 5 international investment instrument: A compendium (2001)395. Article1- of the draft refers to 'fair and equitable treatment of the property of the other parties.
11. See, UNCTAD,1 International investment instrument: A compendium, 1996, 4.
12. See, the Ninth International Conference of American States, Economic Agreement of Bogotá, - which covered provision of adequate safeguards for foreign investors in its Article 22 of the agreement. But alike the Havana Charter, the Bogotá Agreement failed to come into force due to lack of support; See, Supra note. 5 Stephen Vasciannie, at 99-164.
13. See, OECD Draft Convention on the Protection of Foreign Property (1967),7 ILM (1968)- the ideology and the object set out in the OECD draft was adopted again in the draft for UN Code of Conduct on Transnational Corporation in its 1983. Article 1(a) of the OECD Draft Convention on the Protection of Foreign Property (1967)- states that "Each party shall at all time ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures……" available at http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf (Accessed on 01/05/2020)
14. See, Supra, note 1 at 120 (For the text of the section); or see, OECD, Negotiating Group on the Multilateral Agreement on Investment (MAI), (22 April, 1998), The Multilateral Agreement on Investment (Draft) at pg 56 available at http://www.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf (Accessed on 04/12/2019).
15. US-Chile Free Trade Agreement signed on June 6, 2003.
16. US-Australia Free Trade Agreement signed on March 1, 2004.
17. US-Central America Free Trade Agreement (CAFTA) signed on January 28, 2004. The Central American countries are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua.
18. US-Singapore Free Trade Agreement signed on May 6, 2003.
19. See, OECD, International Investment Law: A Changing Landscape, 2005, 78-79.
20. Art. III(2): "each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in the Guidelines"
21. Article 1105 (1) of the NAFTA, which entered into force on 1 January 1994, stipulates under the rubric "Minimum Standard of Treatment" that: "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".
22. See, Energy Charter Secretariat, A Legal Framework of Energy Corporation, (Sept., 2004). Article 10(1) of the Treaty read –"Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord

at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party, 2004. Available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (Accessed on 05/07/2019).

23. See, Supra Note 14
24. See, Supra Note15
25. See, Supra Note 16
26. See The Concise Oxford Dictionary of Current English, Eighth edition, Clarendon Press, Oxford, 1990, p. 420; See Untied Nation, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreement II, United Nation Conference on Trade and Development, (UN, Geneva, 2012).
27. Black's Law Dictionary,9th ed, West Pub. Co., West, 2004, 619.
28. See, Ioana Tudor, The Fair and Equitable Treatment Standard in International Foreign Investment Law (Oxford: Oxford University Press, 2008, p. 128.
29. See, Drakopoulou, M., Equity, Conscience and the Art of Judgment as Ius Aequi et Boni, Law Text Culture, 5(1), 2000. Available at: http: http://ro.uow.edu.au/ltc/vol5/iss1/19/ (Accessed on 07/12/2019)
30. See WS Holdsworth. The Early History of Equity, 11 Mich. Law Rev. 537-571 [Holdsworth in his scholarship has emphasised that the court of Chancery as court of conscience: it must not be technically a court of conscience. He strongly argues on the ratio laid down in the leading early decision of Earl of Oxford's case (1615)I Ch. Rep. I and refers to Danyell v. Jackson (1575) Monro, op. Cit. 433; and Nicholas v. Dutton (1608) mentions that the relation of equity to the law, continued to depend to a considerable extent upon the conscience of the chancellor. We can only see the remote beginnings of the causes which will, by settling the contents of these rules, make the court only technically a court of conscience, and, in these last days enable the judge of the chancery Division of the High Court to deny that it is in any sense a court of this character.]
31. See, Chirtoph Schreuer, Fair and Equitable Treatment, in: Protection of Foreign Investment through Modern Treaty Arbitration- Diversity and Harmonisation (A.K Hoffmann. ed)125, 2010.
32. See, Supra, note 24 at pg. 129
33. Infra note, 43
34. Ibid, (Tribunal found that it had to interpret the concept of FET autonomously taking into account its text according to its ordinary national law, and the good faith principle. The intention behind the concept was to strengthen the security and trust of foreign investors thereby maximizing the use of economic resource.) Also, See, ¶155, 156.
35. 25 May, 12 ICSID Report 6, 2004.
36. 16 ICSID review- FILJ 248. Award dtd 13th NOV 2000, 2001.
37. I.C.J Rerports, 1982, p.18.
38. Ibid ¶ 71.
39. See, Georg Schwarzenberger, International Law As Applied By International Courts and Tribunals, Vol.3, (, Stevens & sons, London, Pp- -19. [Georg Schwarzenberger, argues, the meaning of ex aequo et bono jurisdiction is that the organ consider may apply rules of justice and equity to the dispute before it, irrespective of the incorporation of such rules in international law, and take into consideration even purely pragmatic aspects of an issue"], 1976.
40. Stephan W Schill. International Investment Law And Comparative Public Law, 2010, p152.
41. See, Supra, note 28
42. See M Nash Leich, Cumulative Digest of US. Practice in Int'l Law,1981-1998 at 2652; See also, Supra note, 1 at 123.
43. See, UNCITRAL Partial Award March 17, at [297], 2006.
44. See H Thrilway. The Sources of International Law, in International Law, (MD. Evans), Oxford, 2003,Pp118-122. Thrilway, argues 'pacata sunt servanda'- that what has been agreed must be respected. He also answers why it should be respected? He answers under Article 38 of the ICJ statute, already referred to, provides that the court in deciding disputes in accordance with international law, is to apply international treaties and conventions in force; but that is no more than recognition of treaties as one of the formal sources of primary rules. The Statute is in fact a material source of the secondary rules that treaties make law, but not a formal source of that rule. See, also CMS Gas Transmission Company v. The Argentine Republic, ICSID case No. ARB/01/8, Award 12th May,2005 [referring to art.25, which it regarded as customary international law, that 'there can be no doubt…that a stable legal and business environment is an essential element of fair and equitable treatment'] See also, Kuwait v. American independent Oil Co (AMINOL), (1982) 21ILM976
45. See SGS v. Philippines, ICSID, 29 January 2004, 42 I.L.M. 1285.
46. See, Supra, note 32 at p. 217.
47. (E.g., US Model BIT, 2004.
48. See, TECMED v. Mexico,29May2003, 43 ILM (2004) 133, ¶153., See, Supra, Note 37. Sulka Award 17 March 2006, ¶307
49. See, Supra, Note 23
50. See, Supra, Note 1 -Rudolf at 124; [Dolzer and stevens quotes FA Mann, writing about BITs in 1981 where he says "A tribunal would not be concern with a minimum, maximum or average standard. It will decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other word is likely to be material. The term is to be understood and applied independently and autonomously". ] F.A Mann view was also adopted by the C.Schreuer, Fair and Equitable Treatment in Arbitral Practe, 6 The Journal of World Investment and Trade, 357-386); Also See, Supra, Note 5, 2005.
51. See, Supra, Note 12.

52. See, 30ILM (1991)628,639 21st June, 1990.
53. Ibid, [Dissenting opinion available at http://italaw.com/sites/default/files/case-documents/ita1035.pdf] [Accessed on 09/12/13]
54. See, Supra, note 21- Reference of text of Article 1105(1) of NAFTA.
55. See,Pope & Talbot v. Canada, Award on Demages, 31 March 2002, 41 ILM (2002) 1347, ¶ 17-69; Mondev v.USA,11 Oct.2002; 42 ILM(2003)85 ¶100, ADF Group Inc. v. USA, Award, Award 9 January 2003, 18 ICSID Review- FIL (2003) 195,6 ICSID Reports 470, ¶175-178; Waste Management v. Mexico, 43ILM (2004)967, ¶90-91. See, especially, Supra, Note-1, Dolzer at Pg 125.
56. Ibid
57. See, Supra, note 46 Schreuer
58. 12 Nov. 2000, 40 ILM 1408,2001.
59. See, Supra, note 51
60. Award of 1st July, 2004, 12 ICSID Reports 59.
61. Ibid ¶189 and 190 especially.
62. See, Roth A.H., The Minimum Standard of International Law Applied to Aliens Leiden (1949) 127. See also Supra, Note 26 at 9 ['The international standard is nothing else but a set of rules, correlated to each other and deriving from one particular norm of general international law namely, namely that the treatment of an alien is regulated by the law of nations…. the international minimum standard" is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property….]
63. See, Orellana M., International Law on Investment: the Minimum Standard of Treatment (MST) Vol 1(3) TDM
64. 2004
65. See, Supra, Note 51.
66. See Lauder v. Czech Republic, Award, 3rd September, 2001, 9 ICSID Reports 66 ¶ 99; CMS v. Argentina, Award, 12th May, 2005,44 ILM (2005) 1205¶ 273; See also, Muchlinski, Multinational Enterprises and the Law Award, 1999, 625.
67. Id [The Tribunal found that the "full protection and security" standard could not be interpreted as creating "strict liability" and that it did not render Sri Lanka liable for any destruction of investments, without the need to prove that the damages suffered were attributable to the State or its agents, and to establish State's responsibility for not acting with "due diligence". (¶.45-53)- Per contra- many eminent scholars argues that FET obligation cannot be absolute but strict. Here, I am skeptical of considered views of arbitrator in AAPL case qua 'absolute liability accorded to FET'. In contrast, my views sharply forfeit with tribunal opinion. I see, to accord FET with absolute liabilities is more bent toward private foreign investor rather a host state. I would argue that the obligation associate with FET is to assist in achieving protection-able, fair administrative treatment within the domain of standard clause; I see, FET accord with strict liability will be in balance interest of host state and private foreign investor.]
68. See, Supra, Note 48.
69. See, Award 14th July, 2006. [Available at http://italaw.com/documents/AzurixAwardJuly2006.pdf ] (Accessed on 10/2/2020)
70. See, Supra, Note 31.
71. See, PSEG v. Turkey, Award, 19 January 2007, available at http://ita.law.uvic.ca/documents/PSEGGlobal-Turkey-Award.pdf. (Accessed on 10/12/2013); Genin v. Estonia- Award, 25th June 2001, 6 ICSID Reports 241 at ¶ 367 tribunal had referred to fair and equitable treatment as: … an "international minimum standard" that is separate from domestic law, but that is, indeed a minimum standard.";
72. Ibid at ¶235.
73. See, Christoph H. Schreuer, Fair and Equitable Treatment (FET): Interactions with other Standards, in: Investment Protection and the Energy Charter Treaty (C. Ribeiro ed.) 63 pg.16; also See, Note 65, 2008.
74. Ibid
75. Award of 5th Oct, 2012. (Available at http://italaw.com/sites/default/files/case-documents/italaw1443.pdf (Accessed on 13/07/)
76. Ibid at ¶17[ Tribunal interesting also noted that the customary international law must be met: 1) determine the general and consistent State practice, and 2) determine that such practice is followed by the States from a sense of legal obligation (opinio juris sive necessitatis, "opinio juris"). Further tribunal clarified that the burden of proof to establish the existence of a norm in customary international law falls on the party that alleges its existence, and must be proven based on State practice and opinio juris, not based on decisions of arbitral tribunals]
77. See Barnali Choudhury, Evolution or Devolution?.Defining Fair and Equitable Treatment in International Investment Law, (2005) 6 JWIT 297. See also, P Muchlinski, The Relevance of the conduct of the investor under The Fair and Equitable Standard, ICLQ55, 2006, p535.
78. Id Muchlinski at 556; [Muchlinski suggest that it will be necessary to consider the needs of the host country that is charged with the duty to regulate the entry and behaviour of aliens into its territory in the public interest. This duty is based on the inherent international legal right of the sovereign State to regulate conduct that occurs upon its territory.] See, id at pg.533
79. See, SSP v. Egypt, ICSID Case No ARB/84/3 award of 20 May 1992: 8 ICSID Rev-FILJ 328 (1993).
80. See, Agreement between the Republic of Austria and the Federal Democratic Republic of Ethiopia for the promotion and protection of Investment. Dated 25/09/2005 (Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security qua transfer of technology). (Available at http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2005_III_206/COO_2026_100_2_240560.pdf) (Access on 13/12/13).
81. Ibid at 539; also See, ICSID Case No ARB(AF)/99/1 award of 16 Dec 2002: 18 ICSID Rev-FILJ 488 (2003).
82. See, Tony Clarke, Twilight of the Corporation, 29 THE ECOLOGIST, 158, 158-61, 1999.