THE MINIMUM STANDARD OF TREATMENT IN INTERNATIONAL INVESTMENT LAW: INTERPRETATION AND EVOLUTION

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ABSTRACT

The minimum standard of treatment in international investment law has been a controversial standard. The lack of precise definition, customary status and its overall vagueness proofs that. Although, the origin of minimum standard of treatment is the State responsibility but its content, which determines when the actions or omissions of a State with regard to an alien fall below this minimum standard, is quit uncertain. Primarily, the standard was created in order to protect aliens and their property under the general international law of the time. Even though, it has become a well-established standard under general international law, it has failed to be fully recognized under international investment law. The main reason could be the disagreement between developing and developed countries on the customary status of the standard as well as the existence of an imprecise scope and content. This article in particular studies the two flexible phases of the minimum standard of treatment namely the early opposition, and its recent evolution in the context of international investment law. In this respect, the boundaries set by the Neer case, the subsequent divergent interpretations of the standard and the NAFTA Interpretative Note as well as its recent evolutionary position will be scrutinized. In light of these reviews, it is evident that the standard has evolved since the Neer test and whatever the effects of interpretations by States as well as arbitral tribunals could be, the severity of the threshold for this standard is still high.

Key words: Minimum Standard of Treatment, International Investment Law, Interpretation, Evolution

INTRODUCTION

The minimum standard of treatment (MST) has sparked debates among States, judicial or arbitral bodies as well as scholars. It is a standard full of controversy from its creation until the present day. The Standards' customary status and most importantly its inherent vagueness are all evident of this. The colonial powers contemplated about an international minimum standard in order to protect their nationals and property.[1] By the time, it developed as a norm of customary international law to protect foreign nationals from all kinds of violations, without consideration of their identity as investors.[2]

Some scholars have attempted to define the standard. For example, according to Roth, '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, that the treatment of an alien is regulated by the laws of nations'.[3] While, in the opinion of Shaw this minimum standard indicates a level of protection for the foreigner below which the treatment provided by the host state must not fall.[4]As for Klager, the international minimum standard is a 'chatoyant notion', which is on the assumption that there is a standing body of customary rules protecting a foreign individual in another country.[5]

Apart from definitional attempts, the *Neer* case has examined the criteria for failing a minimum treatment test. The Commission in that case provided that "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 standard is immaterial".[6]

Similar historical tests have also been applied in some other cases. For example, in *Roberts* case in which Mexico was found in violation of minimum standard of treatment by locking up a US citizen in a cell with other men under cruel and inhuman conditions. The reason for this decision by the commission was that the test for mistreatment of an alien was not equality but the treatment of alien in accordance with the ordinary standards of civilization.[7] Moreover, a similar test was seen in *Chevreau* Case, which was about the detention and treatment of a French citizen, by British forces in Persia during war confusion in 1918.[8]

The *Janes* case is another example of the minimum standard. In the case, the tribunal similar to some of the previous cases confirmed the infringement of the standard because of the lack of diligence by Mexican authorities in proceeding against a murderer whose identity had been lost for eight years.[9]

[1] Sornarajah (2010) International law on foreign investment, pp. 8–20, 27–37). See also Pahuja. (2011). Decolonising International Law: Development, Economic Growth, and the Politics of Universality, pp. 95–171.
[2] Root. (1910). The basis of protection to citizens residing abroad, p.517; Borchard. (1915). The diplomatic protection of citizens abroad: or, The law of international claims, p. 177.
[3] Roth. (1949). The minimum standard of international law applied to aliens, p. 127.
[4] Shaw MN (2008) International law, p.824.
[5] Kläger R (2011) Fair and equitable treatment in international investment law, p. 48.
[6] Neer Claim (USA vs. Mexico Opinion) US–Mexico General Claims Commission, 15 October 1926, pp. 60–66.
[7] Harry Roberts (USA v. Mexico), General Claims Commission United States and Mexico (Award of 2 November 1926).
[8] Madame Chevreau (France v. United Kingdom), Permanent Court of Arbitration (Award of 9 June 1931).
[9]Laura M. B. Janes and others (USA v. Mexico), General Claims Commission United States and Mexico (Award of 16 November 1926).

Even more, to support this standard, the US-Mexican Claims Commission in the *Hopkins* case pointed, "It not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment that it accords to its own citizens under its municipal law. The citizens of a nation may enjoy many rights, which are withheld from aliens, and, conversely, under international law, aliens may enjoy rights and remedies, which the nation does not accord to its own citizens".[10]

However, the international minimum standard has faced the opposition of developing countries. The primary source of this difference of opinion was the national treatment concept culminating from the Calvo doctrine[11] in Latin America. The theory of National treatment as a counterpart to the minimum standard demanded the host states to treat aliens favourably instead of more favourably in comparison to their own nationals.[12]

At this time, the Calvo doctrine and the national treatment arguments faced the Hull doctrine or the so-called Hull formula. However, the formula deals only with the amount of due compensation, as one disputed element of the minimum standard.[13] While the Hull formula appears to have gained dominance over time as it is firmly established in various international investment agreements unlike the Calvo doctrine but the minimum standard is still not certain, even today.[14]

In another attempt, developing countries pushed for the Declaration and Programme of Action on the Establishment of a New International Economic Order (NIEO) in the UN General Assembly in 1974.[15] This declaration stated, "each state is entitled to exercise effective control over its natural resources and their exploitation with means suitable to its own situation, including the right of nationalization or transfer of ownership to its nationals.

Moreover, developing countries tried later in the same year to achieve a controversial restatement of the Calvo doctrine through the Charter of Economic Rights and Duties of states. Although the charter leaned the balance somewhat towards the developed countries but still these countries saw some controversy on the language of some provisions such as the regulation of expropriation and nationalization leading them to vote against the Charter and to abstain by others.[16]

The debate over the customary status of the minimum standard continued to bring divergent opinions. For instance, in the sphere of general international law, the existence of an international standard has historically been opposed by some states invoking the above-mentioned example of national treatment.[17] While, in the context of protection of economic interests of foreign individuals and corporations, it has proved to be more controversial and vaguer particularly with regard to its content.[18]

Furthermore, the above-cited cases related to physical injuries of aliens for example in times of civil strife and the ensuing negligence of administration of criminal justice. In the end, it was the most power capital exporting states, which presumed the minimum standard as customary law and acted upon from the 19th century onwards.[19]

MST UNDER INTERNATIONAL INVESTMENT LAW

In the area of international investment law, there has been more complexities over the nature of MST under customary international law. For example, the newly independent states coming out from colonialism in Africa and Asia started opposition to the customary status of minimum standard of treatment. [20]They took the position binding themselves to provide foreign investors only national treatment or the rights in accordance with their national laws.[21]

In addition, the ICJ case of *Barcelona Traction* in 1970 clearly mentioned that there was no rule of customary international law under international investment law. The Court in particular noted that "the evolution of the law has not gone further and that no generally accepted rules in the matter have crystalized on the international plane".[22]
However, two decades after the *Barcelona Traction* judgment, the ICJ in the 1990 *ELSI* case, explicitly referred to the existence of a minimum standard of treatment.[23] In this way, minimum standard of treatment represents a long established and basic rule of custom.[24] However, the next challenging issue from 1990s' onward was the undefined and vague content of the minimum standard of treatment under customary international law.

[10] George W. Hopkins (USA v. Mexico), General Claims Commission United States and Mexico Docket No. 39 (Award of 31 March 1926).
[11]C. Calvo, Le droit international the´orique et pratique, 4th edn (1887/1888).
[12] I. Brownlie. ((2008). Principles of Public International Law, 7th edn, pp. 523-524.
[13] A. F. Lowenfeld, International Economic Law, 2nd edn (2008), pp. 397 403.
[14]See Sornarajah (n 1), pp. 140 141 and 328.
[15] G.A. Res. 3201 and 3202 (S. VI) adopted 1 May 1974. *See* also Denza and Brooks (1987) p. 909.
[16] G.A. Res. 3281 (XXIX) adopted 12 December 1974.
[17] Ioana Tudor. (2008). *The Fair and Equitable Treatment Standard in International Foreign Investment Law,* p.60; see also, Todd Weiler. (2011). 'An Historical Analysis of the Function of the Minimum Standard of Treatment in International Investment Law', p.345.
[18] See Sornarajah (n 1), p. 151.
[19] Thomas (2002) p. 38.
[20] Dumberry P. (2017). Fair and Equitable Treatment: Its Interaction with the Minimum Standard and its Customary Status, p.14-15.
[21] Stephen Schwebel. (2005). 'The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law', p. 3.
[22] *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain),* [1970] [46–47].
[23] *Sicula S.p.A. (ELSI) (US v. Italy)* (Judgment) [1989] [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).
[24] P. Dumberry. (2016). *The Formation and Identification of Rules of Customary International Law in International Investment Law,* p. 96.

The origin of minimum standard of treatment is the State responsibility but it is content which determines when the actions or omissions of a State with regard to an alien fall below this minimum standard is quit uncertain. For example, In addition to preceding definitions cited previously, according to Newcombe *et al*., the MST 'consist of a series of interconnecting and overlapping elements or standards that apply to both the treatment of foreigners and their property.'[25] A number of other writers also have opined that the notion of MST is ambiguous and is without clear content.[26]

In a clarification attempt, The 2005 OECD report observing the case law suggested the areas in which the international minimum standard applies. These are namely 'the administration of justice in cases involving foreign nationals, usually related to the concept of denial of justice', 'the treatment of aliens under detention', full protection and security and the 'general expulsion by the host State' which should be the least injurious to the person affected'.[27]

Later on, the 2012 UNCTAD report had a similar classification of the contents of MST.[28] However, this report somewhere else stated that the minimum standard is 'highly indeterminate, lacks a clearly defined content and requires interpretation'.[29] The reports' suggestion was that 'the MST is a concept that does not offer ready-made solutions for deciding modern investment disputes; at best, it gives a rough idea of a high threshold that the challenged governmental conduct has to meet for a breach to be established'.[30] Therefore, it is an umbrella concept meaning that it encompasses different elements in itself.

Overall, the vagueness of the MST under custom had led to the OECD attempts for negotiations of a comprehensive Multilateral Agreement on Investment (MAI, which were not successful.[31]This in turn paved the way to the so-called treatification era from the 1990's onward.

Many scholars believe that this era began because of the lack of sufficient guidance and protection to foreign investors presented by the customary law.[32] For example, Klager in conformity with many other scholars is of the opinion that by that time many states not only felt the existence of MST and its unknown contents but also its challenging and flexible nature. According to him, due to the failure of MAI, States started signing BITs to reaffirm and clarify the status of foreign investments. In other words, they wanted to get rid of uncertainty regarding the customary law in this field and to have a firmer set of rules that applied at least the parties to the treaty.[33]

According to Schreuer and Dolzer, in this period, the dispute over customary rules for protection of foreign investments became a matter of the past and there was no opposition of developing countries to the application of the MST.[34] In fact, they offered' more protection to foreign investment than traditional customary law did, now on the bases of treaties negotiated to attract additional foreign investment.[35]

Thus, From 1990s onwards, the countries started using the notion of FET in their majority of investment treaties instead of the old application of MST under customary international law.[36] This was not the ending of the story, a decade after, however, MST made a comeback. This was due to the broad interpretation of the FET clauses by arbitral tribunals in particular under the NAFTA. The next part will go through the review of some controversial NAFTA arbitral decisions, which led the discussion of the MST back to the scene.

MST AND THE NAFTA CONTROVERSIAL AWARDS

The return of MST discussion was because of a few controversial awards such as in *Metalclad*,[37] *S.D. Myers*[38] and *Pope &Talbot*[39] by the NAFTA arbitral tribunals of taking different approaches in interpreting article 1105 entitled Minimum Standard of Treatment. The first subsection of this article says, "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."[40]

[25] Andrew Newcombe & Luis Paradell. (2009). *Law and Practice of Investment Treaties: Standards of Treatment*, p. 236.
[26]See Sornarajah. (2007). 'The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?', p.172; M.C. Porterfield. (2006). 'An International Common Law of Investor Rights?', p.10; Tarcisio Gazzini. (2007). 'The Role of Customary International Law in the Field of Foreign Investment', p. 699.
[27]OECD. (2005). *International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives,* p. 82.
[28]UNCTAD. ((2012). *Fair and Equitable Treatment*, p.44.
[29] Ibid. p. 28.
[30] Ibid. 46-47.
[31] For a draft text, see *Multilateral Agreement on Investment*, Draft Consolidated Text, DAFFE/MAI (98)7/REV1 (22 April 1998).
[32] Dolzer & Walter. (2007). 'Fair and Equitable Treatment – Lines of Jurisprudence on Customary Law' p. 99: Orellana. (2004). 'International Law on Investment: The Minimum Standard of Treatment (MST)', p. 3; McLachlan. (2008). 'Investment Treaties and General International Law, p. 365; Al Faruque. ((2004). 'Creating Customary International Law Through Bilateral Investment Treaties: A Critical Appraisal', p. 293.
[33] Klager (n 4) p. 263-4; see also McLachlan & Weiniger. (2007). *International Investment Arbitration: Substantive Principles,* p. 17.
[34] Schreuer & Dolzer. (2008). *Principles of International Investment Law*, p.16.
[35] Ibid. see also Schwebel (n 21) p.28.
[36] See Tudor (n 15), p. 23.
[37] *Metalclad Corporation v. Mexico*, ICSID Case No. ARB (AF)/97/1, Award, 30 August 2000.
[38] *S.D. Myers Inc. v. Canada*, UNCITRAL, First Partial Award, 13 November 2000.
[39]*Pope & Talbot v. Canada*, Interim Award on June 26, 2000.
[40] NAFTA art.1105.

The Metalclad *v. Mexico* tribunal interpreted the above article in a broad manner. The extensive interpretation showed itself when the tribunal in finding a breach of MST of article 1105, referred to transparency under article 102 (1) which states that one of the purposes of NAFTA is transparency. The tribunal found that Mexico had "failed to ensure a transparent and predictable framework for Metalclad's business planning and investment." [41]

Mexico sought to set aside the award in the place of arbitration in British Columbia. The supreme court of British Columbia set aside the findings of the award that was relevant to MST. Based on the review of the case, the court, supporting the contention of Mexico regarding the tribunal's expansion of the matter beyond the scope of Chapter 11, rejected the decision of the tribunal because of specifically attaching an extra obligation of transparency to FET under article 1105.

The court was of the view that the tribunal erred as it interpreted article 1105 to equate Mexico's domestic law violation with breach under the MST requirements of article 1105 while FET standard should be limited to a pre-exiting rule of customary international law. In short, it held that the tribunal erroneously combined chapter 18 of transparency with chapter 11 and thus transparency is not a requirement under customary international law. Furthermore, it also found the mistake of the tribunal to rule that a violation of FET in itself formed the violation of article 1110 of expropriation without compensation.[42]

In the final analysis of the court's ruling, it should be noted that the judgement was an effort to avoid the tribunals from an extensive interpretation of FET. However, the different interpretative methods regarding the MST may continue to exist because of the lack of a system of precedence in international arbitration as it happened again in S.D. *Mayers* case in 1998.

The *S.D Mayers v. Canada* case of 1998 was another example of the broader interpretative method and the debate over the role of MST in NAFTA article 1105. The majority of the tribunal in this case held that on the fact of the case, the breach of national treatment in article 1102, equally established a violation of MST under article 1105.[43]

The unexpected result of the case was the equation of conventional international law rule of national treatment with the minimum standard under the custom. One of the members of the tribunal even had dissented from this view, saying that breach of another provision of the NAFTA is not a basis for finding a violation of the MST.[44]

Finally, the *Pope & Talbot tribunal* interpreted MST broadly by giving the 'fairness' element a separate identity and beyond MST.[45] Canada argued that 'fairness' included in MST and did not require additional fairness element. It further pointed that the state conduct or denial of fairness needs to be egregious or shocking to constitute a violation of article 1105.[46] However, the tribunal rejecting Canada's argument, interpreted article 1105 to include 'fairness elements' free from the 'threshold limitation' of "egregious', 'outrageous', 'shocking' state conduct. [47]

The tribunal added that the NAFTA provision had evolved over time from this particular version. It also based its reason on article II.2 of the US Model Investment Treaty of 1987 and its FET clause. This means that the tribunal in finding a breach of the MST interpreted FET as an additional standard beyond the customary international law. Interestingly, the tribunal had admitted that it is true that the language of article 1105 suggests otherwise, since it states that the fairness elements are included in international law.[48]

In short, the effect of these awards was interpreting FET Clause as providing investors with treatment protections beyond the MST that is the level of standard of treatment required of host states would be broader than the one existing under the custom. Remarkably, these three tribunals rendered the awards despite knowing the fact that under article 1105 entitled 'MST' and the FET is clearly referred to this standard under international law.

What is more evident that from the outset both the NAFTA parties such as United States and Canada had argued in their pleadings that FET was directly linked to the MST and referred to it under custom. Even, these countries had this clarification well before the issue become a matter of controversy of these awards.

Eventually, the divergent interpretations of these three above-mentioned cases led the NAFTA parties to issue a joint interpretative note in order to clarify their understanding of the status of FET-MST in the realm of customary international law.

THE INTERPRETATIVE NOTE AND THE EVOLUTION OF MST

In the aftermath of those above analyzed controversial cases taking a broad interpretation of MST in Article 1105, the NAFTA Free Trade Commission (FTC) pursuant to its power under article 1131 (2) issued a binding note of interpretation. The Note was adopted to clarify the scope of FET and its conformity with MST and to avoid the future extensive interpretation by the NAFTA

[41] *Metalclad* (n 37), para, 99.
[42] *Mexico v. Metalclad Corp*., Supreme Court of British Columbia 2001 BCSC 664 (Judgment of 2 May 2001).
[43] *S.D. Myers* (n 38), para. 266.
[44] *SD Myers, Inc. v Canada*, UNCITRAL Case, Partial Award, 13 November 2000, Separate Opinion of Arbitrator Schwartz 121 ILR 130, paras 235 &255.
[45] *Pope* & *Talbot v. Canada,* Award on the Merits of Phase 2 on April 10, 2001. Para 195.
[46] Ibid. para 109.
[47] Ibid. paras, 110-111.
[48] Ibid. para. 109.

arbitral tribunals. The Commission clarified three disputable aspects, which was at the center of the controversy arising from those incompatible cases. The note provides that:

(1) Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party,
(2) The concept 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, and
(3) 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).[49]

However, after the issuance of the Note of interpretation, the NAFTA subsequent tribunals confirming the note regarding the link of MST to customary international law, has raised the new idea of 'evolutionary' MST.[50] As Newcombe claims that this note of interpretation has not ended the debate about the meaning of FET within NAFTA because it still does not clarify the content of MST.[51]

Similar to *Pope and Talbot* tribunal discussed previously, the *Mondev,*[52] *ADF*[53]*, and Loewen*[54] tribunals have also stressed on the evolutionary character of MST. It means that the tribunals have not been satisfied with applying the *Neer* standard for interpretation of fairness and equity. It might be the reason that these tribunals thought that the *Neer* standard only related to protection of the physical person and or in the present context of international investments and business, an act can be considered inequitable or fair without necessarily being considered as outrageous.

In *Mondev*, the tribunal by abandoning the *Neer* standard was of the opinion that there has been a considerable development to both the substantive and procedural rights under customary international law and what is unfair and inequitable need not be equated with the outrageous or egregious. It also opined that a state might treat a foreign investment unfairly or inequitably without necessarily acting in bad faith.[55] Moreover, the tribunal determined that customary law referred in FTC's interpretation is the current international law, which is composed of various BITs and FTAs entered into by states.[56]

Later, the *ADF* tribunal first emphasized on the importance of FTC notes 'for consistency and continuity of interpretation, which multiple ad hoc arbitral tribunals are not well suited to achieve and maintain'.[57] Subsequently, the tribunal made the assertion in its award that the international law minimum standard is not a "static photograph" of the law as it stood in 1927 when the *Neer* case was rendered and that both customary international law and the MST constantly are in the process of development. [58]

The *Loewen* tribunal also expressed the view that bad faith or malicious intention is not a required element of MST but only that "manifest injustice in the sense of lack of due process leading to an outcome which offends a sense of judicial propriety is enough".[59]

Following the above cases, the *Glamis*[60] and *Cargill*[61] tribunals have also admitted that this proposition of what is considered today as 'egregious; and 'shocking' has evolved since the 1920s.[62] Although, these tribunals unlike the above mentioned tribunals had concluded that no evidence was provided to establish that the current customary international law had moved beyond the MST.[63] In any event, there does not seem to be a practical difference in reasoning of these two above cited cases.[64] In other words, they both upheld the evolving nature of MST under the customary international law.

More controversially, in *Merrill & Ring*,[65] the tribunal supported a so- called 'convergence' theory, which brought the evolutionary character of MST to the extreme level. This means that because of its evolution, MST level of treatment for foreign investors has reached the level of autonomous FET standard contained under the present BITs. The *Merrill* case unlike the above-mentioned cases seems to be in direct challenge to FTC's note of interpretation.[66] It should be noted the practical outcome of these cases have

[49]NAFTA FTC Notes of Interpretation') (adopted by the NAFTA Free Trade Commission on 31 July 2001).
[50] Patrick Dumberry. ((2014). 'Moving the Goal Post! How Some NAFTA Tribunals have Challenged the FTC Note of Interpretation on the Fair and Equitable Treatment Standard under NAFTA Article 1105.
[51] See Newcombe (n 25) p.274.
[52] Mondev International Ltd vs. United States of America, ICSID Case No. ARB (AF)/99/2, Award 11 October 2002, 6 ICSID Reports 192.
[53]ADF Group, Inc vs. United States of America, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, 18 ICSID Review—Foreign Investment Law Journal (2003) 195.
[54] Loewen Group Inc, and Raymond L. Loewen vs. United States of America, Award, 26 June 2003, 7 ICSID Reports 442.
[55] Mondev (n 70) para. 116.
[56] Ibid. para 125.
[57] ADF (n 71) para. 177.
[58] Ibid. para. 179.
[59] Loewen (n72) para. 132.
[60] *Glamis Gold Ltd v. United States*, UNCITRAL, Award, 14 May 2009.
[61] Cargill vs. United Mexican States, ICSID Case No. ARB (AF)/05/02 (NAFTA) Award, 18 September 2009.
[62] Glamis (n 78) para. 616; see also Cargill (n 78).
[63] Glamis (n 77), para 614.
[64] See Dumberry. (2013). *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105*, p.106.
[65] *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, Award, 31 March 2010.
[66] Ibid. para 210.

not had any impact on state liability.[67] Meaning that even these tribunals rejected the high threshold of the Neer test, the states were not held liable.

What is more, the NAFTA parties have also agreed with the evolutionary nature of MST when considering the meaning and implications of FTC interpretation but somehow stressing on the high threshold to be given to state conduct breaching MST. For Example, Canada In the context of ADF case, asserted that the standard was never 'frozen in amber at the time of the Neer decision' and added what is considered 'shocking' or 'egregious' can be contrasted between the year 2002 and 1926 but there is still a high threshold for finding a violation of MST. [68]

Anyhow, the Note of interpretation encouraged NAFTA parties to include this guidance of the Note into their model BITs and FTAs for further clarification.[69]With regard to US FTA's, there is an additional interpretative provision, which defines the customary international law as "the general and consistent practice of States that follow from a sense of legal obligation". This provision reiterates that according to NAFTA parties, the standard is a customary international law standard, not a conventional one.[70]

In brief, the FTC's notes of interpretation has attempted to narrow the interpretative authority of NAFTA arbitral tribunals in the aftermath of the controversial cases by explicitly linking MST to customary international law. As a leeway, tribunals have leaned on the evolutionary nature of MST and have differentiated between the *Neer* test and the present notion of fairness and equity.

Considering the effects of FTC's Note of interpretation, as Brower argues the tribunals may still interpret NAFTA article 1105 based on interpretation rules provided in the Vienna Convention while the Notes cannot fully restrict it.[71]

CONCLUSION

The minimum standard of treatment, once speculated under international law to protect foreign nationals and their properties, has struggled for its recognition in the context of international investment law. This was evident in the discord between developing and developed world to justify the standard among all the countries of the world. Furthermore, the standard itself has been vague in definition, scope and content until today. In the past, the Neer case set a boundary to demonstrate when a minimum standard of treatment is violated. However, the standard has evolved since the Neer test.
In sum, whatever the effects of interpretations by States as well as arbitral tribunals could be; the severity of the threshold for this standard is still high. The minimum standard of treatment experienced opposition, and evolution, it is to be seen what the future holds for this standard.

REFERENCES

ADF Group, Inc vs. United States of America, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, 18 ICSID Review—Foreign Investment Law Journal (2003) 195.

Al Faruque, Abdullah. (2004). 'Creating Customary International Law Through Bilateral Investment Treaties: A Critical Appraisal', 44 Indian JIL 312–313.

Andrew Newcombe & Luis Paradell. (2009). Law and Practice of Investment Treaties: Standards of Treatment, Kluwer.

Andrew P. Tuck. (2010).'The "Fair And Equitable Treatment" Standard Pursuant to the Investment Provisions of the U.S. Free Trade Agreements with Peru, Colombia and Panama',16 L. & Bus. Rev. Am. 385.

Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), [1970] ICJ Rep 3 [46–47].

Borchard, E. Montefiore. (1915). The diplomatic protection of citizens abroad: or, The law of international claims. New York: The Banks law publishing co.

Brownlie, Ian. (2008). Principles of Public International Law, 7th edn (Oxford: Oxford University Press.

Calvo, Carlos. (1887/1888). Le droit international the´orique et pratique: Pre´ce´de´ d'un expose´ historique des progre´s de la science du droit des gens, 4th edn, Paris: Guillaumin.

[67] See Dumberry (n 64) p. 123.
[68] Second Submission of Canada Pursuant to NAFTA Article 1128, 19 July 2002, paragraph 33; see also Transcript of the Oral Hearing, Vol. II, 16 April 2002, pp. 492-493. Also Post Hearing Transmission of the United States, 27 June 2002, p. 20; Second Submission of the United Mexican States in the Matter of ADF Group Inc. v. United States of America, 22 July, p. 15.
[69] Article 5 of US 2004 Model BIT; Article 6 of Canada 2014 Model FIPA; see for example, US FTAs with Singapore (2003) , Australia (2004), Central America (CAFTA, 2004), and Oman (2009); See also Tuck. ((2010). 'The "Fair and Equitable Treatment" Standard Pursuant to the Investment Provisions of the U.S. Free Trade Agreements with Peru, Colombia and Panama', p. 385
[70]See for example, US FTAs with Australia (2004).
[71]Brower. ((2002). Remarks on "Fair and Equitable Treatment under NAFTA's Investment Chapter", p. 10-11.

Campbell McLachlan. ((2008). 'Investment Treaties and General International Law ', 57 ICLQ.

Canada 2014 Model FIPA https://www.italaw.com/resources/investment-treaties < accessed 27 August 2020.

Cargill vs. United Mexican States, ICSID Case No. ARB (AF)/05/02 (NAFTA), Award, 18 September 2009.

Charles Brewer. ((2002). 'Fair and Equitable Treatment under NAFTA's Investment Chapter', 96 Am. Soc'y Int'l L. Proc. 9.

C. McLachlan, L. Shore & M. Weiniger. (2007). International Investment Arbitration: Substantive Principles, Oxford UP.

C. Schreuer & R. Dolzer. (2008). Principles of International Investment Law, Oxford UP.

Denza, Eileen. (1987). "Investment Protection Treaties: United Kingdom Experience". Eileen Denza and Shelagh Brooks. International and Comparative Law Quarterly, Vol. 36.

Dolzer R. & A. von Walter. (2007). 'Fair and Equitable Treatment – Lines of Jurisprudence on Customary Law' in F. Ortino (ed), Investment Treaty Law, Current Issues II.

Dumberry P. (2017). Fair and Equitable Treatment: Its Interaction with the Minimum Standard and its Customary Status (Brill Research Perspectives in International Investment Law and Arbitration, G.A. Res. 3201 and 3202 (S. VI) adopted 1 May 1974.

G.A. Res. 3281 (XXIX) adopted 12 December 1974.

Gazzini, Tarcisio, 'The Role of Customary International Law in the Field of Foreign Investment' (2007) 8 Journal of World Investment and Trade.

George W. Hopkins (USA v. Mexico), General Claims Commission United States and Mexico Docket No. 39 (Award of 31 March 1926).

Glamis Gold Ltd v. United States, UNCITRAL, Award, 14 May 2009.

Harry Roberts (USA v. Mexico), Award of 2 November 1926, UN RIAA, Vol. IV.

Kläger R (2011) Fair and equitable treatment in international investment law. Cambridge University Press, Cambridge.

Lowenfeld, Andreas F. (2003). 'Investment Agreements and International Law', Colum. J. Transnat'l L. 42, p. 123 International Economic Law, 2nd edn (Oxford: Oxford University Press, 2008).

Loewen Group Inc, and Raymond L. Loewen vs. United States of America, Award, 26 June 2003, 7 ICSID Reports 442.

Laura M. B. Janes and others (USA v. Mexico), Award of 16 November 1926, UN RIAA, Vol. IV

Madame Chevreau (France v. United Kingdom), Award of 9 June 1931, AJIL 27 (1933).

M.C. Porterfield. (2006). 'An International Common Law of Investor Rights?', 27 U. Pa. J. Intl Econ. L.

Metalclad Corp. v. United Mexican States, ICSID Case No. ARB (AF)/97/l, Award, 30 August.

Mexico v. Metalclad Corp., Supreme Court of British Columbia 2001 BCSC 664 (Judgment of 2 May 2001).

Mondev International Ltd vs. United States of America, ICSID Case No. ARB (AF)/99/2, Award 11 October 2002, 6 ICSID Reports 192.

M. Sornarajah. (2007). 'The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?' In Federico Ortino et al. (eds), Investment Treaty Law: Current Issues II, BIICL.

Multilateral Agreement on Investment, Draft Consolidated Text, DAFFE/MAI (98)7/REV1 (22 April 1998).

Neer Claim (USA vs. Mexico) USA–Mexico General Claims Commission, Award dated 15 October 1926 Reports of International Arbitral Awards, Vol. 4, 60–66.

North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 1105, 32 ILM 605.

Notes of Interpretation of Certain Chapter 11 Provisions ('NAFTA FTC Notes of Interpretation') (adopted by the NAFTA Free Trade Commission on 31 July 2001).

OECD. (2005). International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives.

Orellana, M.A. (2004). 'International Law on Investment: The Minimum Standard of Treatment (MST)', 3 Transnational Disp. Mgmt. 1–2.

Pahuja, Sundhya. (2011). Decolonising International Law: Development, Economic Growth, and the Politics of Universality. Cambridge, England: Cambridge University Press.

Patrick Dumberry. (2014). 'Moving the Goal Post! How Some NAFTA Tribunals have Challenged the FTC Note of Interpretation on the Fair and Equitable Treatment Standard under NAFTA Article 1105', 8(2) World Arb. & Med. Rev.

Patrick Dumberry. (2013). The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105, Wolters Kluwer.

P. Dumberry. (2016). The Formation and Identification of Rules of Customary International Law in International Investment Law, Cambridge UP.

Pope & Talbot v. Government of Canada (2002) 7 ICSID Rep 43.

Root E (1910) The basis of protection to citizens residing abroad. Am J Int Law Proc 4(3):517.

Roth AH. (1949).The minimum standard of international law applied to aliens. A.W. Sijthoff, Leiden.

SD Myers, Inc. v Canada, UNCITRAL Case, Partial Award, 13 November 2000, Separate Opinion of Arbitrator Schwartz 121 ILR 130.

S.D. Myers Inc v. Government of Canada (NAFTA: UNCITRAL) (2000) 8 ICSID Rep 3.

Shaw MN (2008) International law, 6th edn. Cambridge University Press, Cambridge.

Sicula S.p.A. (ELSI) (US v. Italy) (Judgment) [1989], ICJ Rep 115 [111].

Sornarajah M (2010) International law on foreign investment, 3rd edn. Cambridge University Press, New York.

Stephen Schwebel, 'The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law', in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner (No. 693, ICC Pub. 2005).

Thomas, J.C. (2002). "Reflection on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators". ICSID Review – Foreign Investment Law Journal, 17 (1).

Tudor, Ioana. (2008).The Fair and Equitable Treatment Standard in International Foreign Investment Law Oxford UP.

UNCTAD, Fair and Equitable Treatment, (2012) UNCTAD Series on Issues in International Investment Agreements II.

US 2004 Model BIT < http://www.state.gov/documents/organization/117601.pdf > accessed 27 August 2020.

Weiler, Todd, 'An Historical Analysis of the Function of the Minimum Standard of Treatment in International Investment Law' in Todd Weiler & Freya Baetens (eds.), New Directions in International Economic Law: In Memoriam Thomas Walde (Martinus Nijhoff, 2011).

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