



Fair and Equitable Treatment & Full Protection and Security

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Fair and Equitable Treatment

- Since 2000 (*Maffezini & Metalclad*) most important BIT standard, most often invoked
- Absolute or non-contingent standard
- Very different wording in different BITs, almost always included
- Relationship to custom and to other standards problematic



FET versions

- “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.”
- Article 1105 NAFTA



FET versions

- “Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area of the other Contracting Party.”
- Article 2(2) France Hong Kong BIT 1995.



FET versions

- “Each Contracting State shall in its territory in any case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under the Treaty.”
- Article 2(2) German Model BIT 2004



FET versions

- “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law.”
- Article II(2)(a) Argentina-US BIT



FET versions

- “Each of the Contracting Parties undertakes to grant, within its territory and its maritime area, fair and equitable treatment according to the principles of international law to investments made by investors of the other Party, and to do it in such a way that the exercise of the right thus recognized is not obstructed de jure or de facto.”
- Article 3 Argentina/France BIT



Historic Origin

- US Friendship, Commerce and Navigation (FCN) treaties
- 1948 Havana Charter for an International Trade Organisation
- 1967 OECD Draft Convention on the Protection of Foreign Property
 - “Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Party.”



Fair and Equitable and the International Minimum Standard

- Identical
 - Fair and equitable treatment as an expression of the international minimum standard
 - or
- Different
 - Fair and equitable treatment as an autonomous standard



Same as custom

- "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 concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."
- NAFTA Free Trade Commission, Clarifications Related to NAFTA Chapter 11 (2001)



Same as custom

- “1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
- 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.”
- Article 5 US Model BIT 2004.



Same as custom

- Followed by NAFTA tribunals
- BUT also some others



Same as custom – NAFTA

- *Mondev International Ltd. v. United States of America*, Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 122;
- *United Parcel Service of America Inc. v. Government of Canada*, Decision on Jurisdiction, 22 November 2002, para. 97;
- *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, ICSID Additional Facility Award, 9 January 2003, para. 199.



Same as custom – ICSID

- “While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.”
- *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 284.



More than custom

- “The broad concept of fair and equitable treatment imposes obligations beyond customary international requirements of good faith treatment.”
- *CME Czech Republic B V v The Czech Republic, Partial Award*, UNCITRAL Award 2001, para. 156.



More than custom

- “The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. The purpose of the third sentence is to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law.”
- *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 361.



Different from custom

- “It might well be that in some circumstances in which the international minimum standard is sufficiently elaborate and clear, the standard of fair and equitable treatment might be equated with it. But in other cases, it might as well be the opposite, so that the fair and equitable treatment standard will be more precise than its customary international law forefathers.”
- *Sempra Energy v Argentina*, ICSID Case No. ARB/02/16, 28 September 2007, para. 302.



Different from custom – *Vivendi II*

- “The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. [...]”
- *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.7.



Different from custom – *Vivendi II*

- “[...] Second, the wording of Article 3 requires that the fair and equitable treatment conform to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty’s fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago.”
- *Ibid.*



Dynamic standard

- “[...] what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the *Award in the Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.”
- *ADF Group Inc. v United States*, ICSID Case No. ARB (AF)/00/1, Final Award, 9 January 2003, para. 179.



The *Neer* Standard

- “[T]he 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 recognize its insufficiency.”
 - *Neer v. Mexico*, US-Mexican Claims Commission 1927.



A real issue?

- “[...] whatever the merits of the controversy between the parties may be, it appears that the difference between the treaty standard and the customary minimum standard, when applied to the specific facts of the case, may be more apparent than real.”
- *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para. 291.



Level of Protection – Low

- “[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”
- *Waste Management v. Mexico*, ICSID 2004



Level of Protection – High

- “[fair and equitable treatment] should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – “to promote”, “to create”, “to stimulate”- rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.”
- *MTD Equity v. Chile*, ICSID 2004



Legal Basis for FET – Good Faith

- “This Arbitral Tribunal finds that the commitment of fair and equitable treatment [...] is an expression and part of the *bone fide* principle recognized by international law, although bad faith is not required for its violation.”
- *Tecmed v. Mexico*, ICSID AF Award, 2003, para. 153.



FET – dictionary approach

- “In their ordinary meaning, the terms “fair” and “equitable” mean “just”, “even-handed”, “unbiased”, “legitimate” [...] It follows from the ordinary meaning of “fair” and “equitable” and the purpose and object of the Treaty that these terms denote treatment in an even-handed and just manner, conducive to fostering the promotion and protection of foreign investment and stimulating private initiative.”
- *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 290.



Elements of Fair and Equitable Treatment

- The Rule of Law and Due Process
- Predictability and Stability
- Transparency
- Legitimate expectations
 - Lack of discrimination and arbitrariness (potential overlap with other standards)
 - Duty to protect (potential overlap with full protection and security)



The Rule of Law and Due Process

- “In the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays “a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety”. [...] The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection.”
- *Mondev v. USA*, ICSID Add. Facility 2002, para. 127.



The Rule of Law and Due Process

- “‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;”
- Article 5(2)(a) US Model BIT 2004.



Stability and Predictability

- “[...] stability of the legal and business framework is an essential element of fair and equitable treatment in this case ...”

LG&E v. Argentina, ICSID Award 2006, para 124.

Occidental Exploration and Production Company v Republic of Ecuador, LCIA No. UN 3467, Award, 1 July 2004, para. 183.



Stability and Predictability

- “What counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty.”
- *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 300.



Transparency

- “The Tribunal understands [transparency] to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.”
- *Metalclad Corporation v Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 76.



Transparency

- “The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relation with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”
 - *Tecmed v. Mexico*, ICSID AF Award, 2003, para. 154.



Legitimate expectations

- Fair and equitable treatment “requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”
- *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, para. 154.



Legitimate expectations

- “The standard of ‘fair and equitable treatment’ is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the ‘fair and equitable treatment’ standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors’ legitimate and reasonable expectations.”
- *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para. 302.



Legitimate expectations

- “[...] the concept of ‘legitimate expectations’ relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.”
- *International Thunderbird Gaming Corporation v Mexico UNCITRAL (NAFTA)*, Award, 26 January 2006, para. 147.



Legitimate expectations

- “The essence of the protection sought was well explained in *Tecmed*, where the tribunal held in the light of the good faith requirement that under international law, the foreign investment must be treated in a manner such that it “will not affect the basic expectations that were taken into account by foreign investor to make the investment.” This requirement becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations, [...]”
- *Sempra Energy v Argentina*, ICSID Case No. ARB/02/16, 28 September 2007, para. 298.



Legitimate expectations

- “[An] expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate.”
- *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 331.



Legitimate expectations

- “[...] the scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.”
- *Saluka v The Czech Republic*, Partial Award, 17 March 2006, para. 304.



Legitimate expectations

- “In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.”
- *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 333.



Lack of discrimination and arbitrariness

- “The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to the fair and equitable treatment.”
- *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, 290.



Duty to protect

- See *infra* cases dealing with full protection and security



A Correct Summary?

- “Thus, this Tribunal, having considered, as previously stated, the sources of international law, understands that the fair and equitable standard consists of the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.”
 - *LG&E v. Argentina*, ICSID Award 2006, para 131.



A Correct Summary?

- “The [host state], without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor’s investment in a way that does not frustrate the investor’s underlying legitimate and reasonable expectations. A foreign investor [...] is entitled to expect that the [host state] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances.”
- *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para. 309.



Violations of Fair and Equitable Treatment – Abrogation of Guarantees

- “The measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. The discussion above, about the tariff regime and its relationship with a dollar standard and adjustment mechanisms unequivocally shows that these elements are no longer present in the regime governing the business operations of the Claimant. It has also been established that the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision.”
- *CMS v. Argentina*, ICSID Award 2005, para. 275.



Violations of Fair and Equitable Treatment – Lack of Due Process

- “[...] the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.
- “[...] the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.”
- *Loewen v. USA*, ICSID Add. Facility 2003, paras. 136, 137.



Violations of Fair and Equitable Treatment – Revocation of a License

- “The lack of transparency in INE’s behavior and intention throughout the process that led to the Resolution, which does not reflect in full the reasons that led to the non-renewal of the Permit, cover up the final and real consequence of such actions and of the Resolution: the definitive closing of the activities at the Las Víboras landfill without any compensation whatsoever, whether Cytrar agreed or not, in spite of the expectations created, and without considering ways enabling it to neutralize or mitigate the negative economic effect of such closing by continuing with its economic and business activities at a different place.”
- *Tecmed v. Mexico*, ICSID Add. Facility 2003, para. 164.



Violations of Fair and Equitable Treatment – Discrimination

- “[T]he Czech Republic’s conduct towards IPB and Saluka/Nomura in respect of Saluka’s investment in IPB shares was unfair and inequitable. [...] The Czech Government failed to deal with IPB’s as well as Saluka’s/Nomura’s proposals in an unbiased, even-handed, transparent and consistent way and it unreasonably refused to communicate with IPB and Saluka/Nomura in an adequate manner.”
- *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para. 407.



Violations of Fair and Equitable Treatment – Mismanagement

- “The fact that key points of disagreement went unanswered and were not disclosed in a timely manner, that silence was kept when there was evidence of such persisting and aggravating disagreement, that important communications were never looked at, and that there was a systematic attitude not to address the need to put an end to negotiations that were leading nowhere, are all manifestations of serious administrative negligence and inconsistency. The Claimants were indeed entitled to expect that the negotiations would be handled competently and professionally, as they were on occasion.”
- *PSEG*, ICSID Award 2007, para. 246.



Conclusions

- Fact-specific inquiry
- Approximation of customary international law standard and fair and equitable
- Due Process, predictability, transparency and legitimate expectations as main elements of the fair and equitable treatment standard



Full Protection and Security

- “Each Party shall accord to covered investments treatment in accordance with customary international law, including ... full protection and security.”
- Article 5 US Model BIT 2004



Full Protection and Security

“Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.”

Art. 2 (2) UK-Sri Lanka BIT



Full Protection and Security

- “Each Contracting Party shall accord full protection and security to the investments made by the other Contracting Party’s investors, in accordance with International Law and shall not, through legally groundless actions or discriminatory measures, hinder the management, maintenance, development, usage, enjoyment, expansion, sale, or, where applicable, disposition of such investments.”
- Article 3(1) Spain-Mexico BIT



Full Protection and Security

- “Investments [...] shall enjoy [...] protection and full security in accordance with the principle of fair and equitable treatment referred to in Article 3 of this Agreement.”
- Article 5(1) Argentina/France BIT



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- Argentina/Germany BIT



Protection against physical harm

“The practice of arbitral tribunals seems to indicate, however, that the “full security and protection” clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.”

Saluka Investments BV (The Netherlands) v The Czech Republic, Partial Award, 17 March 2006, para. 484.



Protection against physical harm

- “There is no doubt that historically this particular standard has been developed in the context of physical protection and the security of a company’s officials, employees and facilities.”
- *Enron v. Argentina, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 286.



Protection against physical harm

- *Asian Agricultural Products Ltd. v. Sri Lanka*, ARB/87/3, Final Award, 27 June 1990, paras. 45-53 – destruction of a shrimp farm by security forces
- *American Manufacturing and Trading, Inc. v. Zaire*, ARB/93/1, Award, 21 February 1997, paras. 6.04-6.19 – looting by armed forces
- *Wena Hotel Limited v. Arab Republic of Egypt*, ARB/98/4, Award, 21 November 2000, paras. 84-95 – seizure of a hotel by employees



Protection against physical harm

- “‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”
- Article 5(2)(a) US Model BIT 2004.



Beyond physical harm

- “[full protection and security] is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view. The Tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms “protection and security” are qualified by “full” and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.”
- *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 408.



Beyond physical harm

- “If the parties to the BIT had intended to limit the obligation to “physical interferences”, they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor’s investment of protection and full security, providing, in accordance with the Treaty’s specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment.”
- *Aguas del Aconquija S.A. and Vivendi Universal v. Argentina (=Vivendi II)*, Award 2007, para. 7.4.15.



Beyond physical harm

“Thus protection and full security (sometimes full protection and security) can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized.”

Aguas del Aconquija S.A. and Vivendi Universal v. Argentina (=Vivendi II), Award 2007, para. 7.4.17.



Beyond physical harm

- “[T]he obligation to provide full protection and security is wider than “physical” protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, “security” is qualified by “legal”. In its ordinary meaning “legal security” has been defined as “the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.”
- *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 303.



Relationship to FET

- Divergence of opinion whether the two standards are
- separate
- or
- identical



FET = full protection and security

“ [T]he question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security.”

Occidental v. Ecuador, LCIA Administered Case No. UN 3467, Award, 1 July 2004, Award 2004, para. 187



Full protection and security as a separate but interrelated standard

- “In some bilateral investment treaties, fair and equitable treatment and full protection and security appear as a single standard, in others as separate protections. The BIT falls in the last category; the two phrases describing the protection of investments appear sequentially as different obligations in Article II.2(a):
“Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and...”
- *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 407.



Full protection and security as a separate but interrelated standard

- “The Tribunal is persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security. [...] It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view.”
- *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 408.



Due diligence

- “[full protection and security] obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances. However, the Treaty does not oblige the Parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State.”
 - *Lauder v. Czech Republic*, UNCITRAL 2001, para. 308.
- “[...] full protection and security is not absolute and does not impose strict liability upon the State that grants it.”
 - *Tecmed v. Mexico*, ICSID 2003, para. 177.



Due diligence

“[...] the language imposing on the host State an obligation to provide “protection and security” or “full protection and security by international law” [...] could not be construed according to the natural and ordinary sense of the words as creating a “strict liability”.”

AAPL v. Sri Lanka, Award 1990, para. 49.



Vigilance

“[...] The obligation incumbent upon Zaire is an obligation of vigilance, in the sense that Zaire as the receiving State of the investments made by AMT [...] shall take all measures necessary to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract from such obligation.”

AMT v. Zaire, Award 1997, para. 6.05