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REVIEWING THE ADMINISTRATION OF DOMESTIC REGULATION IN WTO AND INVESTMENT PROTECTION LAW:
THE INTERNATIONAL MINIMUM STANDARD OF TREATMENT OF ALIENS AS “ONE STANDARD TO RULE THEM ALL”?

by Dr. Anastasios Gourgourinis

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Anastasios Gourgourinis  
Lecturer in Public International Law, National and Kapodistrian University of Athens
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Address
Panteion University of Social and Political Sciences
Department of International and European Studies
136 Sygrou Ave.
GR-17671, Athens
Greece

Internet
http://www.ecefil.eu

Contact
info@ecefil.eu

Coordinator, Design
ECEFIL, Dr. Ziaouk Sophia

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Reviewing the Administration of Domestic Regulation in WTO and Investment Protection Law: The International Minimum Standard of Treatment of Aliens as “One Standard to Rule Them All”?

Dr. Anastasios Gourgourinis*

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Abstract

This paper examines equitable treatment standards prescribed by World Trade Organization (WTO) agreements and international investment agreements (IIAs), and argues that the customary minimum standard of treatment of aliens has permeated both specialized fields of international economic law, being their common normative core regarding the administration of domestic regulation vis-à-vis both foreign traders and investors. Ergo, it is demonstrated how the same domestic regulatory measure, affecting foreign traders/investors, is indeed capable of giving equally rise to successful claims before both WTO panels and investment arbitration tribunals.

Dr. Anastasios Gourgourinis was recently elected Lecturer in Public International Law, specializing in International Economic Law, at the Faculty of Law of the National and Kapodistrian University of Athens. He practices law in Greece as a member of the Athens Bar, currently serving as a Special Legal Advisor for Strategic Investments at the Hellenic Ministry of Development, Competitiveness and Maritime Affairs, and holds a Research Fellow position at the Bureau of International and Constitutional Institutions of the Academy of Athens.

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A. Introduction

This paper seeks to demonstrate how essentially the same minimum standards of treatment protecting foreign traders/investors are established by the World Trade Organization (WTO) multilateral trade regime on the one hand, and international investment law comprising of the web of International Investment Agreements (IIAs), and most notably the 2,676 concluded Bilateral Investment Treaties (BITs),\(^1\) as well as Free-Trade Agreements containing provisions on investment, such as the North American Free Trade Agreement (NAFTA),\(^2\) on the other. While trade and investment constitute indeed distinct regimes, with different goals, processes, actors and institutional mechanisms,\(^3\) both provide for international adjudication regarding the review of domestic governmental practices.\(^4\) In this regard, it will be analyzed herein how WTO and IIAs provisions on standards of “(fair and) equitable” and “fair and equitable”, standards of protection for foreign traders/investors regarding the administration of domestic regulation, interact, under the influence of the international minimum standard, as “one standard to rule them all”; in other words, whether on the basis of the same or similar facts norms derived from different regimes lead to the same or similar juridical consequences, thus leading to a certain degree of regime harmonization via harmonized arrangements.\(^5\) Thus, and while a recent study juxtaposing national treatment provisions in trade and investment concluded that “investors cannot assume that they will prevail on a national treatment claim before an investment tribunal even if their country has earlier prevailed on the same claim at the WTO, and vice versa”,\(^6\) it is here submitted that the juxtaposition of equitable treatment provisions in WTO law and IIAs leads to the opposite conclusion, so that the same set of facts regarding the administration of domestic regulation can give rise to successful challenges brought before either the WTO arena or investment arbitration tribunals.

Hence, and before entering the merits of the above proposition via an examination of the due process prescriptions of WTO and investment protection law against the background of the international minimum standard of treatment of aliens, it is first necessary to briefly discuss the potential dual capacity of aliens as foreign traders as investors, and vice versa, in contemporary international economic law.

\(^1\) As at the end of 2008. **UNCTAD (2009)**, at 2.

\(^2\) North American Free Trade Agreement, 32 **ILM** 289 (Parts. 1-3); 32 **ILM** 605 (Parts. 4-8). Chapter 11 NAFTA provides for protection for investors and investments in NAFTA countries.

\(^3\) For example, see regarding the differences between the two regimes in the context of countermeasures, **Paparinskis (2011)**, 259.

\(^4\) E.g. **Ginsburg (2008)**, 1.

\(^5\) To paraphrase from **Emilio Agustín Maffezini v Spain**, Decision on Objections to Jurisdiction of 25 January 2000, ICSID case No ARB/97/7, **IIC** 85 (2000), para. 62.

\(^6\) **DiMascio & Pauwelyn (2008)**, 48, at 88. Similarly, see **Kurtz (2009)**, 749.
B. The potential dual capacity of foreign traders as investors and vice versa

Trade and investment, even though they appear to constitute distinct subject-matter international regimes, cannot be viewed in isolation from each other and are considered as inter-connected and concomitant in a globalized economy.\(^7\) Accordingly, while the close relationship between the two disciplines can be explained in terms of trade theory, it can also be traced in the texts of the WTO covered agreements themselves.\(^8\) International trade regulation on goods, services and intellectual property rights (IP rights), as reflected in the World Trade Organization (WTO) Agreement,\(^9\) the 1994 General Agreement on Tariffs and Trade (GATT),\(^10\) the Agreement on Subsidies and Countervailing Measures (SCM) Agreement,\(^11\) the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement,\(^12\) and most notably, the General Agreement on Trade in Services (GATS),\(^13\) and the Agreement on Trade Related Investment Measures (TRIMs),\(^14\) impinge upon issues of investment protection to the extent that it directly affects trade.\(^15\) So despite the fact that a multilateral agreement dealing specifically with investment in the WTO ambit is lacking, service suppliers under GATS Mode 3 are rather likely to qualify as foreign investors.

One cannot of course ignore the important different characteristics of the WTO and the investment protection regimes.\(^16\) Most notably, while the WTO prescribes solely for inter-State dispute settlement with little or no visible role for private parties, dispute settlement under IIAs mostly operates on an investor versus host-State adjudicative basis; while the WTO dispute settlement aims at the removal of WTO-incompatible measures, or, in the alternative, compensation and suspension of concessions (retaliation) \textit{pro futuro}, investor-State adjudication under IIAs focuses on reparation, i.e. retrospective remedies awarded to private parties themselves (i.e. investors) without a duty to withdraw the illegal measure; also, while in the WTO adjudication there is no requirement of legal or economic interest for complainants,\(^17\) in

\(^7\) See WTO Doha Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1; 41 ILM 746 (2002), paras. 20-22.

\(^8\) See e.g. \textit{Trebilcock & Howse (2005)}, at 442-446, 452-461, \textit{Sornarajah (2004)}, at 397-402.


\(^13\) General Agreement on Trade in Services, Annex 1B of the Marrakesh Agreement, in \textit{WTO (1994)}, at 284.

\(^14\) Agreement on Trade-Related Investment Measures, Annex 1A of the Marrakesh Agreement, in \textit{WTO (1994)}, at 143.


\(^16\) E.g. \textit{Molinuevo (2006)}, found at: \textit{http://www.nccr-trade.org}.

investor-State adjudication under IIAs claimants must prove the existence of a causal link between the acts or omissions complained and the injury suffered.18

But crucially, what both the trade and investment regimes feature in common are the eventual beneficiaries of the standards of protection under both disciplines, i.e., private parties. While foreign investors are afforded direct protection by IIAs, the goal of the WTO agreements, to use the formulation featuring in the WTO website, “although negotiated and signed by governments…is to help producers of goods and services, exporters, and importers conduct their business.”19 This has been reiterated by WTO adjudicators: hence, a panel has noted that “[p]redictability in the intellectual property regime is indeed essential for the nationals of WTO Members when they make trade and investment decisions in the course of their businesses”,20 while similarly, WTO arbitrators, addressing a suggestion that suspension of commitments or other obligations under the GATS in principal service sectors other than distribution services would not be “practicable or effective” under Article 22.3(b) of the DSU Dispute Settlement Understanding (DSU),21 accepted the possible detrimental impact to the foreign direct investment.22 Perhaps the most pertinent illustration of the above considerations can be traced in the so-called NAFTA “spaghetti-bowl”, where the trade and investment obligations of the US, Canada and Mexico under both the NAFTA and the WTO has been premised on the overlap of provisions on trade and investment protection.23

Ergo, and as a working hypothesis, foreign traders (producers or services providers or holders of IP rights) will be taken, for the purposes of the present study, to also qualify as foreign investors under IIAs and vice versa. One could point to instances where the former have established their own distribution network in the importing Member, or have otherwise established a subsidiary in the importing country so as to facilitate the flow and provision of goods and services in the given foreign market, thus eventually rendered them capable of qualifying as foreign investors as well foreign traders. Still, for a given foreign trader to qualify also as a foreign investor certain requirements are to be met.


More specifically, in the field of international investment protection, and given that the qualification of “investors” is rather linked with the definition of “foreign investment”, 24 often a distinction is occasionally drawn between, on the one hand, “foreign direct investments”, which are accorded with IIAs remedies, and, on the other, “portfolio investments”, which are sometimes not included in the protection. 25 What is more, there exists no precise or uniform definition of the term “investment” in international law, to the extent that Article 25(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) 26 does not purport to define it, 27 so that it is essentially reserved for State-parties to IIAs to define in detail what constitutes an “investment” for the purposes of their inter se international legal relations. 28 Still, there seem to have prevailed certain generic criteria for the notion of investment under the ICSID Convention, often seen as reflected in the so-called “Salini test”: i) a contribution of money or other assets of economic value, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State’s development. 29 More recently, the Phoenix Action Tribunal, building on the Plama Consortium Award, 30 identified two further requirements: (v) assets invested according to host-State laws and regulations, 31 and (vi) assets invested bona fide. 32 While the “Salini test” has been criticized, 33 its potential utility has been

24 E.g. Bayview Irrigation District No 11 and ors v Mexico, Award of 19 June 2007, ICSID Case No ARB(AF)/05/1; IIC 290 (2007), at paras. 90-122.  
25 See for the distinction, Sornarajah (2004), at 7-18, 227-228.  
26 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 40 ILM 577  
27 For, note that any given ICSID tribunal must satisfy itself that the Claimant has made an “investment” under both the BIT in casu (or any other instrument containing the consent to arbitrate) as well as the ICSID Convention. See Salini Construtorri S.atA. and Italstrade S.atA. v. Morocco, Decision on Jurisdiction of 23 July 2001, ICSID case No. ARB/00/4; 30 ILM 577, at para. 44; Joy Mining Machinery Ltd v Egypt, Award on jurisdiction of 30 July 2004, ICSID Case No ARB/03/11; IIC 147 (2004); 19 ICSID Rev—Foreign Investment L J 486 (2004), at para. 50. The definition of investments in IIAs can confirm or restrict the generic ICSID definition, but they cannot expand it in order to have access to arbitration under the ICSID facilities. Equally, the Energy Charter Treaty or the UNCITRAL Rules do not contain a definition of “investment”.  
28 See respectively, Mihaly International Corporation v Sri Lanka, Award of 15 March 2002, ICSID Case No ARB/00/2; IIC 170 (2002); (2002) ICSID Rev—Foreign Investment L J 142, para. 33: “the definition [of “investment”] was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.”  
29 Salini v. Morocco, supra note 27, at para. 52, in addition to a fifth element of regularity of profit and return earlier mentioned in Fedax NV v Venezuela, Decision on Jurisdiction, ICSID Case No ARB/96/3; IIC 101 (1997); 37 ILM 1378, para. 43. Favourably towards to the “Salini test”, see Joy Mining, supra note 27, at para. 53; Jan de Nul NV and Dredging International NV v Egypt, Decision on jurisdiction of 16 June 2006, ICSID Case No ARB/04/13; IIC 144 (2006), para. 91.  
30 Plama Consortium Ltd v Bulgaria, Award of 27 August 2008, ICSID Case No ARB/03/24; IIC 338 (2008), at paras. 138-146.  
32 Phoenix Action Ltd v Czech Republic, Award of 9 April 2009, ICSID Case No ARB/06/5; IIC 367 (2009), paras. 82-83, 101-115.
acknowledged “in the event that a tribunal were concerned that a BIT or contract definition of investment was so broad that it might appear to capture a transaction that would not normally be characterized as an investment under any reasonable definition”. 34

In any case, one should always keep in mind the authoritative observation by a leading commentator according to which the abovementioned elements “should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the [ICSID] Convention”. 35 Crucially for the purposes of the present study, it indeed appears that, in view of the analysis just above, it is in principle feasible for foreign traders to qualify simultaneously as foreign investors in the State to which they export their products or provide their services abroad. What in fact both foreign traders and investors share in common, from a normative point of view, is that both in principle benefit from the protection afforded by the customary minimum standard of treatment of aliens, which is to be discussed just infra.

33 See Douglas (2009), at 198-202, as well as, Biwater v Tanzania, supra note 18, paras. 310-318; Pantechniki SA Contractors and Engineers v Albania, Award of 28 July 2009, ICSID Case No. ARB/07/21; IIC 383 (2009), paras. 36-43; Toto Costruzioni Generali SpA v Lebanon, Decision on Jurisdiction of 8 September 2009, ICSID Case No ARB/07/12, IIC 391 (2009), paras. 81-85.

34 Inmaris Perestroika Sailing Maritime Services GmbH and ors v Ukraine, Decision on Jurisdiction of 8 March 2010, ICSID Case No ARB/08/8; IIC 431 (2010), para. 131.

35 Schreuer (2001), at 140.
C. The application of the international (customary) minimum standard of treatment of aliens (investors and traders) as a ‘floor’ for the administration of domestic regulation

The debate on the existence and content of an international minimum standard of treatment of aliens perhaps dominated international legal discourse in late 1930s. On the one side of the spectrum, the Latin American States appeared as the main advocates of the so-called “Calvo Doctrine” according to which the principle of non-intervention in the domestic domaine réserve of States dictated that aliens could not claim treatment more favorable than the one reserved for nationals. On the other, the view shared by Western States was perhaps early capitalized by Elihu Root in 1910:

“There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country’s system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.”

Contemporary international law has seemingly at least resolved the issue in favor of the latter view: an international minimum standard of treatment of non-nationals has indeed prevailed irrespectively of the treatment afforded to nationals. To use the formulation of an authoritative treatise, there exist “general requirements of customary international law, such as those which impose on a state international responsibility for denial of justice to aliens, or which require it to observe in its treatment of aliens certain minimum international standards.”

The above proposition perhaps echoes, inter alia, the long standing ruling of Permanent Court of International Justice (PCIJ) in the Upper Silesia case where the existence of a international (customary) minimum standard of treatment of aliens was acknowledged by making reference to “limits set by the generally accepted principles of international law” conditioning the treatment of non-nationals by host-States. It is also in this spirit that the International Court of Justice (ICJ) has subsequently remarked in the Barcelona Traction case that, “[w]hen a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assume s obligations concerning the treatment to be afforded them.” In a later passage, the Court then explained that this

36 See, among many, Roth (1949); Shea (1955); Lillich (1984), at 14-17.
37 Root (1910), at 521-522.
38 Sacerdoti (1997), at 342: “National treatment should be considered to satisfy “prima facie” the requirements of the international minimum standard. Invocation of the latter can be still considered relevant whenever national law does not provide, generally or in a specific instance, for adequate guarantees of fair treatment in accordance with generally shared values of substantial and procedural fairness and justice in respect of the enjoyment of property and the normal conduct of business operations.”
40 Case Concerning Certain German interests in Polish Upper Silesia (Germany v. Poland), Merits, Judgment, PCIJ Series A, No. 7 (1926), at 22.
standard of treatment of aliens is in fact “guaranteed by general international law”.\textsuperscript{42} Reference to the international minimum standard was made in 2004 by the Eritrea-Ethiopia Claims Commission when discussing Ethiopia’s failure to provide reasonable notice regarding the collection tax liabilities of Eritrean expellees; as stated, “… [i]nternational law did not prohibit Ethiopia from requiring that expellees settle their tax liabilities, but it required that this be done in a reasonable and principled way. …Viewed overall, the tax collection process was approximate and arbitrary and failed to meet the minimum standards of fair and reasonable treatment necessary in the circumstances.”\textsuperscript{43} In late 2010, the Hague Court in the Ahmadou Diallo case reiterated that treatment of aliens should not fall below customary standards, by stating that “[t]here is no doubt...that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments.”\textsuperscript{44} Accordingly, it is today safely maintained that a certain international minimum standard of aliens is concretely entrenched in public international law.

The normative content of the minimum standard of treatment, characterized as a “contingent standard”,\textsuperscript{45} has been traditionally been linked with wrongful deaths of aliens,\textsuperscript{46} cruel and inhumane treatment,\textsuperscript{47} abusive expulsion of aliens,\textsuperscript{48} taking of property,\textsuperscript{49} and most notably, denial of justice.\textsuperscript{50} In fact, it is often that references to the

\textsuperscript{42} Ibid., para. 87.


\textsuperscript{45} See Falsafi (2006-2007), 317.

\textsuperscript{46} See e.g. J. W. & N. L. Swinney (U.S.A.) v United Mexican States, General Claims Commission (Convention of September 8, 1923) (United Mexican States, United States of America), 16 November 1926, 4 RIAA 98, at 100: “It is not clear from the record why Swinney [a US national] looked like a smuggler or a revolutionary at that time and place, and how the Mexican officials could explain and account for their act of shooting under these circumstances, even when they considered him committing an unlawful act in crossing from one bank to another (a fact they did not see). Human life in these parts, on both sides, seems not to be appraised so highly as international standards prescribe.”

\textsuperscript{47} E.g. Harry Roberts (U.S.A.) v United Mexican States, General Claims Commission (Convention of September 8, 1923) (United Mexican States, United States of America), 2 November 1926, 4 RIAA 77, at 80: “That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment.”

\textsuperscript{48} See Boffolo case, Mixed Claims Commission (Italy-Venezuela), 13 February and 7 May 1903, 10 RIAA 528, at 532: “…there may be a broad difference between the right to exercise a power [i.e. expulsion of aliens] and the rightful exercise of that power.”

\textsuperscript{49} See, inter alios, Borchard (1939-1940), at 458-460;

\textsuperscript{50} See, inter alia, Laura M. B. Janes et al. (U.S.A.) v United Mexican States, General Claims Commission (Convention of September 8, 1923) (United Mexican States, United States of America), 16 November 1926, 4 RIAA 82, at 88. As Charles de Visscher wrote in 1935, “le déni de justice n’est plus désormais le seul fait générateur de la responsabilité internationale. Celle-ci peut être engagée par des actes ou par des omissions imputables à l’Etat et qui ‘sont sans connexion avec l’administration de la justice. Tel est le cas, par exemple, si la législation locale
minimum standard of treatment of aliens relate to the administration of justice at the
domestic level affecting the rights and interests of aliens. Denial of justice, as a
standard that “can hardly be defined in a purely rationalistic way”,\textsuperscript{51} according to Jan
Paulson is always procedural, though “[t]here may be extreme cases where the proof of
the failed process is that the substance of a decision is so egregiously wrong that no
honest or competent court could possibly have given it. Such cases would sanction the
state’s failure to provide a decent system of justice.”\textsuperscript{52}

That said, it bears to take note of the pertinent observation that “[t]he adjective
“minimum” does not mean that the standard itself is low, i.e., an easy test to meet.
Instead, the standard is something below which no government conduct can fall without
triggering a successful claim for compensation.”\textsuperscript{53} In fact, the threshold required for the
ascertainment of the breach of the international minimum standard of treatment of
aliens is rather demanding. In this respect, it is commonplace to refer to the Neer claim
before the US-Mexican Claim Commission as the landmark case respectively. For, it
was there stated that,

“the treatment of an alien, in order to constitute an international delinquency should
amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of
governmental action so far short of international standards that every reasonable and
impartial man would readily recognize its insufficiency. Whether the insufficiency
proceeds from the deficient execution of a reasonable law or from the fact that the
laws of the country do not empower the authorities to measure up to international
standards is immaterial.”\textsuperscript{54}

In the same fashion, the ruling on the Chattin case equated the breach of the
customary minimum standard with treatment of aliens “far below international
standards of civilization”.\textsuperscript{55} In the Salem case the Tribunal opted for an equally
stringently high threshold and stated that,

prive les étrangers du minimum de droits auquel le droit international leur permet de prétendre.”
De Visscher (1935), at 419-420.

\textsuperscript{51} Spiegel (1938), at 80. Similarly, see the previously published relevant analysis in Lissitzyn
(1936).

\textsuperscript{52} Paulsson (2005), at 98. Cf. Adede (1976), at 90-93. On the relationship between denial of
justice and access to justice, see Francioni (2009).

\textsuperscript{53} See, referring to Article 1105 NAFTA, Weiler (2003-2004), at 75. Note that in 2001, after the
merits award and before the award on damages in the Pope & Talbot Chapter 11 investment
dispute, the NAFTA Free Trade Commission pursuant to Article 2001(2)(c) NAFTA issued an
interpretation binding on NAFTA Tribunals, according to which “fair and equitable treatment”
and “full protection and security” in Article 1105(1) NAFTA do not require treatment in
addition to or beyond that which is required by the customary international law minimum
standard of treatment of aliens. Further on fair and equitable treatment provisions in IIAs, see
infra Section D.

\textsuperscript{54} L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, General Claims
Commission (Convention of September 8, 1923) (United Mexican States, United States of
America), 15 October 1926, 4 RIAA 60, at 61-62. For an identical reasoning, see Louis B.
Gordon (U.S.A.) v United Mexican States, General Claims Commission (Convention of
September 8, 1923) (United Mexican States, United States of America), 8 October 1930, 4 RIAA
586, at 590.

\textsuperscript{55} B. E. Chattin (U.S.A.) v United Mexican States, General Claims Commission (Convention of
September 8, 1923) (United Mexican States, United States of America), 23 July 1927, 4 RIAA
282, at 292. Similarly, see e.g. Daniel Dillon (U.S.A.) v United Mexican States, General Claims
Commission (Convention of September 8, 1923) (United Mexican States, United States of
America), 3 October 1928, 4 RIAA 368, at 369.
“...international law has from the beginning conceived under the notion of "denial of justice" forming base of political claims only exorbitant cases of judicial injustice. Absolute denial of justice; inexcusable delay of proceedings; obvious discrimination of foreigners against natives; palpable and malicious iniquity of a judgment—these are the cases which, one after another, have been included into the notion of "denial of justice".”  

Put differently, if “considerable efforts” of the State concerned can be traced, then a “broad and general view of the steps taken rather than on a criticism of some particular point” may suffice for the acknowledgment that the treatment of aliens did not fall below customary standards.  

The same high threshold for the violation of the minimum standard appears to have been also endorsed in the much later ELSI case, where the ICJ interpreted “full protection and security required by international law” under the 1948 Treaty of Friendship, Commerce and Navigation between the US and Italy as corresponding to the international minimum standard, and held that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law… It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”  

For the purposes of the present discussion, it is important to note as an interim conclusion that it is exactly the customary character of the minimum standard as a part of general international law (that is, binding erga omnes), that verifies its relevance regarding the treatment afforded to aliens independently of their capacity as investors, or traders, or both. In this sense, it indeed prescribes for generic minimum guarantees as a ‘floor’. In the following Sections of this study it will be shown how the customary standard has in fact permeated the international trade and investment regimes by contextually underlying their provisions dealing with the proper administration of domestic regulation vis-à-vis aliens.

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56 Salem Case (Egypt, USA), Agreement between the United States of America and Egypt regarding arbitration of the claim of George J. Salem (signed at Cairo, January 20, 1931), Award of 8 June 1932, 2 RIAA 1161, at 1202.

57 A. L Harkrader (U.S.A.) v United Mexican States, General Claims Commission (Convention of September 8, 1923) (United Mexican States, United States of America), 3 October 1928, 4 RIAA 371, at 372-373. Cf. Fitzmaurice (1932), at 110-111: “the merely erroneous or unjust decision of a court, even though it may involve what amounts to a miscarriage of justice, is not a denial of justice, and, moreover, does not involve the responsibility of the state. To involve the responsibility of the state the element of bad faith must be present, and it must be clear that the court was actuated by bias, by fraud, or by external pressure, or was not impartial; or the judgment must be such as no court which was both honest and competent could have delivered.”


59 Ibid., at para. 128.
D. The application of WTO due process standards for the administration of domestic trade regulation

The WTO covered agreements focus on trade in goods, services and IP rights. While it is rather common that these three are regulated as such in the WTO texts (i.e. as products, services or rights), a closer look reveals a number of provisions also provide for standards of protection for the natural or legal persons benefiting from inter-State trade, that is, foreign traders, producers, service providers and IP rights’ holders. As a result, what follows is an overview of WTO provisions concerning minimum due process standards that can possibly benefit foreign investors in their capacity as foreign traders.

1. Minimum standards for transparency and procedural fairness in the administration of domestic trade regulations

As a necessary prerequisite for the preservation of the basic principles and to further the objectives underlying the multilateral trading system, Members of the WTO have the general duty of maintaining WTO-compliant domestic legislation. According to Article XVI:4 of the WTO Agreement, “each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”. Nevertheless, in reality not only the content but also the modus of administering domestic legislation, that is reasonably and transparently, is crucial for the observance of the rights and obligations stemming from the “Single Undertaking”. As a result, the covered agreements are equipped with provisions related to the administration of, otherwise WTO-consistent, domestic regulation affecting international trade, providing for certain minimum due process and transparency self-standing standards benefiting foreign traders. These standards have been inserted in the WTO agreements as fundamental protective guarantees infused with considerations related to justice, fairness and equity.

To start with, in the GATT context, Article X GATT entitled “Publication and Administration of Trade Regulations” is designed so as to afford protective guarantees mainly for private parties, i.e. traders. As has been held by a panel, Article X GATT is a “due process theme”, whose title and content is “aimed at ensuring that due process is accorded to traders when they import or export.” Ergo, Article X GATT deals rather with the publication and administration of laws, regulations, judicial decisions and administrative rulings of general application; whether the former themselves are discriminatory is a matter of conformity with the substantive provisions of the GATT.

Under Articles X:1 and X:2 GATT, “laws, regulations, judicial decisions and administrative rulings of general application” must be published and cannot be

60 E.g. see Davey (2006), at 300-301; Weiss & S. Steiner (2006-2007), at 1571-1585.
enforced prior to their official publication.\textsuperscript{65} According to the Appellate Body, Article X:2 is expressive of the transparency principle which “has obviously due process dimensions” and dictates that “Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures”.\textsuperscript{66}

Moreover, under Article X.3 GATT WTO Members must administer their domestic legislation of general application related to trade in goods in a “uniform, impartial and reasonable manner”; further they must institute “independent judicial, arbitral or administrative tribunals or procedures” made available to interested private parties to have recourse for prompt and effective review of measures affecting trade not in conformity with the above standards. It is in this spirit, how Article X:3 GATT establishes “certain minimum standards for transparency and procedural fairness” in the administration of trade laws”,\textsuperscript{67} encompassing “notions such as notice, transparency, fairness and equity.”\textsuperscript{68} Uniformity, impartiality and reasonableness are not cumulative requirements, so that, for instance, a WTO Member may be found to administer domestic regulation in an unreasonable manner, even if not in a non-uniform or impartial manner.\textsuperscript{69} Reasonableness was thus interpreted as corresponding to “notions such as “in accordance with reason”, not irrational or absurd”, “proportionate”, “having sound judgement”, “sensible”, “not asking for too much”, “within the limits of reason, not greatly less or more than might be thought likely or appropriate”, “articulate”, “or as a process which “inherently contains the possibility of revealing confidential business information”.\textsuperscript{70} On the other hand, uniformity has been envisaged as requiring consistency and predictability in the domestic law administration,\textsuperscript{71} resulting in “an actual or possible future adverse impact on the trading environment”,\textsuperscript{72} but still not


\textsuperscript{66} Appellate Body Report, United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11, at 21. As noted by Steve Charnovitz, this was the first instance where “the connection [was made] between information transparency for the public and the ability of the affected individual to act on the information by participating in a government's administrative review process.” Charnovitz (2003-2004), at 935.


\textsuperscript{70} Ibid, at paras. 7.385-7.388.

\textsuperscript{71} Panel Report, Argentina –Hides and Leather, supra note 62, at para. 11.94.

\textsuperscript{72} Ibid., at para. 11.83.

\textsuperscript{73} Panel Report, EC – Selected Customs Matters, supra note 63, at para. 7.154.
requiring “identical results where relevant facts differ”.\textsuperscript{74} \textit{Per} the Appellate Body, the lack of uniformity of administrative processes (as contrasted to their application) does not necessarily entail a violation of Article X:3(a) GATT;\textsuperscript{75} for, importantly,

“the term "administer" in Article X:3(a) refers to putting into practical effect, or applying, a legal instrument of the kind described in Article X:1. Thus, under Article X:3(a), it is the application of a legal instrument of the kind described in Article X:1 that is required to be uniform, but not the processes leading to administrative decisions, or the tools that might be used in the exercise of administration.”\textsuperscript{76}

Finally, the requirement of impartiality would not be met in cases where administrative procedures would permit private parties with a competitive interest, but lacking relevant legal interest \textit{in casu}, to gain access to otherwise confidential information.\textsuperscript{77} What would then seem as a core element for a violation is “the uncertainty created as the result of non-uniformity, i.e. where application of a policy varies across time and locations.”\textsuperscript{78}

Noteworthy also is that in \textit{EC – ‘Customs’} the Appellate Body had emphatically noted that,

“[w]hile the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument.”\textsuperscript{79}

Hence, it has been observed that the above dictum signaled the abandonment of the substantive/administrative dichotomy previously followed by panels and potentially brings substantial aspects of domestic regulation into the scope of Article X:3 GATT.\textsuperscript{80} In any event, claims under Article X GATT generally require a high threshold of “solid evidence” which the complaining Member must be adduced, reflecting “the gravity of the accusations inherent in [Article X GATT] claims”.\textsuperscript{81}

Almost identical is the coverage of Article VI GATS as a matter of both substance and language,\textsuperscript{82} while the threshold of evidence also remains high.\textsuperscript{83} In the TRIPS


\textsuperscript{76} Ibid., at para. 224. Cf. the critique in \textit{Mitchell & Sheargold (2008-2009)}, at 1071-1072.

\textsuperscript{77} Panel Report, \textit{Argentina – Hides and Leather, supra} note 62, at para. 11.100.


\textsuperscript{79} Ibid., at para. 200.

\textsuperscript{80} \textit{Ala'I (2008-2009)}, at 270-271.


\textsuperscript{82} See \textit{Delimatsis (2006)}, at 20-21. On the general relevance of GATT provisions for the interpretation of GATS, see e.g. Appellate Body Report, \textit{EC – Bananas, supra} note 17, at para. 231.
ambit, Articles 41.2, 42 and 63 TRIPS form “an internationally-agreed minimum standard which Members are bound to implement in their domestic legislation” for the protection of nationals of other Members; WTO Members are obligated to establish domestic IP rights’ enforcement procedures which are “fair and equitable”, “not unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays”, providing adequate effective procedural due process guarantees to interested private parties, i.e. IP rights’ holders as well as defendants. What is more, Article 63 TRIPS on “Transparency of Dispute Prevention and Settlement”, similarly to Article X:1 GATT and Article III GATS, establishes transparency requirements.

One could further point to Article 1.3 of the Licensing Agreement, which according to the Appellate Body, “by its very terms” establishes “neutral ... fair and equitable” administration and application of import licensing procedures in an identical way to in a way identical to Article X:3(a) GATT. Mutatis mutandis, the “minimum standards” of fairness established by Article X:3(a) and apply in the administration of domestic trade regulation must be observed in the area of antidumping and safeguards measures, given that they would fall into the scope of Article X:1 GATT as measures of general application, and thus are to be read in conformity with the disciplines of Article X GATT.

As a result, it has been found, for example, in Mexico – ‘Pipes’ that “positive evidence” must be “inherently reliable and creditworthy”, an “objective examination” would take place if the antidumping investigation is conducted “in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation”, accompanied by “even-handed” identification, investigation and evaluation of the relevant factors. In the same spirit, in Argentina – ‘Footwear’ the panel held that in the absence of explanations related to the selection of one set of data to the exclusion of others during a safeguards investigation, the findings and conclusions reached on the basis of such data could not be “reasoned”.

In sum, the minimum due process guarantees of administration of domestic trade regulations enshrined in Article X GATT appear to permeate substantially all facets of WTO regulation. Overall, it appears that the scope of Article X GATT can feasibly extend beyond customs duties, to all trade rules, as further evidenced by various provisions of other WTO agreements, so that eventually, and “after being neglected

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86 Appellate Body Report, EC – Bananas, supra note 17, at paras. 197, 203.
90 van den Bossche (2005), at 474.
for over 50 years, GATT Article X has a bright future ahead of it.\textsuperscript{91} This is to be rendered even more evident by the relevance of Article X:3 GATT in the interpretation of the chapeau of Article XX GATT, as the Appellate Body recognized in US – ‘Shrimp’.\textsuperscript{92}

In effect, the analysis of the non-arbitrariness element in Article XX GATT, as well as Articles XIV GATS, and Articles 2.3 and 5.5 SPS, that follows in the next Section, reveals that almost identical considerations also have prevailed in the interpretation of the above provisions by WTO organs, thus fully confirming the preponderant role of Article X GATT 1994 as somewhat an ‘umbrella’ requirement safeguarding domestic compliance with WTO rules. In this sense, equitable considerations relating to minimum due process and transparency requirements will equally again appear as dominant, as an emerging element of good governance in and under WTO law.\textsuperscript{93}

2. The “non-arbitrariness” requirement under Articles XX GATT, XIV GATS, and Articles 2.3 and 5.5 SPS

Articles XX GATT 1994, XIV GATS, paradoxically entitled “General Exceptions”, operate as a non-precluded measures clauses defining the limits of WTO Members’ regulatory autonomy to address non-trade societal concerns but still without engaging in protectionist practices in trade in goods and services. Overall, and given the fact that they feature very similar structure and formulations, both provisions have been harmoniously interpreted by WTO organs, so that eventually the conditions for their invocation are almost identical as a matter of principle.\textsuperscript{94}

Hence, Article XX GATT 1994 has long been viewed as “a limited and conditional exception from obligations under other [GATT] provisions”,\textsuperscript{95} but still “not a positive rule establishing obligations in itself.”\textsuperscript{96} Since the Appellate Body Report in US – ‘Gasoline’, the invocation of Article XX GATT 1994 as a defence for a measure has been deemed to entail a two-tiered analysis consisting of the “provisional justification” by reason of characterization of the measure under XX paragraphs (a) to (j), and, second, “further appraisal of the same measure under the introductory clauses of Article XX” with the burden of proof lying with the WTO Member invoking the exception.\textsuperscript{97} In effect, while the measures resulting to discrimination must fall within the scope of paragraphs (a) to (j), thus encompassing a wide range of domestic regulatory concerns, the chapeau additionally requires a further determination of whether the modus of application of the measure in question must not result to “arbitrary”, or “unjustifiable” discrimination between countries where the same conditions prevail, or otherwise constitute a “disguised restriction on international

\textsuperscript{91} Pauwelyn (2009), at 48.

\textsuperscript{92} Appellate Body Report, EC – Bananas, supra note 17, at paras. 182-183.

\textsuperscript{93} See Ala’i (2008).


\textsuperscript{95} GATT Panel Report, United States – Customs User Fee, L/6264, adopted 2 February 1988, BISD 35S/245, at para. 5.9.


trade. From these three requirements of the chapeaux, the reference to “arbitrariness” in its plain meaning probably denotes the most apparent case of insertion of equitable considerations related to the successful utilization of the general exceptions of Articles XX GATT 1994 and Article XIV GATS.

Accordingly, the Appellate Body in US – ‘Shrimp’ has specifically identified “arbitrariness”, under the chapeau of Art. XX GATT, in the administration of the U.S. Section 609 certification process due to, inter alia, the lack of transparency, predictability, any formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification was made. Moreover, crucial was the rigidity of the application of the measure without due regard to the its appropriateness according to the conditions prevailing in the various exporting Members, as well as the fact that no formal written, reasoned decision were actually provided in the course of the certification process, so that WTO Members whose applications were denied did not receive notice of such denial (other than by omission from the list of approved applications), or of the reasons for the denial. Later the Panel in the Article 21.5 DSU compliance dispute referred to the ordinary meaning of the word “arbitrary” in the context of the chapeau as “capricious, unpredictable, inconsistent”, to be later followed by the Panel in Brazil – ‘Tyres’.

In the context of the chapeau of Article XIV GATS, the Appellate Body in US – ‘Gambling’ provided some guidance on instances where the application of measures is takes place in an arbitrary way by referring to “facially neutral measures, [where] there may nevertheless be situations where the selective prosecution of persons rises to the level of discrimination”, but only when there accompanied by (high-threshold) evidence concerning “the overall number of suppliers, and on patterns of enforcement, and on the reasons for particular instances of non-enforcement.” Similar is the effect of Articles 2.3 and 5.5 SPS which, read together, essentially reproduce the structure and aims of the chapeaux of Articles XX GATT 1994 and XIV GATS.

Nonetheless, note that, while Articles XX GATT 1994 and XIV GATS are exceptions, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) rather creates obligations to be met so that sanitary or phytosanitary measures are introduced or maintained, i.e. different obligations not already imposed by GATT 1994, because “nowhere is consistency with GATT

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98 Ibid.
presumed to be consistency with the SPS Agreement." In effect, Articles 2.3 and 5.5, read together, prohibit “arbitrary or unjustifiable” discrimination in different but comparable situations concerning the appropriate levels of sanitary or phytosanitary protection. Again, “arbitrariness” under Articles 2.3 and 5.5 SPS has been found in cases where justification of different levels of protection in comparable or identical situations was lacking and scientific evidence pointed to contrary conclusions, while lack of arbitrariness was identified in cases of difference in the levels of protection concerning hormones used for growth promotion purposes, as distinct from hormones used for therapeutic and zootechnical purposes.

Overall, it would appear that the requirement for “non-arbitrariness” under Articles XX GATT 1994, XIV GATS, and Articles 2.3 and 5.5 SPS is very much influenced by the disciplines of the grandfathered Article X GATT 1994, and, hence, also reflecting a minimum standard of administration of domestic trade regulation to be observed by WTO Members. The insertion of such equitable considerations in the WTO agreements has been considered, in passim, by a commentator as recasting the customary international law minimum standard of treatment of aliens. This is further reinforced by the Appellate Body’s remark in *EC – ‘Bananas’* that Article 1.3 of the Licensing Agreement, making explicit reference to “fair and equitable manner” of administration has identical coverage with Article X GATT. Hence, support is indeed provided to the view supported herein that Article X GATT 1994, and the other relevant provisions of the covered agreements, have actually incorporated the customary minimum standard, insofar as protecting foreign traders from arbitrary discrimination in practice may indeed necessitate identical guarantees as those traditionally recognized for foreign investors, and which are analyzed infra.

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E. The application of IIAs “fair and equitable treatment” Standards for the Administration of Domestic Regulation

In the previous Section, an overview of WTO provisions relating to the administration of domestic trade regulations showed that equity as due process, procedural fairness, transparency and so on, enjoy a central role respectively. This Section aims at demonstrating that these provisions of the WTO agreements as minimum standards of treatment of foreign traders are essentially identical with the customary international minimum standard of treatment of foreign investors. As a result, the analysis that follows will seek to address whether the guarantees of fair and equitable treatment provided by IIAs to foreign investors, often seen as reflecting the customary minimum standard of treatment of aliens, could also afford the same degree of protection to investors as traders on the basis of facts, giving rise, for example, to a breach of Article X:3(a) GATT 1994.

The “fair and equitable treatment” standard for foreign investors was first inserted in the 1948 Havana Charter for an International Trade Organization, which was eventually never ratified. Since then, it has featured in a number of earlier international instruments on investment protection, but contemporarily is included in almost every IIAs in force, albeit occasionally, under different formulations. For instance, the requirement of fair and equitable treatment of foreign investors is also prescribed by Article 1105(1) NAFTA and Article 10(1) ECT, as well as Article 5(1) of the 2004 US Model BIT.

As obvious from the standard’s own formulation, fair and equitable treatment is rooted in considerations of fairness and equity, and is thus inherently vague, so that resorting to dictionary definitions can become somewhat circular. This is further understandable given the scope of application of the concept: marking the dividing line between legitimate domestic regulation and administration on the one hand, and unfair or inequitable treatment of foreign investors on the other, is with little, or no, doubt a rather sensitive issue in the field of investment protection, especially given the fact that it is different from cases of direct or indirect expropriatory takings of alien property. The quest for a proper definition of the standard as included in a vast number of international instruments on investment protection has thus focussed on the appropriate yardstick by reference to which host-State measures are to be scrutinized. Accordingly, when arbitral tribunals established under IIAs are called to assess whether a provision related to fair and equitable treatment has been breached, they would either regard the relevant treaty stipulation as referring to the minimum standard of treatment of aliens under customary international law, or as referring to all sources of international law, or, alternatively view it as an independent, autonomous and self-contained treaty standard. This is understandable to the extent that, at the end of the day, investment tribunals have jurisdiction to hear claims based on alleged violations of specific IIAs provisions.

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111 On the origins of the concept, see, e.g. Yannaca-Small (2004), at 3-7.
112 See Klein Bronfman (2006), at 625-637.
115 Dolzer (2005), at 88.
116 E.g. see Schreuer (2005).
As a result, a process of interpretation of the any given fair and equitable treatment IIAs clause is necessitated in every instance, given that is some cases the standard is explicitly linked with the customary minimum standard, or international law, while in other occasions it appears self-standing without any qualification. Thus, what could safely be said is that a violation of fair and equitable treatment would depend largely on the treaty instrument which contains it, hence leaving no room for generalizations, but only allowing for ad hoc conclusions. So, while indeed the debate on the relationship between fair and equitable treatment on the one hand, and the minimum standard, as well as the customary international law, on the other, is still ongoing, the current discourse does not intend to take part. Nevertheless, it bears to be noted that in a number of occasions, even when Tribunals viewed the fair and equitable treatment IIAs provisions either as referring to the customary minimum, or as a self-standing treaty clause, they nevertheless held that both were in essence contextually identical, to the extent that “this precision is more theoretical than real… the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.”

Nevertheless, the Neer and ELSI cases should not be read as enshrining the minimum standard as a contemporary customary rule. Custom evolves through the passage of time, it is not static. As the Mondev Tribunal noted, the international minimum standard cannot considered as “as meaning no more” than the Neer claim, nor should the ELSI case be seen as undoubtedly conclusive; for, in view of the emergence of a vast number of international instruments on investment protection providing for “fair and equitable treatment” and “full protection and security”.

“[i]n the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and uncreditable, with the result that the investment has been subjected to unfair and inequitable treatment.”

In this respect, the Waste Management Tribunal, referring to the earlier S.D. Myers, Mondev, ADF and Loewen cases, identified the breach of the minimum standard in cases of conduct attributable to the host-State which is

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117 E.g. Lauder v Czech Republic, Final Award of 3 September 2001, Ad hoc—UNCITRAL Arbitration Rules, IIC 205 (2001), at para. 292; Continental Casualty Co v Argentina, Award of 5 September 2008, ICSID Case No ARB/03/9; IIC 336 (2008), at para. 254. Note that BIT provisions prescribing that fair and equitable treatment afforded to foreign investors “shall in no case be accorded treatment less than that required by international law” have been interpreted so that “that actions or omissions of the Parties [to the IIA in question] may qualify as unfair and inequitable, even if they do not amount to an outrage, to willful neglect of duty, egregious insufficiency of State actions, or even in subjective bad faith.” See Lemire v Ukraine, Decision on Jurisdiction and Liability of 14 January 2010, ICSID Case No ARB/06/18; IIC 424 (2010), paras. 253-254.


“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.”

Other arbitral Tribunals have also followed this line of reasoning, envisaging the customary minimum standard as evolving over time, e.g. not contemporarily requiring bad faith conduct so as to trigger a violation of fair and equitable treatment.

Hence, the ADF Tribunal stated that “both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.” According to the Glamis Award, while substantiating a change in the content of a customary norm is rather cumbersome, the minimum standard has been modified regarding what is today considered (as opposed to 1926) as “shocking” and “outrageous”, despite the fact that the minimum standard as such does not appear to have moved beyond the Neer formulation. In the same spirit, the Merrill & Ring Tribunal, when applying Article 1105 NAFTA, opined that,

“the applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, today’s minimum standard is broader than that defined in the Neer case and its progeny. Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law, as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard.”

So while the international minimum standard is indeed a minimum standard, still requiring a considerable degree of “egregiousness”, fair and equitable treatment has been envisaged as encompassing “legal security”, that is, “the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application”, “stability of the legal and business framework”, “treatment in an...
even-handed and just manner”, failure to accord due process resulting to denial of justice, and transparency “as a significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework.”

Moreover, as the Walter Bau Tribunal explained, “the Treaty promised FET and “legitimate expectations” come within FET’s parameters”.

Still, the fair and equitable treatment standard has its inherent limits prohibiting its abusive invocation. Notably, the investor bears the burden of exhausting all the effective judicial remedies provided within the host State’s legal system in order to successfully allege denial of justice suffered. As the AMTO Tribunal stated, “failure” to exercise rights within a legal system or “unwise” exercise of these rights are do not constitute unfair and inequitable treatment, for in this case the investor would “pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law.” Overall, a violation of the fair and equitable treatment standard, similarly to the international minimum standard of treatment of aliens and WTO case-law analyzed earlier, essentially entails “an outright and unjustified” repudiation of domestic regulation, evidenced by “the record as a whole – not dramatic incidents in isolation”.

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130 Azurix Corp v United States, Award of 14 July 2006, ICSID Case No ARB/01/12; IIC 24 (2006), at para. 360.

131 Waguih Elie George Siag and Clorinda Vecchi v Egypt, Award of 11 May 2009, ICSID Case No ARB/05/15, IIC 374 (2009), at para. 452.

132 Plama Consortium v. Bulgaria, supra note 30, at para. 178; See also, Waguih v Egypt, supra note 131, at para. 450; Rumeli v Kazakhstan, supra note 119, at para. 617; Biwater v Tanzania, supra note 18, para. 602; Toto Costruzioni Generali SpA v Lebanon, Decision on Jurisdiction of 8 September 2009, ICSID Case No ARB/07/12, IIC 391 (2009), paras. 169-173; EDF (Services) Ltd v Romania, Award of 2 October 2009, ICSID Case No ARB/05/13, IIC 392 (2009), para. 286. Also see Zoellner (2005-2006), at 604-624.

133 Walter Bau AG v Thailand, Award of 1 July 2009, Ad hoc—UNCITRAL Arbitration Rules; IIC 429 (2009), para. 11.7.


135 GAMI Investments, Inc v Mexico, Final Award of 15 November 2004, Ad hoc—UNCITRAL Arbitration Rules; IIC 109 (2004), at para. 103. Cf Helnan International Hotels AS v Egypt, Decision on the Application for Annulment of 29 May 2010, ICSID Case No ARB/05/19; IIC 440 (2010), para. 50: “A single aberrant decision of a low-level official is unlikely to breach the standard unless the investor can demonstrate that it was part of a pattern of state conduct applicable to the case or that the investor took steps within the administration to achieve redress and was rebuffed in a way which compounded, rather than cured, the unfair treatment.”
F. The WTO and IIAs standards for the administration of domestic regulation as two sides of the customary ‘coin’

Having addressed the content and generic scope of the international minimum standard of treatment of aliens, and recalling the previous analysis on WTO provisions prescribing minimum due process requirements in the administration of domestic trade regulation by WTO Members, as well as the application of fair and equitable treatment provisions in IIAs by investment arbitration tribunals, it is readily apparent that both the trade and the investment regimes have been influenced by common customary ‘core’ of the international minimum standard which, independently of treaty dictates, benefits private parties in their dual capacity as foreign traders and investors. As the foregoing survey demonstrated, the minimum due process WTO standards as interpreted by panels and the Appellate Body are substantially, if not entirely, concordant with the fair and equitable treatment protection afforded by IIAs. In the context of trade and investment disputes regarding the administration of domestic regulation, the international minimum standard as lex generalis, i.e. custom as general international law, could, then, possibly be relevant in the interpretation of the concordant (that is, not conflicting) WTO or IIAs provisions on minimum due process requirements as a “relevant rule of international law” (applicable, as general custom, in the legal relations of all WTO Members and IIAs Parties) under Article 31(3)(c) of the Vienna Convention on the law of treaties.136 One could even wait to eventually see a WTO panel ruling on a Article X:3 GATT complaint, for example, to authoritatively refer not only to lex generalis, but also the lex specialis from the investment protection regime, and vice versa.137 Furthermore, and notwithstanding the distinct, in principle, objectives and operation of both disciplines, there exists room to argue that under the same set of facts parallel proceedings before the WTO panels as well as investment tribunals could be both and equally fruitful. Both deal with facets of administration of domestic regulation, both do not necessitate proof of bad faith on behalf of the domestic authorities, and both seek to establish minimum standards of treatment for foreign business.

To take the example of the ADF v USA investment dispute in the NAFTA context: in this case the Canadian investor challenged on the basis, inter alia, of Article 1105(1) NAFTA (“fair and equitable treatment”) the public procurement process by the Commonwealth of Virginia. The Tribunal did not entertain his claim on a number of grounds: the relevant domestic content and performance requirements could not be characterized as “idiosyncratic or aberrant and arbitrary”, his legitimate expectations arising from US case-law were unfounded and not based on any misleading representations by US officials, while there was also not proof of discrimination in favor of other bidders, situated in like circumstances.138 The resemblance of the above criteria with those established by Articles X, XIX and XX of the plurilateral WTO

136 On Article 31(3)(c), see e.g. McLachlan (2005). On the operation of lex specialis and its interaction with Article 31(3)(c), see Gourgourinis (2010).

137 While investment tribunals have indeed not hesitated to authoritatively refer to WTO case-law (e.g. see, among many instances, Continental v Argentina, supra note 117, para. 187 footnote 281; Mobil Corporation Venezuela Holdings BV and ors v Venezuela, Decision on Jurisdiction of 10 June 2010, ICSID Case No ARB/07/27; IIC 435 (2010), para. 170; ), WTO panels and Appellate Body appear rather reluctant. In any case, a few examples of cross-citation may be found: see Appellate Body Report, United States – Anti-Dumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793, para. 54 footnote 30; Appellate Body Report, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, adopted 20 May 2008, para.160 footnote 313.

138 ADF v USA, supra note 123, at paras. 188-191.
Procurement Agreement is striking, also in view of the overall panel and Appellate Body jurisprudence on minimum due process requirements for the administration of domestic trade regulations. In essence, it would not be unfeasible to suggest that if the facts of the ADF case were different, i.e. displaying “unfair”, “discriminatory” and “partial” selection of suppliers in a procurement process in US territory, lacking “non-discriminatory, timely, transparent and effective and generally available” procedures for review of the relevant Commonwealth of Virginia measures, apart from the investor-State route under NAFTA chosen by ADF, the WTO adjudication route would also be open for Canada to challenge (possibly, successfully) under Article XXII of the plurilateral Procurement Agreement (to which the US is also a Member) the arbitrariness of the procurement process.

Similarly, recall that according to the facts of the Argentina – ‘Hides and Leather’ WTO dispute, under Argentinian Customs laws, the representatives of the domestic Association of Industrial Producers of Leather, Leather Manufacturers and Related Products (ADICMA) were entitled, upon request, to be present in the export clearance process of bovine hides along with the individual exporters of hides and their customs clearance agents. The WTO panel there found a violation of Article X:3(a) GATT 1994 on the basis of the unreasonableness and the impartiality of the process: the only private parties with a relevant legal interest in the process are the domestic exporter (and his agent) and the foreign buyer; conversely, the representatives of ADICMA would lack a specific legal interest in the case, but moreover, they would have “an adverse commercial interest” being competitors of the foreign buyers, so that obtaining access to otherwise confidential business information related to the names of the exporters, prices and details of exporting deals, would run counter to due process and impartiality in the export clearance process. Assuming arguendo that the European buyers could qualify as investors under the Argentinean IIAs (which would not be unlikely, if, for example, they maintain a subsidiary in Argentina), it would then appear that, apart from the WTO complaint launched by the EC, they themselves could also invoke the fair and equitable treatment protective standard they enjoy as foreign investors on the basis of the same relevant facts, so as to challenge the clearance process and seek compensation for damage sustained because of the inherent impartiality of the process, and the detrimental flow of confidential information related to their business activities.


G. Conclusions

The present study attempted to demonstrate how the provisions of WTO and investment protection law on the administration of domestic regulation, and more specifically the treatment afforded to foreign traders/investors, have both been permeated and influenced by the international minimum standard as two sides of the customary ‘coin’. On the basis of the potential dual capacity of aliens as foreign traders as investors and vice versa in contemporary international economic law, this paper discussed the international minimum standard of treatment of aliens as a ‘floor’ for the protection of foreign traders/investors vis-à-vis, one the one hand, due process standards regarding the administration of domestic regulation under WTO law, and, on the other, fair and equitable treatment standards prescribed by the various IIA. The last section eventually suggested that a triangular normative relationship regarding the administration of domestic regulation between the customary rule as lex generalis and the provisions of the trade and investment regimes as leges speciales can be attained, thus enforcing the proposition advanced herein that based on the same set of facts, investors can assume that they will prevail on a fair and equitable treatment claim if their country has earlier prevailed, for example, on a Article X:3 GATT claim at the WTO, and vice versa.
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