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'CAVEAT INVESTOR'? THE RELEVANCE OF THE CONDUCT OF THE INVESTOR UNDER THE FAIR AND EQUITABLE TREATMENT STANDARD*

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Abstract The role that investor conduct plays in applying the fair and equitable treatment standard is relatively unexplored. On the basis of conceptual analysis, and emerging international judicial and arbitral case law, this article suggests that investor conduct is an important consideration. Investor duties are being accepted in relation to the avoidance of unconscionable conduct, the reasonable assessment of investment risk in the host country, and a duty to operate an investment reasonably. These requirements may be said to lead to a new limit upon the fair and equitable treatment standard encapsulated in the phrase 'Caveat Investor'.

The fair and equitable treatment standard is a cornerstone of the evolving international law on the protection of investors and their investments. It has attracted significant attention not only in doctrinal writing but also in recent arbitral jurisprudence under the auspices of the North American Free Trade Agreement (NAFTA) and the International Centre for the Settlement of Investment Disputes (ICSID). To date, the standard has been discussed primarily as a measure for determining the obligations of host countries towards investors and investments.[1] In this process the role, if any, that the

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[1] See further UNCTAD *Fair and Equitable Treatment* Series on issues in international investment agreements (United Nations New York and Geneva 1999); Steven Vasciannie 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 99 OECD *Fair and Equitable Treatment Standard in International Investment Law* Working Papers on International Investment Law No 2004/3 (OECD Paris September 2004); Patrick G Foy and Robert J Deane 'Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement' (2001) 16 ICSID Rev-FILJ 299; J C Thomas 'Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators' (2002) 17 ICSID Rev-FILJ 21; Patrick Dumberry 'The Quest to Define "Fair and Equitable Treatment" for Investors under International Law—The Case of the NAFTA Chapter 11 *Pope and Talbot* Awards' (2002) 3 JWI 657; Christoph Schreuer 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 JWIT 357; Rudolf Dolzer 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39 Int'L Law 87.

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conduct of the investor may play in the evolution and application of the standard has not been examined in much detail. Such an examination may be necessary in view of the fact that the application of the standard is beginning to cover a wider range of governmental administrative action and judicial or other national dispute settlement processes.[2] This, in turn, may raise demands, on the part of host governments, to constrain the application of the standard through the development of new defences, so as to ensure a proper balance between the protection of investors and the inherent right of a State to regulate economic conduct within its borders.

The need for such defences may be of especial concern for developing country governments, whose limited resources can affect their ability to provide an effective evaluation of the nature of the proposed investment, and, subsequently, to ensure that the expected benefits are realized. Equally, transitional country governments, that have limited experience of dealing with private investors in a market-based system, may find themselves confronted with investor actions that may weaken the value of their investment to the economy and community. As will be shown in this paper, such concerns have not gone unheeded before international investment tribunals.

It has been argued that the balance between host country and investor concerns can be achieved by reference to international minimum standards of treatment as an integral part of the fair and equitable treatment standard.[3] This will no doubt help in determining what the host country must not do to ensure that investors are treated fairly and equitably, but it may well miss the point. Administrative action is a highly complex, and virtually indispensable, part of modern governance. It is usually concerned with very specific contexts and policy goals. Key to administrative effectiveness are perceptions of what investors are doing and whether their acts benefit the economy and the wider public interest. Therefore a central question in any defence to a claim of unfair and/or inequitable treatment on the part of the investor must be: what was the investor doing to engage the allegedly unfair administrative response?[4] It is the purpose of this paper to explore further the implications of including considerations of investor conduct in the determination of whether an act of

[2] See further the discussion of the cases in Schreuer, ibid 370–3.

[3] See Barnali Choudhury 'Evolution or Devolution?—Defining Fair and Equitable Treatment in International Investment Law' (2005) 6 JWIT 297.

[4] The question arises whether the investor's conduct is only relevant where it constitutes a major reason for the impugned administrative or judicial action, or whether any other conduct on their part may be referred to in defence. Here two issues need to be distinguished: the justification, by the respondent country, of the impugned measure by reference to the investor's conduct, where a direct causal relationship between the impugned act and the motivating conduct will be necessary to make out the defence (see eg *Genin v Estonia* ICSID Case No ARB/99/2 award of 25 June 2001: ICSID Rev-FILJ395 (2002)), and the attribution of causal responsibility for the alleged harm to the investor, where wider evidence of investor conduct may be of relevance to show that the alleged harm suffered by the investor was caused, either in whole or in part, by their own actions and not as a result of the impugned act of the host government (see, eg, *MTD Equity v Chile* ICSID Case No ARB/01/7 award of 25 May 2004: (2005) 44 ILM 91).

the host country's administrative and/or judicial authorities has breached the fair and equitable treatment principle. It will approach this task in two steps. First, it will address the main conceptual issues that the inclusion of investor conduct as an aspect of the standard might raise. This will begin with a review of the methodology behind the evolution of the fair and equitable treatment standard, bearing in mind that it is a standard based on international law and must therefore develop on the basis of how international legal rules develop. Secondly, the paper will review the main international judicial and arbitral sources that might assist in showing how far, if at all, investor conduct already plays a part in deciding the scope of the fair and equitable treatment standard.

In this connection, the development of the fair and equitable treatment standard has been a major aspect of the recent surge in case-law concerning investor-state disputes. However, the express discussion of investor conduct has been relatively sparse in that context. On the other hand, investor conduct issues have been more regularly addressed in relation to claims of regulatory taking. There seems no reason against using the pronouncements of tribunals on these matters as an aid to the elucidation of how investor conduct issues might develop in relation to the fair and equitable treatment standard. Indeed, just as the various claims made by an investor can and do overlap, given their origin in one set of facts, so too will the investor's conduct be of relevance to an assessment of all claims they make. Although these determinations by tribunals are far from providing a developed doctrine of the role of investor conduct in the resolution of investment disputes, they are highly suggestive as to the importance that should be placed on such conduct in appropriate cases and as to the kinds of investor conduct that will be relevant.

In addition to recent arbitral awards, note must be taken of the two cases decided before the International Court of Justice (ICJ) that are of direct relevance to the present discussion. These are the *Barcelona Traction Case*,[5] in which the ICJ made certain pronouncements concerning the role of equitable analysis in relation to investor claims against host countries, and, more importantly, the *ELSI Case*[6] where the conduct of investors lay at the heart of the decision that the 1948 US–Italy Treaty of Friendship, Commerce and Navigation, and its 1951 Supplementary Treaty, had not been breached by the Italian authorities when dealing with the events arising out of the bankruptcy of the US owned and controlled Italian company Elettronica Sicula SpA (ELSI).

[5] (1970) ICJ Reports 3.

[6] (1989) ICJ Reports 15. According to Vacsiannie (n 1) 137, the majority opinion in the *ELSI Case* did not seek to apply the fair and equitable treatment standard to the facts as the FCN Treaty did not contain any explicit reference to that standard. However, the emphasis placed on corporate conduct in that case is instructive to the present discussion as it helps to shed light on how such conduct might be used in determining whether the investor can rely on the protection of the IIA in question.

Given the evolving character of the fair and equitable treatment standard, the discussion that follows maps the beginning of a process that may lead to the crystallization of a formal doctrine by which the host country can provide evidence of investor conduct in defence of its regulatory actions. From the ensuing analysis, it appears that investor conduct will be relevant at all stages of the case: in determining whether the fair and equitable standard has been breached, in determining the causal relationship between the conduct, the impugned act and the alleged harm suffered, and in determining the amount of compensation to be awarded. At the substantive level, certain trends can be discerned in the case-law that point to the need for an investor to take care in how they act if they are to benefit from the full protection and security of their investment under an IIA. These may be classified around three major duties: a duty to refrain from unconscionable conduct, a duty to engage in the investment in the light of an adequate knowledge of its risks, and a duty to conduct business in a reasonable manner. Where unconscionable conduct is found, this may have serious consequences for any claim made by the investor. Evidence of such conduct may vitiate any right to a claim, especially if the regulatory response that is being challenged arises out of the application, by the host country, of its powers to punish the conduct through an interference with the investment. On the other hand, given that the second and third duties may be said to lie in a general duty of care in the conduct of foreign investment business, rather than in a strong moral abhorrence of certain types of conduct, the consequences of a failure to comply may be less serious. Here evidence of failure to comply may result in a reduction of compensation commensurate with the causal connection between the investor's conduct and the degree of loss that can be attributed to that conduct, rather than to any alleged abuse of regulatory powers on the part of the host country. Taken together this emerging case-law does suggest that investor conduct is important and may lead to the development of a new limit to the fair and equitable treatment standard that can be encapsulated in the phrase: 'Caveat Investor'!

I. CONCEPTUAL ISSUES

The fair and equitable treatment standard is still shrouded with considerable uncertainty, although certain elements appear to be taking clearer shape. Thus, it is now reasonably well settled that the standard requires a particular approach to governance on the part of the host country that is encapsulated in the obligations to act in a consistent manner, free from ambiguity and in total transparency, without arbitrariness and in accordance with the principle of good faith.[7] In addition, investors can expect due process in the handling of

[7] See *Techmed v Mexico* ICSID Case No ARB (AF)/00/2 award of 29 May 2003: 23 ILM 133 (2004) paras 154–5.

their claims[8] and to have the host authorities act in a manner that is non-discriminatory and proportionate to the policy aims involved.[9] These will include the need to observe the goal of creating favourable investment conditions and the observance of the legitimate commercial expectations of the investor.[10] On the other hand, the standard is case specific and requires a flexible approach given that, 'it offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures that have been taken against its interests'.[11] Such case specific flexibility cannot ignore the possible relevance of investor conduct in a given case. In addition, certain further arguments can be put in favour of allowing investor conduct to form a consideration in the fair and equitable treatment standard. Both on a literal interpretation of the terms 'fair' and 'equitable', and on a contextual interpretation, there appear to be no obstacles to such an extension of reasoning.[12]

A. Literal Interpretation of 'Fair' and 'Equitable'

The concepts of 'fair' and 'equitable' are, to a large extent, interchangeable. 'Fair' is defined, by the *Concise Oxford Dictionary*, as 'just, unbiased, equitable, in accordance with rules'.[13] Thus fairness connotes, among other things, equity. It leaves open the possibility of looking not only at the conduct of the person who must act fairly but also the conduct of the person who is acted upon. Indeed, that would be the implication of the synonymous use of 'equity'

[8] See eg *Loewen v United States* ICSID Case No ARB (AF)/98/3 award of 26 June 2003: 42 ILM 811 (2003).

[9] See *Loewen v United Sates* ibid; *Waste Management Inc v Mexico* ICSID Case No ARB (AF)/00/3 award of 30 Apr 2004: 43 ILM 967 (2004) para 98; *MTD Equity v Chile* (n 4) para 109.

[10] *TECMED v Mexico* (n 7) paras 156–7. See also *International Thunderbird Gaming Corporation v Mexico* NAFTA Arbitration under UNCITRAL Rules award of 26 Jan 2006 (available at <www.asil.org/ilib>) where the majority of the Tribunal suggests that under NAFTA, and the international minimum standard embodied in its fair and equitable treatment provision, Article 1105, only a gross denial of justice or manifest arbitrariness would fall below acceptable international standards (para 194). This would appear to be more restrictive of the standard than other recent awards. See also the Separate Opinion of Professor Thomas Waelde for an extensive discussion of the scope of the doctrine of legitimate expectations in relation to the standard and its application to the particular facts of the case (available at <www.asil.org/ilib>). A summary of the main points of the case appears at notes 75 and 92 below.

[11] PT Muchlinski *Multinational Enterprises and the Law* (revised paperback edition Blackwell Oxford 1999) 625. See also *Mondev International Ltd v United States* ICSID Case No ARB (AF)/99/2 award of 11 Oct 2002: 42 ILM 85 (2003) para 118 and *Waste Management* (n 9) para 99.

[12] Here it is not enough merely to take a literal approach to definition, but to use a holistic perspective where text is interpreted in its actual context and in the light of the functions of international investment agreements. This is a general problem in international economic law. See, for example, the jurisprudence of the WTO, as discussed in Federico Ortino 'Treaty Interpretation and the WTO Appellate Body report in US-Gambling: A Critique' 9 JIEL 117 (2006).

[13] *Concise Oxford Dictionary* (8th edn Clarendon Press Oxford 1990) 420.

in this connection. For if 'equity' means anything it suggests a balancing process and weighing up of what is right in all the circumstances. It is, after all, a word related to the idea of 'equilibrium' defined as 'a state of physical balance'.[14] In addition 'equity' is itself defined not only as synonymous with 'fairness' but also as 'the application of the principles of justice to correct or supplement the law'.[15] Thus the dictionary definition refers explicitly to a legal usage. Accordingly the meaning of this usage should now be briefly considered.

In English law, equitable principles developed to ensure that the unjust effects arising out of a literal and inflexible application of the common law to a case could be avoided.[16] The application of equity by the Chancery was based on a willingness to review the specific facts of a case to determine whether, in that context, the application of a principle of law was proper or whether it had to be replaced by an assessment of what would be right and just on those facts. Thus 'equity', in a legal sense, connotes a degree of flexibility arising out of sensitivity to the need to apply rules with discretion. This meaning of equity is accepted as an aspect of international law.[17] Furthermore, the development of equitable principles in English law has led to the development of certain 'maxims of equity' which have crystallized into guiding principles for the application of rules of law.[18] Certain of these clearly take into account the motives and behaviour of any person who seeks equitable relief. Thus it is said that 'the person who comes to equity must do equity' and that the 'person who comes to equity must come with clean hands'. The conduct of the claimant is central to the application of equitable principles. Indeed, such equitable considerations are also echoed in the logic of common law principles concerning commercial fairness. While generally espousing the doctrine of freedom of contract, English commercial law will expect that, in return for legal protection, a commitment to fair and honest conduct on the part of the claimant, as well as on the part of the defendant, can be demanded.[19] This can be summarized in the concept of 'unconscionability', where the court will set

[14] ibid 396.

[15] ibid.

[16] See further JH Baker *An Introduction to English Legal History* (4th edn Butterworths Lexis Nexis London 2002) 105–11. See also FW Maitland *Equity and the Forms of Action at Common Law* (CUP Cambridge 1929) 1–22.

[17] See Ian Brownlie *Principles of Public International Law* (6th edn OUP Oxford 2003) 25. In the *Tunisia–Libya Continental Shelf Case* the International Court of Justice (ICJ) held that: 'Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. The Court can take such a decision only on condition that the parties agree (Art 38, para 2 of the Statute), and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement. The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result' ICJ Reports (1982) 18, para 71.

[18] See further Gary Watt *Trusts and Equity* (OUP Oxford 2003) 17–27.

[19] See eg the law relating to fraud, misrepresentation or undue influence in contract. See generally J Beatson *Anson's Law of Contract* (28th edn OUP Oxford 2002) chs 6–7.

aside any contract that is tainted by an element of improper conduct on the part of the claimant or defendant that the law recognizes as unconscionable.[20]

B. Contextual and Teleological Interpretation

A purely literal approach to the interpretation of legal terms is often very incomplete. The term(s) in question must be reviewed in the light of the context and policy behind their use. In this connection, it should be recalled that the fair and equitable treatment standard, as a part of the wider international minimum standard of treatment for aliens, has been described as an evolving one that is not 'frozen in time' and that it is in a constant process of development.[21] Accordingly, the meaning of the standard should be determined in the context of the value system that underlies the international investment protection treaties in which these terms can be found.

The need for ensuring a good investment climate has already been mentioned as one issue that will inform the content of the standard. It motivates an investor protection perspective. In addition, it will be necessary to consider the needs of the host country that is charged with the duty to regulate the entry and behaviour of aliens into its territory in the public interest.[22] This duty is based on the inherent international legal right of the sovereign State to regulate conduct that occurs upon its territory. That right pre-exists any limitation thereon created by international agreement. Accordingly this will motivate a restrictive interpretation of the terms in question, as they constitute a qualification of a general principle of international law. The need to balance these two perspectives is essential if international investment agreements (IIAs) are to operate effectively and with a degree of political legitimacy. Too much investor protection will create an impression that national sovereignty has been given up to control by faceless international tribunals, whose decisions may restrict the regulatory powers of host countries, while too much discretion for the host country will raise fears of bad governance, and a resulting poor investment climate, on the part of investors. Neither outcome is intended by the terms of IIAs.

To take this point further, as Thomas Franck suggests, fairness in relation to international investment must be seen in the context of the way in which the global capital market operates. According to Franck,

[20] See Sir Roy Goode *Commercial Law* (3rd edn Penguin London 2004) 94. Equally such concerns have been expressed through increased regulation of contracts to ensure fairness, as in the field of consumer protection.

[21] See *ADF Group Inc v United States* ICSID Case No ARB (AF)/00/1 award of 9 Jan 2003 18 ICSID Rev-FILJ 195 (2003) paras 179–81, citing *Mondev International Ltd v United States* (n 11) paras 114–16.

[22] See generally UNCTAD *World Investment Report 2003* (United Nations New York and Geneva 2003) ch v.

> the [global] capital market operates within a political system. That system, whether national or international, speaks to what its participants perceive to be key developmental priorities, cultural values and the distribution of social goods. The political system thus constitutes a special case of 'justice as fairness' discourse within the larger quest for legitimate rules and institutions to promote development.[23]

He sees the development of developing countries as a core element in this process, one that may see the law insisting on 'a degree of state intervention in the terms of capitalization, production and earnings'.[24] In this connection, it may be said that the fairness of such regulatory conduct towards investors cannot be judged without also assessing the conduct of investors towards the community on behalf of which the State may act. This introduces a number of further contextual considerations as possible sources of interpretation of the fair and equitable treatment standard: first the relationship between investment risk and the legitimate expectations of investors and, secondly, the possible influence of rising expectations of international corporate social responsibility.

As to the question of investment risk, given the international character of foreign investment it may be said to carry a higher degree of risk than purely domestic investment. Indeed, foreign investment may be characterized as a prime example of high risk-high return investment. Even large multinational enterprises can experience a high level of risk on a host country that is unfamiliar to the firm. Such risk is exacerbated where the country in question is noted for political instability, corruption, and an inefficient system of administration. In such cases it may be especially important for the investor to be able to rely on international standards of treatment, and international systems of dispute settlement, to ensure the full security of its investment. On the other hand, in a market economy, a degree of independent judgment as to the scope of an investment risk will be expected of the investor. Not all investment risks can, or should, be protected against. This may prove inimical to the efficient functioning of a market economy, where the freedom of economic actors to make informed business judgments lies at the heart of the market mechanism. It is up to the firm to determine the risks and to develop an appropriate strategy to deal with them.[25] Any assessment of regulatory fairness will need to be made in the light of this factor. Thus losses caused by bad management of investment risk should not, in principle, be compensable under the fair and equitable treatment standard. This may be related to the legitimate expectations element of the standard, in that it cannot be a part of the investor's legit-

[23] Thomas M Franck *Fairness in International Law and Institutions* (Clarendon Press Oxford 1995) 439.

[24] ibid.

[25] See further Christopher A Bartlett, Sumantra Ghoshal, and Julian Birkinshaw *Transnational Management: Text Cases and Readings in Cross-Border Management* (4th edn McGraw Hill Irwin Boston 2004) ch 3.

imate expectations that they should be able to avoid losses caused by poor management, by blaming them instead on poor regulation by the host country.[26]

As to the rise in expectations that investors should be good corporate citizens and respect the emergent principles of international corporate social responsibility, it may be said that these represent a benchmark by which the conduct of multinational enterprises will increasingly be judged in the future. Such standards have emerged in international codes of conduct, notable among which are the OECD Guidelines for Multinational Enterprises[27] and the UN Global Compact,[28] and in corporate and industry codes, as well as binding conventions.[29] These standards can serve to inform the content of what may be regarded as ethical business practice. They include, in particular, a general duty to obey the law, to pay taxes, to act in accordance with fundamental labour standards and to observe human rights principles. Firms should also avoid involvement in bribery and other forms of corruption, provide full disclosure of their activities as required by national law, and act in accordance with general standards of market fairness as required under law. Thus firms should not act in an anti-competitive manner by engaging in restrictive business practices or abuse of a dominant position, or take unfair advantage of weaker competitors, such as through international transfer pricing manipulations that are not open to domestic firms. In addition, firms should facilitate development objectives through assisting in technology transfer and in observing national development policies. [30] These standards could be used to assess the conduct of a foreign investor in a given case. Failure to meet these minimum ethical standards could act as a factor in determining whether the investor's complaint of unfair and inequitable treatment is properly made out. That is not to say that, whenever the investor falls below these standards of behaviour, the host country authorities are entitled to act in any manner they like. In all cases they must act in accordance with the good governance stan-

[26] Indeed, the legitimate expectations of the investor will be bounded by the objective state of the applicable law as the investor found it at the time of entering into the investment. In addition, the investor cannot require the host country to determine or organise the law in any particular manner See, for further discussion, Dozer (n 1) 102–3.

[27] OECD *Guidelines for Multinational Enterprises* (OECD Paris 2000) <www.oecd.org/daf/investment/guidelines/mnetext.htm>.

[28] See further <www.unglobalcompact.org>. See also the *UN Norms on the Responsibilities of Transnational Enterprises and Other Business Enterprises with regard to Human Rights* UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) available on <www.umn.edu/humanrts/links/norms-Aug2003.html>.

[29] See further UNCTAD *Social Responsibility* Series on issues in international investment agreements (United Nations New York and Geneva 2001). The only legally binding international convention in this area to date is the OECD *Convention on Combating Bribery in International Business Transactions* which came into force on 15 Feb 1999. See further OECD *Guidelines for Multinational Enterprises* (n 27) 'Commentaries' para 44.

[30] For a fuller discussion see Peter T Muchlinski 'The Social Dimension of International Investment Agreements' in Julio Faundez, Mary E Footer, and Joseph J Norton (eds) *Governance, Development and Globalization* (Blackstone Press London 2000) 373.

dards that are inherent in the fair and equitable treatment standard. However, it may allow a tribunal to assess more accurately whether the regulatory action in question was proportionate and whether the nature of the investor's conduct entitled the regulator to interfere with the investor's rights. It would shift the onus onto the investor to show that their behaviour did not warrant the regulatory response that they encountered. Finally, it should be stressed that recourse to international standards of corporate social responsibility will not preclude the imposition of higher regulatory standards under national law. It should not be open to the investor to use such standards as an argument for avoiding the overriding duty to obey national law and to abide by the standards that it sets.

II. JUDICIAL AND ARBITRAL DECISIONS

The role of investor conduct in the development of the fair and equitable treatment standard will now be examined with a more detailed discussion of the relevant cases. This follows the substantive classification listed in the introduction, based on emergent duties to refrain from unconscionable conduct, to invest with adequate knowledge of risk and to conduct business in a reasonable manner.

A. The Duty to Refrain from Unconscionable Conduct

As noted in section I, commercial law recognizes that certain kinds of conduct have no place in good commercial practice. Accordingly, fraud, misrepresentation, undue influence or abuse of power on the part of an investor may all form the basis of a legitimate interference with their rights to conduct the investment. In such cases even the outright termination of the investment may be justified, provided it is a proportionate response to the impugned action. The leading case in this regard is *Azanian v Mexico*.[31] The claimants were US citizens who had formed a Mexican entity, DESONA, which held a concession contract to undertake waste collection and disposal in the city of Naucalpan de Juarez. The investors had obtained the concession on the basis of a business plan that asserted, among other matters, the extensive competence of the claimants in the waste management business working through a US company named Global Waste, and which made extensive claims as to amounts of capital that would be invested and the number of jobs created.[32] In fact, only one of the investors had any experience at all in this field, and Global Waste had been in existence for only 14 months in Los Angeles, despite assertions that it had over 40 years of experience in the business.[33] In

[31] ICSID Case No ARB(AF)/97/2 award of 1 Nov 1999; 14 ICSID Rev-FILJ 538 (1999).
[32] ibid para 106.
[33] ibid para 29.

addition, the business plan relied on commitments from third parties that were not to materialize. Indeed, the claimants had no resources of their own that could be used to put the plan into operation,[34] and they had failed to disclose to the relevant authorities that a major third party had withdrawn from the project. The Tribunal held that this non-disclosure was unconscionable.[35] More generally, the Tribunal said that the local authority charged with regulating the concession contract was entitled to expect more from the investors than that they would get third parties to carry out bits and pieces of this valuable contract once it had been signed.[36] Therefore, the termination of the concession was justifiable in the circumstances, a conclusion that had been upheld by three levels of Mexican administrative and judicial bodies. This case shows that misrepresentations, made by the investor as to the prospects and manner of operation of an investment, can justify a termination of the investment contract where the applicable national law allows for such a termination on the ground that the misrepresentation renders the contract invalid. On the facts the Mexican authorities had acted lawfully and so no claim could arise under NAFTA.

The issue of investor competence was also raised in the earlier case of *SPP v Egypt*.[37] In response to a claim arising out of the seizure of two hotels in Egypt by the state-owned Egyptian partners in a joint venture established with the claimant to develop the hotels, the Egyptian Government sought to argue that the claimant, Southern Pacific Properties (SPP), was not competent to undertake the investment. This was based on SPP's alleged misrepresentation as to its financial capacity and tourism expertise when the project was proposed to the Egyptian Government.[38] The claimant responded by saying that its long expertise in the tourism industry had been thoroughly investigated by the Egyptian authorities and that none of the allegations made by the Government as to SPP's solvency or competence had been made out.[39] The Tribunal rejected the Egyptian claims. On the evidence, it was clear that SPP had the required funds for the project and that any difficulties in financing the hotels were due to the failure of the Egyptian authorities to provide the joint venture with promised infrastructure support and customs clearance for certain materials and equipment imported for the project.[40] It was also evident that SPP had substantial experience and expertise in the tourism business before becoming involved in the project. The Egyptian authorities had confirmed SPP's experience before entering into the investment agreement after extensive investigations.[41]

This decision suggests that the host country may have an obligation to ensure the truth of any material representations made by the investor as to their competence, financial resources and any other relevant matters pertaining to

[34] ibid para 33. [35] ibid para 110. [36] ibid paras 114–15.
[37] ICSID Case No ARB/84/3 award of 20 May 1992: 8 ICSID Rev-FILJ 328 (1993).
[38] ibid para 113. [39] ibid para 114–15. [40] ibid paras 117–21.
[41] ibid paras 124–5.

the investment. What is unclear is how far such a duty might go. In particular, it may be one thing for the Egyptian Government, as an active party to the project, to use its resources to undertake an extensive investigation; it may be quite another matter for a cash-strapped Mexican local authority to do so. Resources must surely be an issue here, especially in relation to developing host countries that may simply be unable to undertake the relevant inquiries. Equally, to shift too great a burden upon the host country may be to absolve the investor from a fundamental obligation of honesty and candour that lies at the heart of good business practice and, furthermore, to absolve the investor from a duty not to misrepresent facts, given the important public interest issues that can be connected with a major investment project. This raises the question whether investment agreements are purely commercial transactions, where the rule of 'caveat emptor' applies and, with it, a negative rule not to make misrepresentations, or whether their public interest aspects require a positive duty of disclosure on the part of investors. *Azanian* might suggest the latter, though *SPP v Egypt* gives some force to the former view. It remains to be seen how this issue will develop.

SPP v Egypt raises a further key issue in the area of unconscionable conduct. In the course of the proceedings Egypt raised the argument that the seizure of the hotels was justified by the irregular contacts and connections that the claimants were alleged to have had with various government officials at the time the investment agreement was concluded.[42] This allegation was dismissed by the Tribunal on the basis that it was not substantiated by the evidence:

> Nowhere, however, is there any specific allegation of unlawful conduct on the part of the Claimants which could conceivably vitiate the relevant agreements or excuse non-performance of the Respondents obligations under those agreements.[43]

The language of the Tribunal is instructive. It is clear that, if there were sufficient evidence of improper contacts (and the implication of improper influence that would flow from this), the investment agreement would be vitiated and the Respondent could terminate further performance. It may be surmised that if, in a future case, such conduct were to be proved, and the host country terminated the investment, the actions of the host country could not be impugned as unfair or inequitable.

More recently, the issue of improper contact with officials was considered in the case of *Olguin v Paraguay*.[44] In that case, the claimant argued that funds slated for his investment in a snack food company had been expropriated by the alleged failure of the Paraguayan authorities to regulate effectively the

[42] ibid para 127.

[43] ibid para 128. But see the dissenting opinion of arbitrator Mohamad Amin El Mahdi who felt there was sufficient evidence of improper conduct: 8 ICSID Rev-FILJ 400 (1993) 461–72.

[44] ICSID Case No ARB/98/5 award of 26 July 2001: 18 ICSID Rev-FILJ 169 (2003).

activities of a bank, La Mercantil, in which he had made substantial deposits that were to be used to finance the project. The bank failed as a result of the wider economic crisis in Paraguay in 1995 and the claimant lost a substantial part of his deposits. In the course of the hearing it was established that the claimant had been persuaded to invest in the project, and to deposit the required capital with La Mercantil, by an official of the Central Bank of Paraguay, Juan Luis Osselli Pagaliaro. That official, and the general manager of La Mercantil, Tomas Rovira, arranged the execution of the snack food company's articles of association and were named, alongside the claimant, as members of the board. It appears they had diverted bank funds through that company.[45] The claimant subsequently complained that the government authorities had failed to control these actions, which raised issues of conflict of interest on the part of the public and private bank officials involved. The Tribunal was unimpressed saying that, '[p]erhaps it would be overly zealous to attempt to demand that the Paraguayan financial control bodies be obligated to detect and prevent hidden or "shadow" relationships of public officers (in the case of Oselli) or private ones (in the case of Rovira), that place them in a clear situation of legally culpable conflict of interest, as indicated by the auditors of La Mercantil.'[46] While there is no clear finding of corrupt practices on the part of the investor and the officials acting together—it appears rather that the investor was cheated—the suggestion of impropriety may have made the Tribunal unsympathetic to the claim, even though it felt that the Paraguayan authorities had acted negligently in regard to their duties to monitor, supervise and control the agents of their country's financial market.[47]

Thus the conduct of the investor may be weighed against the conduct of the host country authorities in determining whether the latter had indeed acted wrongly. However that conduct must reach a threshold level of unconscionability to negate the improper conduct of the host authorities. For example, in *Feldman v Mexico*[48] the investor claimed to have been discriminated against by the Mexican tax authorities because they had allowed a direct competitor to take advantage of certain tax concessions that had not been extended to him. It appeared that these concessions were being granted contrary to the requirements of Mexican tax law, in that the claimants for the concessions did not provide full invoices for the transactions concerned as required by law.[49] Nonetheless the Tribunal found for the investor on the discrimination claim, though an accompanying claim for expropriation was rejected. In this case the authorities themselves had turned a blind eye to the requirements of the law and the investor sought to take advantage of this, as did his competitors. Whether this decision is appropriate may be open to question. Investment

[45] ibid para 78. [46] ibid para 81. [47] ibid para 70.

[48] ICSID Case No ARB(AF)/99/1 award of 16 Dec 2002: 18 ICSID Rev-FILJ 488 (2003).

[49] ibid paras 128–31, and see the dissenting opinion of arbitrator Jose Covarrubias Bravo which asserts that the profitability of the investment was based on the availability of illegal tax rebates: (2003) 18 ICSID Rev-FILJ 580.

Tribunals should not countenance illegal behaviour by investors or governmental officials. On the other hand, it may be that the Tribunal felt that the improprieties on either side balanced each other out and so a claim for discrimination could be made out in violation of NAFTA Article 1102. It may also be suggested that it is not the role of an international tribunal to reverse an illegal national policy, but to adjudicate the issues arising out of the applicable IIA. Only the question whether the illegality violates the IIA is in issue. However, one may be left to muse whether NAFTA was really intended to allow investors protection against the denial of illegal tax concessions.[50] On the other hand, making the host country pay compensation for not extending illegal tax concessions to foreign investors, contrary to the national treatment rule, can be interpreted as an incentive for the host country not to allow such illegality to prevail in the first place.

The duty not to act in an unconscionable manner may be said to entail an obligation to behave with candour and transparency in dealings with host county authorities. In *Genin v Estonia*[51] the Tribunal noted that there existed a duty on the part of the investor to cooperate prudentially with financial regulators by providing information. On the facts the American investor had failed to do so. In particular, the investor did not offer clear information on the ultimate shareholders of the foreign parent companies, that he in fact owned and controlled, and that had invested in a local bank, EIB. This lack of clarity led the Bank of Estonia to revoke the operating licence of EIB, leading to the investor's claim that he had been subjected to unfair and inequitable treatment contrary to the bilateral investment agreement (BIT) between the United States and Estonia. While the Tribunal found that, in a number of respects, the Bank of Estonia's banking supervision department had acted in a manner that fell below generally accepted banking and regulatory practices, the failure to divulge the beneficial ownership of the parent company to the authorities was a cause of legitimate concern and was one of the very reasons for the suspicions of the authorities regarding the operations of EIB.[52] The Tribunal held that the Bank of Estonia had acted within its statutory discretion and that its ultimate decision could not be said to have been arbitrary or discriminatory against foreign investors in the sense in which those words were used in the BIT. In coming to its conclusion the Tribunal stressed that it was:

> imperative to recall the particular context in which the dispute arose, namely, that of a renascent independent state, coming rapidly to grips with the reality of

[50] On this point the dissenting opinion seems more robust: 'If, in actual fact, the Claimant is not entitled to IEPS rebates, it is repugnant to grant him a somewhat equivalent amount as compensation for damages, only because he alleges that there is another investor—*a Mexican investor, in like circumstances*—who has been granted IEPS tax rebates without being entitled to them either.' Opinion of arbitrator Bravo ibid 593, point 10.

[51] (n 4).

[52] ibid para 362. Note that in *Saluka v Czech Republic* UNCITRAL Arbitation Partial Award (17 March 206) available at <www.asil.org/ilib>, the Tribunal held that a portfolio investor has no duty to disclose long-term investment plans: paras 232–5.

> modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown. This is the context in which Claimants knowingly chose to invest in an Estonian financial institution, EIB.[53]

The suggestion is that investors must take into account the degree of sophistication of the local authorities when doing business in a particular host country. Where that country is like Estonia, in a process of change and transition, this may require a higher degree of candour and transparency than might be expected when dealing with a more developed market economy State. Equally, this may have led the Tribunal into balancing the procedural failures of the Estonian regulators (not giving the investor advance notice of the proposed revocation, or a chance to make representations to the authorities, and making the revocation immediately effective) against the apparent lack of openness and cooperation on the part of the investor. This case raises many interesting issues concerning the relationship between host country characteristics and the resulting responsibilities of good corporate citizens. It might lead to the view that not only a transitional economy, but also a developing country economy, may require some special consideration on the part of the investor as to how they should work with the local authorities. This issue is closely related to the duty to enter into an investment with full knowledge of risk, which is discussed below.

Finally, the principle of unconscionability may require that the investor does not abuse a superior bargaining position with the host country to extract unduly beneficial promises and other advantages for the investment from it.[54] There is very little authority on this question. Indeed, the only hint that such an analysis might be undertaken, by an international tribunal, comes from the *ELSI Case*.[55] In that case, a Sicilian electronics company, ELSI, was wholly-owned and controlled by two US corporations, Raytheon, which owned 99.16 per cent of the shares and Machlett, a wholly owned subsidiary of Raytheon, which owned the remaining 0.84 per cent. ELSI had ceased to be a profitable investment. Between 1964 and 1966 it had made an insufficient operating profit to cover its debts and accumulated losses. This required the company to reduce its equity under Italian law. That was done in 1966 and again in 1967. The US parent companies blamed this situation in part on over-manning and decided to embark upon a series of redundancies. Given ELSI's significance as a major employer in an otherwise economically underdeveloped region, these job losses caused considerable unrest and, eventually, led to strikes and an occupation of the plant in 1968. At the same time, the US parents planned an orderly liquidation of the company under Italian law, while also trying to

[53] ibid para 348.

[54] On the question of coercion of the investor by the host country see Muchlinski (n 11) 498–501.

[55] (n 6). See further Sean D Murphy 'The *ELSI* Case: An Investment Dispute at the International Court of Justice' (1991) 16 Yale Jo Int'l L 391.

save the plant by way of negotiations with local and national authorities in Italy. The US parents had hoped that an Italian public sector partner could enter into ownership of the company and that regional aid could be obtained. According to the majority of the ICJ, this dual track policy had a 'Janus-like character' as the management of ELSI hoped that, 'the threat of closure and dismissal of the workforce might bring such pressures to bear on the Italian authorities to persuade them to provide what Raytheon had long hoped for: an influential Italian partner, new capital and Mezzogiorno benefits.'[56] While not amounting to a finding of actual coercion on the part of the investors, the attention paid by the ICJ to the context of negotiations suggests that, in appropriate cases, the conduct of the investor during negotiations with the host country could be taken into account when determining whether their claim against the host country is valid. Although the investment in ELSI was unprofitable, it can be said that the US parents still had a stronger bargaining position in that they could afford to walk away from the investment, while the Italian authorities were faced with a major regional economic and social catastrophe that they had to remedy.[57]

B. A Duty to Invest with Adequate Knowledge of Risk

The recent case-law on the scope of protection offered by IIAs appears to be developing a principle that the investor is bound to assess the extent of the investment risk before entering the investment, to have realistic expectations as to its profitability and to be on notice of both the prospects and pitfalls of an investment undertaken in a high risk-high return location. Any losses that subsequently arise out of an inaccurate risk assessment will be borne by the investor. They will not be recoverable under the terms of the investment treaty. Such a duty would appear to be entirely consonant with an analysis of the fair and equitable treatment standard, given the inherent balancing process that lies at its heart. This is also a principle that is consistent with good business practice, as it requires the investor to take responsibility for the normal commercial risk associated with the investment rather than to find a source of insurance in the host country's obligations under the applicable investment agreement. The development of such a principle is justified by the view that IIAs, 'are not insurance policies against bad business judgments'.[58] It is further consistent with the concept of corporate social responsibility, as it will encourage prudent investment in the local community—a type of investment that is likely to be more permanent and beneficial. On the other hand, as will

[56] ibid para 81.

[57] One issue that may need to be determined is how negotiations at the pre-entry stage might affect subsequent negotiations between the investor and the host country. On the issue of renegotiation generally see Muchlinski (n 11) 493–8.

[58] *Maffezini v Spain* Case No ARB/97/7 award of 13 Nov 2000: 16 ICSID Rev-FILJ 248 (2001) para 64.

be discussed below, a potential source of uncertainty in the emerging principle lies with the role that host country characteristics might play in this assessment.

Central to the duty under discussion, is a proper assessment of investment risk at the outset of the investment process. Accordingly, where the investor fails to undertake a proper feasibility study they will have to bear the loss that can be attributed to that failure, rather than to any host country action that is contrary to the IIA. For example in *Waste Management v Mexico* the claimant argued that its waste disposal concession for Acapulco had been wrongfully expropriated on the ground that the municipal and regional authorities, with whom the concession had been concluded, failed to meet their financial obligations towards the claimant under the concession, causing the investment to fail. In fact the investment was not a good business proposition from the outset. The claimant had great difficulties in attracting customers to its services, the total number of whom fell well below expectations, and it had employed considerably more personnel for street sweeping and refuse collection services than the minimum that had been required under the concession. The Tribunal held that, '[I]t is clear that the arrangement was not commercially viable, taking into account both the lower than expected proportion of customers serviced and the additional costs incurred.'[59] In the event the Tribunal found no evidence of unfair or inequitable conduct. The non-payment of debts due under the concession by the municipal authorities could be explained by the financial crisis that had hit Mexico at the time, it was not motivated by sectoral or local prejudice, and, in any case, the investor had recourse to local legal remedies to rectify this matter.[60] Nor did the Tribunal uphold the claim that the non-payment was tantamount to an expropriation. In coming to its conclusion the Tribunal made the following general statement:

> In the Tribunal's view it is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of the foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance. A failing enterprise is not expropriated just because debts are not paid or other contractual obligations are not fulfilled.[61]

Though made in the context of expropriation, there appears little reason to exclude such considerations from the availability of redress under the fair and equitable treatment standard.

The applicability of such reasoning to fair and equitable treatment claims is confirmed in the case of *MTD Equity v Chile*.[62] In that case, the Malaysian

[59] *Waste Management v Mexico* (n 9) para 57.
[60] ibid paras 115–16. The additional claim of denial of justice was also not upheld see ibid paras 118–39.
[61] ibid para 177. See also *Feldman v Mexico* (n 48) para 111.
[62] (n 4). The award is subject to annulment proceedings: Dolzer (n 1) 96.

claimant, a property development company skilled in urban development, successfully argued that the standard had been breached by Chile when the Foreign Investment Commission wrongly authorized a major property development investment by the claimant that was incompatible with established planning regulations. The host country authorities thus breached the fair and equitable treatment standard by granting an investment authorization that was unlawful.[63] The claimant had been advised, by the owner of the land in question, that an exception to the planning regulations could be obtained. This was wrong. Instead, the planning authorities prohibited the investment from going ahead.[64] Chile argued that the claimant had failed to exercise the due diligence that a normal investor could be expected to follow when making a study of the feasibility of an investment. The host country could not be responsible for the losses that flowed from the unwise business decisions of the claimant in following bad advice and in not protecting itself against losses due to difficulties in obtaining necessary planning authorizations.[65] The Tribunal agreed. The claimants had relied on the landowner's representation that the land in question could be rezoned, and had paid the full price up-front even though the project did not have appropriate legal protection. They should also bear the risk of loss arising from their partnership with the landowner, who was in financial difficulties.[66] Accordingly, the Tribunal reduced the amount of compensation for breach of the fair and equitable treatment standard by 50 per cent, representing the amount of loss that was attributable to the claimant's own conduct rather than to the unlawful authorization decision. In a similar vein, the Tribunal in the *Genin* case refused to accept a claim for breach of fair and equitable treatment arising out of the purchase, by EIB, of a bank branch, owned by another Estonian bank, that was in financial difficulties. The Tribunal held that there was no proof of misrepresentations being made to the claimant by officials of the Bank of Estonia about the situation of the branch. To the contrary, the officers of EIB who conducted the negotiations regarding the purchase of the branch had acted unprofessionally and carelessly. They had failed to make a proper assessment of the credit portfolio of the branch, and they should have been particularly careful knowing that the parent bank of the branch was on the verge of bankruptcy. Thus the responsibility for the resulting loss was EIB's alone.[67]

Related to the question of assessing the commercial feasibility of an investment is the overall investment climate in the host country. It would appear that the investor must also take this into account when assessing the viability and

[63] See ibid paras 166, 189 and 214.
[64] ibid paras 80–2.
[65] ibid paras 169–70.
[66] ibid paras 244–5.
[67] (n 4) paras 343–5. See also *Noble Ventures Inc v Romania* ICSID Case No Arb/01/11 award 12 Oct 2005, available at <www.asil.org/ilib> paras 103–13, where, in the absence of being able to prove an alleged fraudulent misrepresentation by the host country authorities, the claimant was held to have a responsibility to make an independent verification of public records as to the state of litigation with third parties involving the iron and steel works in which it had invested as part of its privatization.

profitability of the proposed investment. This was made clear in the *Olguin* case where the Tribunal stressed that the claimant could not complain of the admittedly serious shortcomings of the Paraguayan legal system and of various state agencies:

> What is evident is that Mr Olguin, an accomplished businessman, with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries, was not unaware of the situation in Paraguay. He had his reasons (which this Tribunal makes no attempt to judge) for investing in this country, but it is not reasonable for him to seek compensation for the losses he suffered on making a speculative, or at best, not very prudent, investment.[68]

Similar caution has also been required of investors in transitional economies in Central and Eastern Europe. As noted in the discussion of the *Genin Case* above, where the investor knows these local circumstances that may affect the outcome of their claim.[69] More recently, the investment climate in the Ukraine was considered to be relevant in the assessment of the claims arising in the case of *Generation Ukraine v Ukraine*.[70] There, the Tribunal maintained that the vicissitudes of the host State economy were relevant in determining the investor's legitimate expectations when applying the minimum standards of treatment contained in BITs. It noted:

> The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to other investment opportunities in more developed countries. The Claimant thus invested in the Ukraine on notice of both prospects and potential pitfalls. The investment was speculative . . . the Claimant had undoubtedly experienced frustration and delay caused by bureaucratic incompetence and recalcitrance in various forms. But equally, the Claimant had managed to secure a 49-year leasehold over prime commercial property in the centre of Kyiv without having participated in a competitive tender and without having made any substantial payment to the Ukrainian authorities.[71]

In addition, where the host country is facing serious economic crisis, a tribunal will take note of this fact. Thus, in the *Olguin Case*, the Tribunal said that 'prudence would have prompted a foreigner arriving in a country that had suffered severe economic problems to be much more conservative in his investments'[72] Equally, the Tribunal, in the recent case of *CMS v Argentina*, held that account should be taken of the effect of abnormal conditions, prompted by the economic crisis in Argentina, in assessing the scope of protection afforded to the investor by an investment treaty.[73] It continued:

[68] (n 44) para 65(b).

[69] See text at nn 52–4.

[70] ICSID Case No ARB/00/9 award of 16 Sept 2003: (2005) 44 ILM 404.

[71] ibid para 20.37

[72] (n 44) para 75.

[73] *CMS v Argentina* ICSID Case No ARB/01/8 award of 12 May 2005: (2005) 44 ILM 1205 para 244.

> The crisis had in itself a severe impact upon the Claimant's business, but this aspect must to some extent be attributed to the business risk the Claimant took on when investing in Argentina, this being particularly the case as it related to decrease in demand. Such effects cannot be ignored as if business had continued as usual. Otherwise both parties would not be sharing some of the costs of the crisis in a reasonable manner and the decision could eventually amount to an insurance policy against business risk, and outcome that, as the Respondent has rightly argued, would not be justified.[74]

While such concerns may be relevant in special cases, such as transitional economies, economies in crisis, and, possibly, highly underdeveloped countries or failing States, it is unclear how far the investment climate needs to be taken into account in host countries that are not facing such extreme conditions.[75] In addition, the 'investment climate' cannot be used as an excuse for bad governance where the host country is able to offer high standards of administrative action but fails to do so. It remains to be seen how tribunals will develop this aspect of the duty to make a diligent assessment of the proposed investment and, in particular, whether, in the case of transitional economies, tribunals will demand higher standards of administrative and legal probity as these countries become more experienced in the ways of market regulation. It may be rather too easy for a host country to use this argument in justifying its own regulatory shortcomings. Thus some limits need to be developed to this argument. So far the existing case law remains relatively unclear.[76]

The duty to assess the risk of the investment may be seen as an application of the equitable concept of benefit and burden. This may obtain some support from the approach of the ICJ to this issue in the *Barcelona Traction Case*.[77] In relation to the question whether the State of the shareholder in a company should have a right of diplomatic protection on their behalf, independent of any right of the State of nationality of the company to bring a claim on behalf of the company, the Court said:

[74] ibid para 248.

[75] Note that the regulatory and political environment may be a factor that the investor should take into account, and to anticipate regulatory change in areas where high levels of regulation can be foreseen, unless the host country has given assurances that no regulatory changes will take place: see *Methanex v United States* Final Award on Jurisdiction and Merits (3 Aug 2005) Part IV, Chapter D, p 5 paras 9–10 available on <www.state.gov/s/1/c5818.htm>. See further text at nn 92–4 below and see also Dolzer (n 1) 100–4. See also *International Thunderbird Gaming Corporation v Mexico* (n 10) where a majority of the Tribunal found that the Claimant had not been unfairly or inequitably treated by reason of a closure of its gaming outlet, caused by a change in government policy on gaming in Mexico, following a change of government. See however the Separate Option of Professor Thomas Waelde who felt that this change of policy required a proper settlement of the dispute with the Claimant, rather than a unilateral closure of its outlet.

[76] See further Nick Gallus 'The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection' (2005) 6 JWIT 711. Gallus notes that there has been a significant number of BIT based ICSID cases in which the developing host country's level of development was not taken into account. However in *AMT v Zaire* (ICSID Case No ARB /93/1 award of 21 Feb 1997: (1997) 36 ILM 1531) the issue was relevant to the determination of compensation, where the claimant was found to have been aware of local conditions (paras 7.14–7.15).

[77] (n 5).

> It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or refuse it. When establishing a company in a foreign country its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantage thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholder.[78]

This passage is interesting because it considers the voluntary assumption of risk by the company or its shareholders, concerning the availability, or otherwise, of diplomatic protection, as capable of being balanced against the benefits of investing in the host country. This implies that the voluntary assumption of risk by the investor may be a relevant factor in determining whether State conduct is equitable or inequitable to the investor. Although the ICJ is assessing what is equitable in a particular context, this is but one instance of a wider approach to determining equitable or inequitable conduct, which requires an assessment of State actions in the light of the benefits and burdens that may underlie the undertaking of an investment.[79] It would appear that the cases reviewed in this part of the paper offer further examples of how this concept might be applied.

C. A Duty to Conduct Business in a Reasonable Manner

A third emergent principle based on investor conduct may be said to rest upon a duty to conduct the investment, once it has been undertaken, in a reasonable manner. Where it can be shown that the loss incurred by the investor has been caused by their bad management of the investment, rather than by any regulatory action on the part of the host country, a claim for breach of the fair and equitable treatment standard would not lie for that element of loss which could be attributed to the conduct of the investor. This is no more than an extrapolation of the reasoning in *MTD Equity v Chile*, discussed in the previous section, beyond the initial risk assessment to the subsequent management of the investment after entry. It would be strange if such an extension of the causation principle could not occur just because the investment was already established as opposed to being badly assessed at the pre-entry stage.

[78] ibid para 99.

[79] See too the *Oscar Chinn Case* (United Kingdom v Belgium) 12 Dec 1934 PCIJ Ser.A/B, No 63 (1934) 88: 'No enterprise—least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates—can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration of customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.'

The key issue in this connection concerns the content of the duty. To date the case-law is still far from complete. However certain expectations as to the conduct of the investor appear to be crystallizing. Specifically, the investor must manage the investment in a manner that will ensure the economic viability of the investment, they must be aware of the regulatory environment in which they operate, ensure compliance with any applicable regulatory requirements and take relevant professional advice. In addition, should a dispute arise with the local administrative authorities, the investor is bound to take advantage of any available local remedies that are capable of correcting the alleged administrative wrong.

As to the obligation to ensure the economic viability of the investment, this may be said to lie not only with the general company law duty to manage an investment in the best interests of its shareholders, but with a corporate responsibility to act in the best interests of the host country and its economic development. A well-run investment will be able to provide employment, skills and technology transfer and revenue, in accordance with the business plan that forms the basis of the decision to invest. This does not mean that the investor must anticipate every vicissitude that may damage the investment, and be held responsible for the resulting effects. It means that the investor must take reasonable care in the conduct of the investment so that it can realize, so far as is reasonably possible, the anticipated benefits to all the stakeholders with an interest in its success. This approach is illustrated by the decision of the ICJ in the *ELSI Case*, the facts of which have already been outlined above.[80]

On the facts, the United States alleged inter alia a breach of the US-Italy FCN Treaty on the ground that the response of the Mayor of Palermo to the impending closure of the plant, by requisitioning it, amounted to a violation of Article III(2), in that this deprived Raytheon and Machlett of the right to control and manage their investment as protected under that provision. The ICJ held that this claim had not been made out because, by the time the plant had been requisitioned, the parent companies had become unable to control, or to manage, the investment in a way that could lead to an orderly liquidation under Italian law.[81] In particular, no causal link had been established between the requisition and the effects on ELSI attributed to it by the United States. There were numerous causes acting together leading to what the ICJ termed the 'disaster at ELSI'. However, the underlying cause was held to be 'ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition.'[82] The Court continued:

[80] (n 6) and see text at nn 55–6.
[81] This conclusion was strongly opposed by Judge Schwebel, who held, in his dissenting opinion, that the parent companies had not lost their ability to manage but had that ability thwarted by the acts of the Italian authorities.
[82] (n 6) para 101.

> There was the warning loudly proclaimed about its precarious position; there was the socially damaging decision to terminate the business, close the plant and dismiss the workforce; there was the position of the banks as major creditors. In short the possibility of the solution of orderly liquidation, which Raytheon and Machlett claim to have been deprived of as a result of the requisition, is purely a matter of speculation.[83]

This is a clear indication that the ICJ was strongly influenced by the evidence of management conduct when coming to its conclusion. In particular, the Court emphasizes the socially damaging effects of the closure, apparently suggesting that wider stakeholder interests may be relevant in determining how management is conducted. Such an approach would be consistent with recent guidelines on corporate responsibility.[84] This, coupled with the Court's highlighting of the 'arm-twisting' of the Italian authorities to assist in the continued operation of a plant that was never economically self-sufficient and never paid any dividends,[85] suggests that the real problem with ELSI was not only that the parent companies failed to manage the plant profitably, but that they also contributed to its ultimate downfall and to the major social consequences that this entailed. Paradoxically, it could be said that this implies a continuing ability of the parents to manage ELSI, but to do so only very badly, so badly, in fact, that they could be held no longer to control or manage the enterprise![86]

The approach taken by the ICJ in the *ELSI Case* has been endorsed by a recent ICSID Tribunal in *Noble Ventures Inc v Romania*.[87] On facts reminiscent of the *ELSI Case*, the Tribunal held that the claimant could not make out a claim that Romania had breached the fair and equitable treatment standard, or the expropriation provision, under the US-Romania BIT. The claimant had

[83] ibid.

[84] For example, the OECD *Guidelines for Multinational Enterprises* would support such an approach by reference to Guideline II 'General Policies' which includes in para 4 an obligation to '[e]ncourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees'. However, the Guidelines, as interpreted, do not prevent the closure of unprofitable facilities provided that such closure is undertaken in accordance with local laws and practices, that reasonable notice is given to the employees and government authorities and that firms cooperate to the greatest possible extent in the mitigation of any adverse social effects: see Muchlinski (n 11) 464–5.

[85] See text at nn 56–7. See too the discussion of the case in Andreas F Lowenfeld *International Economic Law* (paperback edn Oxford University Press Oxford 2003) 435–8.

[86] The analysis of the ICJ has been criticized on this point: according to Murphy (n 55) 428, the right to control and manage entails an ability to choose a particular course of action, whatever its prospects of success or failure. By coming to its decision, the majority of the ICJ placed too much emphasis on the likelihood of a successful outcome to the liquidation and too little on the freedom of management to choose a particular course of action. According to F A Mann, the right to control and manage subsisted until the requisition: F A Mann 'Foreign Investment in the International Court of Justice: The ELSI Case' (1992) 86 AJIL 92, 96–7. Ultimately, the case may be said to have turned on the failure by the US to establish a key fact—that the company's position was still sufficiently secure to allow its owners to continue to exercise important rights of management and control before the requisition: Murphy, ibid 450.

[87] (n 67).

invested in the privatization of a major iron and steel works (CSR) located in the Resita region, which employed some 4000 workers. The claimant alleged, inter alia, that the respondent country had undermined the economic viability of the investment, through the failure of the relevant privatization authorities to secure the restructuring of CSR's debts, and by reason of its subsequent legal proceedings to effect a judicial reorganization of the company. The Tribunal rejected these claims by reference to the investor's conduct. It held that Noble Ventures was as much to blame for this situation as the state privatization authority. If the claimant had believed that the restructuring was a mere formality then the claimant's assumption was 'fundamentally flawed.' [88] On the evidence, it was clear that without the restructuring, the collapse of CSR was 'all too readily foreseeable'.[89] In addition, the claimant refused to invest any of its own funds in the restructuring process, and had defaulted on repayments on a loan facility provided by a consortium of Spanish banks, which could have provided finance for the restructuring. As a result, the claimant had failed to fulfil its promises to pay the workforce, whose wages were in serious arrears. In the circumstances, as in the *ELSI Case*, the judicial reorganization of the works could be seen as the only short-term solution to the 'social crisis' that had engulfed Resita as a result of the claimant's inability to pay the workforce.[90] Given that, in addition, the judicial reorganisation of CSR had been carried out without arbitrariness or discrimination, and had not been aimed at rescinding the Privatization Agreement between the parties, it was neither a breach of the fair and equitable standard, nor was it an expropriation of the claimant's investment.

A second feature of a duty to manage well lies in the need for management to be fully aware of the regulatory environment in which they operate, and to foresee any regulatory change that is likely as a result of the manner in which that regulatory environment operates. This may be seen as a limit upon the generally recognized obligation of host country authorities to act transparently and to honour any assurances made to investors that existing regulations shall not change.[91] This limitation was made explicit in the recent *Methanex* award.[92] There the claimant, a Canadian producer of methanol, challenged

[88] ibid para 147. [89] ibid para 152. [90] ibid para 177.

[91] On which see, for example, *TECMED v Mexico* (n 7) para 154. See further Schreuer (n 1) 374–80. See also *Occidental Exploration and Production Co v Ecuador* award of 1 July 2004, London Court of International Arbitration Administered Case No UN3467 available at <http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf>. See for critical comment Susan D Franck 99 AJIL 675 (2005) who feels that this award went too far in allowing a claim for breach of fair and equitable treatment for lack of transparency and clarity in the applicable regulatory framework which was also changed during the life of the investment.

[92] (n 75). See also *International Thunderbird Gaming Corporation v Mexico* (n 10) where the majority of the Tribunal held that the US Claimant had no reasonable basis upon which to rely on an official administrative opinion (*Oficio*) to its detriment (see para 196) That opinion had been furnished in response to the Claimant's request to ascertain whether certain types of gaming machines, that it proposed to place in a new outlet in Mexico, complied with the legal definition of a 'game of skill', which was permissible under the law, rather than a 'game of chance' which

Californian legislation, that banned the production of petrol containing methanol-based additives, on the ground that this destroyed its market and discriminated in favour of the US domestic ethanol industry, which could comply with the new regulations. This was said to contravene Article 1110 of NAFTA as it was a measure tantamount to expropriation and it failed to comply with due process of law as required under the fair and equitable treatment standard contained in Article 1105 of NAFTA. The Tribunal rejected the claim. It laid particular importance to the fact that Methanex had not been given any representations by the United States that it could reasonably have relied upon to conclude that such regulatory changes would not occur. To the contrary, Methanex had entered into a political economy, 'in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level . . . continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.'[93] Methanex entered the market fully aware of this process and in the absence of any specific commitments respecting restraints on future regulatory actions made to induce the investment. Having rejected Methanex's allegation that the ban was introduced as a result of improper political pressure, and favouritism for US rivals, on the part of the then Governor of California, the Tribunal concluded that no expropriation had taken place.

In the light of this case, it can be said that an investor enters into a host country market undertaking the risk of foreseeable future regulatory change unless they are given a stabilization commitment. Dishonouring such a commitment on the part of the host country will amount to a breach of the fair and equitable treatment standard. On the other hand, ordinary regulatory change undertaken without a stabilization commitment, even if it is adverse to the investor's interests, cannot amount to a breach of the standard by and of

was prohibited. The Claimant undertook the investment but it was closed by the gaming authority acting under the revised policy of the new Mexican administration, which, unlike its predecessor, was pledged to reverse the liberalization of gaming. In his Separate Opinion, Professor Thomas Waelde disagreed and held that the Mexican authorities had breached the fair and equitable treatment standard in NAFTA. In his view, the *Oficio* was ambiguously worded, but it led the Claimant to rely upon it and to believe that its machines could be lawfully operated. The Claimant was a small business which did not have the same capacity for independent analysis of the regulatory environment as would a large foreign investor, and that, in all the circumstances, its legitimate expectation, created by the *Oficio*, that its investment would not be challenged, was violated. This could not be excused by a change of governmental policy pursuant upon a change of administration. In addition Professor Waelde felt that the Mexican authorities had a duty to ascertain the facts independently of the Claimant, whose approach to them was in the manner of advocacy for permission to operate the outlet in question. Accordingly the authorities had failed to comply with principles of good governance by not doing so and by rendering the *Oficio* on the basis of the facts supplied by the Claimant. For a critique of Professor Waelde's reasoning see Joy Ejegi 'Re: Thunderbird and Legitimate Expectations' *Transnational Dispute Management OGEMID Archive* posted 1 Feb 2006 available at <www.transnational-dispute-management.com/members/ogemid/2006/01/msg00> (accessed 8 Mar 2006).

[93] ibid Part IV, Chapter D, p 5, para 10.

itself. Some further element of misconduct would need to be present that could render the regulatory changes unfair or inequitable. Methanex attempted to prove such additional circumstances by alleging that the executive arm of the Government of California had acted improperly. Such actions might be seen as a breach of the standard, but usually they will be very hard to prove.

A third element of the duty of reasonable management is the requirement to follow any applicable regulatory requirements. Indeed, the formulations used in certain BITs suggest that a failure to comply with the laws and regulations of the host country may result in the exclusion of the investment from the protection of the agreement. Thus, for example, the Malaysian Model BIT defines protected investments as 'all investments that are made in accordance with the laws, regulations and national policies of the Contracting Parties.'[94] This formulation places an obligation on the investor to comply with such laws. For example, in the *Maffezini Case*, the Tribunal held that the claimant was under a legal duty to carry out an environmental impact assessment in order to comply with Spanish and European environmental laws applicable to the establishment of a chemical works in Spain. His deliberate failure to do so could not incur responsibility on the part of the Spanish State under the relevant investment protection treaty, when the latter halted the project for failure to comply with these environmental regulations. In particular the Tribunal noted, 'the Kingdom of Spain's action is fully consistent with Article 2(1) of the Argentine-Spain Bilateral Investment Treaty, which calls for the promotion of investment in compliance with national legislation.' [95] It also noted that ignorance of the law is no excuse, although the claimant was fully aware of the legal requirements in this case.[96] The approach taken in this case could easily apply to other instances where the investor must comply with regulatory requirements to ensure the legality of their investment. Arguably, the duty will exist even if the applicable IIA is silent on the question of compliance with local laws and regulations. This may be so if the duty is seen as implicit in any claim for breach of fair and equitable treatment being an application of the equitable principle that 'the person who seeks equity must do equity'. Prior compliance with the law is surely the epitome of this principle. On the other hand, host countries should not rely on this duty where they make significant, unforeseeable and unannounced changes in the law with the aim of 'trapping' an investor into giving up their investment as a result of non-compliance. That would not be consistent with the accepted spirit of the fair and equitable treatment standard.

[94] Malaysia Model BIT (Feb 1998) Art 1(2)(a) in UNCTAD *International; Investment Agreements: A Compendium Vol V* (United Nations New York and Geneva 2000) 325, 326. See also M Sornarajah *The International Law on Foreign Investment* (2nd edn CUP Cambridge 2004) 266.

[95] (n 58) para 71.

[96] ibid para 70.

Related to the obligation of following applicable regulatory requirements is an obligation to take relevant professional advice. This will ensure proper compliance with the law, and would be a reasonable precaution to take particularly where the investor is operating in an unfamiliar foreign business and legal environment. This requirement was expressly referred to in the *Feldman Case*. There the Tribunal noted that the investor, as a taxpayer, had to conform to the requirements of tax law.[97] A reasonable investor would take tax advice so as to obtain a clarification of any applicable fiscal measures.[98] This was an active duty, requiring positive steps on the part of the investor.[99] The requirement to take independent advice may work to break the chain of causation between governmental acts and the alleged loss suffered by the investor, much as it would under domestic commercial law.[100] For example, in the case of *ADF Group Inc v United States*[101] the Tribunal rejected a claim for breach of the fair and equitable treatment standard in Article 1105 of NAFTA, which was based on an alleged misapplication by the host country of a statute that required local purchasing of inputs for government procurement contracts. The Tribunal observed that the claimant sought to base the claim upon a reading of the applicable case-law that appeared to have arisen from private legal advice that was at odds with the government's own interpretation of the law. In the absence of any misleading statement made by the government on this matter the claim had to fail. This decision suggests, first, that the presence, or absence, of a misrepresentation as to the true state of the law would be required to show that the government authority has acted in breach of the fair and equitable treatment standard and, second, that the investor is bound to ascertain a correct interpretation of the law based upon independent legal advice. Where that advice is inaccurate, in the absence of a misrepresentation of law by the host government authorities, the investor is fixed with the effects of the advice they have received. Any resulting loss is due to the bad advice and not to governmental unfairness. However, this should not be read as allowing governmental authorities to avoid expressing an opinion as to the true meaning of applicable rules and regulations when asked, and instead warning investors to seek independent advice. Such an approach might conflict with emerging duties of transparency on the part of host governments, and would not be in accordance with a positive spirit towards investment promotion and protection.[102]

[97] (n 48) paras 125–31. [98] ibid paras 132 and 114. [99] ibid para 114.

[100] This would be the case, for example, in relation to misrepresentation under English law, where reliance on an independent assessment of the facts when entering into a contract would negate the effect of any misrepresentation made to the representee: see *Attwood v Small* (1838) 6 Cl & Fin 232.

[101] ICSID Case No ARB(AF)/00/1 award of 9 Jan 2003: 18 ICSID Rev-FILJ 195

[102] See, for example, the transparency provisions in the US-Uruguay BIT 25 Oct 2004: (2005) 44 ILM 265 Arts 10–11 which include a duty to notify and inform the investor as to legal developments (Art 11(3)). One issue in this regard might be the effect of any disclaimers as to the accuracy of legal information contained in governmental publications that do not purport to be legally

Finally, a duty of good management may require that legal disputes be taken before effective national dispute settlement bodies. Thus, in the *Feldman Case*, the Tribunal suggested that, as part of the process of clarification of the applicable tax measures, the claimant should have availed himself of local procedures.[103] Similarly, in the *Generation Ukraine Case* the Tribunal, citing the *Feldman Case*, stressed the need for the investor to make a reasonable effort to obtain the legal correction of an administrative fault. Failure to do so could not turn the alleged fault into a breach of the BIT. In the absence of any per se violation of the BIT arising out of the conduct of the local authorities, the only possible violation of the BIT would be a denial of justice before the host country courts.[104] Such awards raise the possibility that the local remedies rule, a principle of international law that has been deliberately omitted from most BITs and other types of IIA, is being introduced by the back door.[105] This view may be strengthened if the duty to take effective legal measures for the review of local administrative and judicial action is built into the substantive standards of protection in BITs and other IIAs. Thus in the *Waste Management Case*, the Tribunal, while acknowledging that the procedural requirement to exhaust local remedies had been dispensed with by NAFTA Chapter 11, went on to say that, 'the availability of local remedies to an investor faced with contractual breaches is nonetheless relevant to the question whether a standard such as Article 1105(1) has been complied with by the State'.[106] It went on to examine the legal proceedings that had taken place in Mexico and concluded that there had not been a denial of justice in violation of the fair and equitable treatment standard.[107]

This approach may create a number of problems.[108] First, it is not clear whether recourse to domestic remedies is a general prerequisite of the fair and equitable treatment standard (or any other substantive standard, for that matter) or an element in proving that the standard has been violated due to a denial of due process before local tribunals. Secondly, to introduce such a substantive requirement may weaken the aim of providing for delocalized

binding, such as investment promotion literature. See also, on the issue of official responses to investor requests for clarification of their legal rights, *International Thunderbird Gaming Corporation v Mexico* (n 10) and (n 92).

[103] (n 48) para 134.

[104] (n 70) para 20.30.

[105] See Christoph Schreuer 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 Law and Practice of International Courts and Tribunals 1, 13–16. See also UNCTAD *Dispute Settlement: Investor State* Series on issues in international investment agreements (United Nations New York and Geneva 2003) 32–4; P Peters 'Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties' (1997) Vol XLIV Netherlands International Law Review 233; for a defence of the need to exhaust local remedies where a BIT is silent on the issue see Sornarajah (n 94) 253–5. Note that in the *ELSI Case* the ICJ held that the US–Italy FCN Treaty, which was silent on the need to exhaust local remedies, did not thereby oust the local remedies rule: (n 6) para 50. However that case involved a State-to-State dispute not an investor-State dispute.

[106] (n 10) para 116.

[107] See also, to similar effect, *Azanian v Mexico* (n 31).

[108] See Schreuer (n 105) 15–16 on which this discussion draws.

dispute settlement procedures under an IIA, as an inducement for investment promotion under the agreement. The exclusion of local remedies may also extend, in certain exceptional circumstances, to agreements that have an exhaustion of local remedies requirement by virtue of the application of the Most-Favoured-Nation (MFN) treatment clause.[109] Such an application of the MFN principle might not be possible if the substantive requirement gathers pace in arbitral case-law. It would be nonsense to require the use of local remedies as a substantive element of the fair and equitable treatment standard while, at the same time, excluding it through the MFN principle. Thirdly, it is unclear how a requirement to use local remedies would combine with a 'fork-in-the-road' provision, requiring the investor to choose between domestic tribunals and international arbitration. According to Professor Schreuer, once the investor has taken the dispute to the national courts that would rule out subsequent access to the international forum.[110] On the other hand, it would appear that such a choice would not preclude the investor from bringing an international claim for breach of fair and equitable treatment under an IIA, if the national procedure fails to meet the minimum due process standard demanded by that principle. In such a case, it is not the underlying investment dispute that founds the international case but the very fact that the national procedures, charged with its resolution, have failed to meet international treaty standards.

On the other hand, the inclusion of the need to use local remedies can help to strike a balance between the rights of the investor and the right of the host country to regulate the investment, including through the provision of adequate national remedies for investors.[111] In addition, in settling disputes, it is wise to use the procedure that is least likely to damage long-term goodwill between the disputants, assuming that they wish to continue with their relationship. Thus, in the case of investment disputes, an ascending order of dispute settlement techniques may be called for beginning with negotiation and other alternative dispute resolution methods, national arbitral and/or judicial dispute settlement and, finally, international dispute settlement. Provided the host country can offer reliable and effective dispute settlement systems it may be in the long-term interests of both parties to have recourse to local courts and tribunals first. The giving of precedence to international dispute settlement as a first option may serve only to escalate disputes, increase legal costs, and to lessen the chances of the investment relationship surviving, especially if the host country

[109] See *Maffezini v Spain* ICSID Case No ARB/97/7 decision on objections to jurisdiction (25 Jan 2000): (2001) 16 ICSID Rev-FILJ 212.

[110] (n 105) 16.

[111] It should be remembered that the deliberate exclusion of the local remedies rule from IIAs is based on the concern that national dispute settlement bodies, in developing host countries in particular, may be unable to deal adequately or impartially with investor-State disputes (But see the *Lowen Case* (n 8) which involved the apparently developed legal jurisdiction of the state of Mississippi). As national legal systems evolve to meet the challenges of attracting investors, such a concern may become less important over time.

community perceives the delocalization of the dispute as being politically illegitimate. By way of conclusion on this point, it may be said that recent case-law developments suggest that investors should have a duty to use local remedies as an aspect of good corporate citizenship and good management practice, in return for the host country providing proper and effective means of redress, with international dispute settlement remaining available, as an option of last resort, to determine whether essential due process standards have been observed at the national level.

III. CONCLUDING REMARKS

This paper has sought to outline some emergent principles concerning the role of investor conduct in the development of the fair and equitable treatment standard. Though based on what can be termed a 'first generation of judicial decisions',[112] the foregoing analysis shows that investor conduct is taken into account in relation to the various claims made by investors, including fair and equitable treatment claims. In so doing, investment tribunals are displaying an ability to balance investor and host country interests. They will accept defences against investor claims that arise out of the investor's own failure to assess risk and/or bad management, that are out of line with the legitimate expectations of investors, or that are in some way unconscionable.

The proper way forward, for the development of the jurisprudence on investor conduct, is to apply concepts of good faith and responsible business practice that are already well understood in national laws and practices, as well as in business custom. It is necessary for investment tribunals to give attention to the underlying 'bargain' between investor and host country and to ask whether each side is keeping to it. In essence that is what fair and equitable treatment is about: is the host country acting in accordance with the legitimate expectations created for the investor at the time the investment was entered into, thereby allowing the investor a reasonable opportunity to profit, and is the investor delivering, to the best standard of care and due diligence, the reasonably anticipated economic and other benefits of the investment? That would appear to encapsulate the true aims and purposes of investment treaties as they are currently drafted.

There are numerous technical issues arising out of the above discussion that will need further clarification by future tribunals faced with defences based on investor conduct. Among the many will be: how to strike a balance between host country representations and those made by investors in determining whether there has been active misrepresentation by either side; the precise role of the host country in verifying investor representations; how notions of undue pressure and undue influence on both sides should contribute to the evolution

[112] Dolzer (n 1) 88.

of the duty not to act unconscionably in negotiations over the investment; what will be an acceptable assessment of risk by the investor and what role does the host country play in this; what are the limits of host country characteristics in determining the responsibility of the investor in carrying loss; are all investors to be treated as equally able to protect their interests or are some weaker than others and need more protection from the host country? However, the most significant issue for the future will be to delimit more fully the role of the need to use local remedies. If taken too far this may effectively neutralize the protective power of IIAs. In particular, their capacity to insist that effective dispute settlement methods are available, by way of the threat of internationalized dispute settlement, will be weakened. It would be strange if developments in the fair and equitable treatment standard were to lead to such a result. On the other hand, the emergent duties of investors appear to be consistent with sound commercial principles and the public policy concerns of host countries when dealing with investors. 'Caveat investor' may well become a common a phrase in international investment law as these issues evolve.[113]

[113] Indeed this phrase has been used in at least one recently published article: see L Yves Fortier and Stephen L Drymer 'Indirect Expropriation in the Law of International Investment: I Know it When I See It, or *Caveat Investor*' (2004) 19 ICSID Rev-FILJ 293.