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EXPROPRIATION OF ALIEN PROPERTY AND THE PRINCIPLE OF NON-DISCRIMINATION IN INTERNATIONAL LAW OF FOREIGN INVESTMENT: AN OVERVIEW

A.F.M. MANIRUZZAMAN*

The principle of non-discrimination is recognized in international customary practice, as part of general international law,[1] judicial decisions,[2] and treaty law. Furthermore, a great majority of jurists have supported the principle as a yardstick of the legality of various state actions.[3] Thus, no one doubts that in customary international law the principle is now firmly established.[4] This explains the principle's relevance and application in the context of General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources[5] and the 1974 Declaration on Economic Rights and Duties of States,[6] even though neither mentions the principle. The principle of non-discrimination is not only relevant in the field of foreign investment, which is the main concern of the present article, but also in various

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1. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 602-05 (5th ed. 1998).

2. For example, in the *B.P. v. Libya* case, a ground for holding the nationalization of the assets of the British oil company illegal was that it was "discriminatory in character." 53 I.L.R. 297, 329 (1979). In the *Liamco* Award, the arbitrator held that "purely discriminatory nationalization is illegal and wrongful." Libya v. Libyan Am. Oil Co., 20 I.L.M. 1, 58 (1981); *see also* The Norwegian Shipowners Claims, 1 R.I.A.A. 307, 339 (1992) (stating that "[t]he United States are responsible for having thus made a discriminating use of the power of eminent domain towards citizens of a friendly nation, and they are liable for the damaging action of their officials and agents towards these citizens of the Kingdom of Norway").

3. *See* J.L. BRIERLY, THE LAW OF NATIONS 224 (1955); E. DE VATTEL, THE LAW OF NATIONS III 139 (1916); S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 190 (1953); GILLIAN WHITE, NATIONALIZATION OF FOREIGN PROPERTY 146 (1961); John H. Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L L. 253 (1941); Lord McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 NETH. INT'L L. REV. 243 (1959); H. Rolin, 6 NETH. INT'L L. REV. 260, 269-70 (1959); MAX SORENSEN, 101 HAGUE RECUEIL DES COURS 178 (1960); A. VERDROSS, 37 HAGUE RECUEIL DES COURS 389 (1931). *Cf.* HANS W. BAADE, *Permanent Sovereignty over Natural Wealth and Resources*, *in* ESSAYS ON EXPROPRIATION 24 (Richard S. Miller & Roland J. Stanger eds., 1967); IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 81 (1983).

4. *See* BROWNLIE, *supra* note 3, at 81.

5. U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

6. U.N. GAOR, 2d Comm., 29th Sess., 2315th plen. mtg., U.N. Doc. A/9946 (1974).

other areas such as human rights[7] and international trade.[8] Although a plethora of writings[9] on the subject concern those matters, there is surprisingly little focus on it in the context of foreign investment, except cursory views in the concerned literature. The gravity of the principle in the corpus of international law cannot simply be ignored. Professor Brownlie notes that "the relevance of the principle is considerable."[10] Some jurists have not even hesitated to consider it a matter of *jus cogens*.[11] But a controversy arises as to the meaning and scope of the principle. Different meanings are often attributed to it as a result of the different angles from which one can consider the matter; thus the issue is a contentious one. The principal arguments surround the rationalization of the principle of non-discrimination, i.e. non-violation of the principle. A clear understanding of the concept is very important in the context of both customary and conventional international law. Non-discrimination has been employed in most recent multilateral instruments such as the North American Free Trade Agreement (NAFTA),[12] the Energy Charter Treaty,[13] and the Organization for Economic Co-operation and Development (OECD) Draft Multilateral Agreement on Investment,[14] and there is no doubt that the principle of alien non-discrimination will be subject to interpretation in various contexts. Thus, the concept itself merits clarification in the context of both general and conventional international law. The purpose of this brief study is to explore the meaning of the concept in international law of foreign investment in the light of juristic views, arbitral and judicial interpretations, and state practice.

In international law the principle of equality (or equality of treatment) is often expressed in the negative form as one of non-discrimination. The simple meaning of the concept as 'absence of

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7. *See generally* Case Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium, 1 EUR. H.R. REP. 252 (1968) [hereinafter Belgian Linguistics Case]; LAURENCE LUSTGARTEN, LEGAL CONTROL OF RACIAL DISCRIMINATION (1980); WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW (1983); E.W. VIERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW WITH SPECIAL REFERENCE TO HUMAN RIGHTS (1973); W.A. McKean, *The Meaning of Discrimination in International and Municipal Law*, 44 BRIT. Y.B. INT'L L. 177 (1970);.

8. *See generally* HYDER KHURSHID, EQUALITY OF TREATMENT AND TRADE DISCRIMINATION IN INTERNATIONAL LAW (1968).

9. *See supra* notes 7-8.

10. BROWNLIE, *supra* note 3, at 81.

11. *See* Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-owned Wealth*, 75 AM. J. INT'L L. 437, 441 (1981); MCKEAN, *supra* note 7, at 277.

12. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 605.

13. European Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360.

14. *See MAI Home Page* (visited Dec. 18, 1998) <http://www.oecd.org/daf/cmis/faqmai.htm>.

discrimination' is quite elusive in both international and municipal law.[15] The concept of discrimination entails two elements: first, the measures directed against a particular party must be for reasons unrelated to the substance of the matter, for example, the company's nationality.[16] Second, discrimination entails like persons being treated in an inequivalent manner. In its literal or formal sense, the principle of non-discrimination may be described, according to Foighel, that: "the rules of international law against discrimination can be considered to be satisfied when foreigners are given *formal equality with the nationals of the country in question in respect of protection in similar situations.*"[17]

A similar view has been reflected in the *Sabbatino* case where the U.S. Circuit Court of Appeals held that "international law is not violated when equal treatment is accorded to aliens and natives, regardless of the quality of the treatment or the motives behind that treatment."[18] However, the foregoing egalitarian views do not operate mathematically in law, as will be seen shortly.

There cannot be any absolute principle of alien non-discrimination; it is neither supported in municipal law nor in international law.[19] But sometimes partisan views are put forward. As White wrote about four decades ago:

> (1) Measures which are aimed exclusively at alien-owned property in a field where there are also national interests constitute illegal discrimination.[20]
>
> (2) Measures which are general in scope but which single out alien property . . . for unfavourable treatment (usually in the matter of payment of compensation) constitute a breach of the (alien non-discrimination) rule unless there is justification for such treatment in treaty provisions.[21]

Weston seems to characterize such views as ethnocentric.[22] Jurists also take a contrary position in the colonial context or in the

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15. *See generally* McKean, *supra* note 7.

16. For example, the Cuban nationalization of American-owned interests by virtue of Cuban Nationalization Law No. 851, July 6, 1960, Article 1 of which read: "The nationalization, through expropriation of the properties or concerns belonging to natural or juridical persons nationals of the United States of America or the concerns in which the said persons have majority interest or participation even though they be organized under the laws of Cuba." ZOUHAIR A. KRONFOL, PROTECTION OF FOREIGN INVESTMENT: A STUDY IN INTERNATIONAL LAW 25 (1972).

17. ISI FOIGHEL, NATIONALIZATION 47 (1957) (emphasis added).

18. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 867 (2d Cir. 1962).

19. *See* M. SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 185 (1986).

20. WHITE, *supra* note 3, at 44.

21. *Id.*

22. *See* Weston, *supra* note 11, at 444.

context of economic imperialism of certain dominant foreign investors. Thus, while considering whether the Indonesian nationalization measures were invalid because they were directed at the Dutch, a German Court said:

> The equality concept means only that equals must be treated equally and that the different treatment of unequals is admissible. For the statement to be objective, it is sufficient that the attitude of the former colonial people to its former colonial master is of course different from that toward other foreigners. Not only were the places of production in the hands of the Netherlands, for the greater part colonial companies, but these companies dominated the world-wide distribution, beyond the production process, through the Dutch markets.[23]

In a similar vein, Baade argues:

> Independence would seem an empty gesture or even a cruel hoax to many a new country if it were prevented from singling out the key investments of the former colonial power for nationalisation. There is no support in law of reason for the proposition that a taking that meets other relevant tests of legality is illegal under international law merely because it is discriminatory.[24]

Article 2 paragraph 3 of the International Covenant on Economic, Social and Cultural Rights of 1966 appears to follow the same lines. It reads: "Developing countries, with due regard to human rights and their national economy, *may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.*"[25] This provision could be a springboard for a State's invocation of the right to self-preservation in support of its discriminatory measures toward non-nationals. This in turn may lead to the assertion of the principle of economic self-determination of a State, an offshoot of the principle of permanent sovereignty of States over natural resources. The above provision is said to have been borne from the initiative of the representative of Indonesia. The logic behind such provision became clear when he stated that:

> [T]he developing countries, which had to rebuild their national economies from the legacy left by colonialism, were not prepared to accept, equally with the highly developed countries, an obligation

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23. N.V. Verenidge Del-Maatschappijen v. Deutsche Indonesische Tabak-Handelsgesellschaft (cited by Martin Domke in 55 AM. J. INT'L L. 585 (1961)).

24. BAADE, *supra* note 3, at 24.

25. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); 4 U.N. MONTHLY CHRON. 42 (1967) (emphasis added); *see also* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS § 180.1 (2d ed. 1990).

> to guarantee the same economic rights to their nationals and to non-nationals. That was not discrimination; but it would be discrimination to compel countries of unequal strength to carry the same load. The developing countries held inevitably to correct the consequences of the discrimination practised under the colonial regime by taking certain measures which might conflict with the interests of a privileged minority.[26]

Thus, Article 2 paragraph 3 of the 1966 Convention appears to be a hard blow to the concept of absolute non-discrimination. Sornarajah finds the justification of such modified principles of non-discrimination in the dependency theory.[27] He stated that:

> The dependency theorists advocate that the peripheral economy should terminate its reliance on the central economy through measures of nationalisation . . . . This soundness of the dependency theory is not the concern of international law. The fact is that the theory has influenced many nationalisations. The law must recognise that a State has a right to choose any economic theory it pleases . . . . [The theory] also validates nationalisations, such as the Indonesian nationalisation, which was motivated by a sense of nationalism against the continuing economic control of nationals of the former colonial power.[28]

Besides such theory, common sense dictates and altruistic philosophy underpins the notion that differential treatment on justifiable or reasonable grounds is permissible. Professor Schachter notes that "since the time of Plato, it has been suggested that 'equality among unequals' may be inequitable and that differential treatment may be

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26. *Summary of Records of Meetings of 3d Committee*, U.N. GAOR, 3d Comm., 17th Sess., at 358, U.N. Doc. A/C.3/SR.1206 (1962).

27. *See generally* E.M. Burg, *Law and Development: A Review of the Literature and a Critique of 'Scholars in Self-Estrangement,'* 25 AM. J. COMP. L. 492 (1977); D.F. Greenberg, *Law and Development in Light of Dependency Theory*, *in* LAW AND DEVELOPMENT 89 (A. Carty ed., 1992); John Henry Merryman, *Comparative and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977).

28. SORNARAJAH, *supra* note 19, at 184. *See also* BAADE, *supra* note 3, at 24-25, stating:

> [N]ationalizations in many underdeveloped countries with few major natural resources tend to be discriminatory by the mere force of circumstances, because the natural resource that is nationalized is exclusively in the control of enterprises belonging to one foreign power, frequently, though not necessarily, the former colonial power . . . . If it is urged that even such discriminations are to be proscribed, the purpose of the asserted rule becomes clear. It is not envisaged as an enumeration of the conditions of the legality of nationalisations, but [as] an attempt to insulate one of the most important areas of international investment from nationalization completely. It is, in other words, an attempt to substitute the restrictions of international law for the restraints previously imposed by colonialism and gunboat diplomacy.

essential for 'real equality'."[29] It has been echoed in certain quarters that the principle of affirmative action based on compensatory or distributive justice[30] available in domestic legal systems should also be adopted in international law.[31] The affirmative action is thus to redress the inequality.

Some jurists also support the view that the equality of treatment "forbids discriminatory distinctions but permits and sometimes requires the provision of affirmative action."[32] The European Court of Human Rights once pronounced that "certain legal inequalities tend only to correct factual inequalities."[33] In the *Advisory Opinion Concerning German Settlers in Poland*, the Permanent Court of International Justice (PCIJ) maintained that "[t]here must be equality in fact as well as ostensible legal equality."[34] The same court also confirmed in the *Advisory Opinion concerning the Treatment of Polish Nationals in the Danzig Territory* that "[t]he prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law."[35] Though mindful of the difficulty in clearly differentiating between these two notions, the PCIJ said in its *Advisory Opinion on the Minority Schools in Albania*:[36] "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to obtain a result which establishes an equilibrium between different situations."[37] The former notion signifies formal equality.[38] However, the Court has contended that formal equality (i.e., provisions for equality contained in the Convention or treaty) may not be affected even though actual discrimination takes place, in fact, on justified grounds. The Court also expressed a preference against the automatic application of the principle of equality of treatment in blanket disregard of factual circumstances.[39] The *Oscar Chinn* case[40]

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29. OSCAR SCHACHTER, *Sharing the World's Resources, in* INTERNATIONAL LAW: A CONSTRUCTIVE PERSPECTIVE 525, 528 (R. Falk ed., 1985).

30. *See* RONALD J. FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION 8-14 (Stephen L. Wasby, ed., 1992); LUSTGARTEN, *supra* note 7, at 14.

31. *See* SORNARAJAH, *supra* note 19, at 185.

32. MCKEAN, *supra* note 7, at 288.

33. Belgian Linguistics Case, 1 EUR. H.R. REP. at 34.

34. 1923 P.C.I.J. 24 (ser. B) No. 6.

35. 1932 P.C.I.J. 28 (ser. A/B) No. 44.

36. 1935 P.C.I.J. 19 (ser. A/B) No. 64.

37. *Id.*

38. *See id.*

39. The jurisprudence of national courts follows the same lines. Thus in *M. Match Works v. Assistant Collector, C.E.*, the Indian Supreme Court noted that "[b]are equality of treatment regardless of realities is neither justice nor homage to the constitutional principle." A.I.R. 1974 S.C. 497, 503.

is instructive on this point. Although there was actual discrimination by the Belgian authority between Belgian Company Union Nationale des Transports Fluviaux (Unatra) under State supervision, on the one hand, and other Belgian and non-Belgian companies not under State supervision, on the other, and despite that the principle of equal treatment was the characteristic feature of the legal regime established in the Congo Basin, the Court found no discrimination existed under the applicable Convention of Saint-Germain. In the Court's literal interpretation of the relevant provisions of the Convention,[41] "the form of discrimination which is forbidden [by the Convention] is . . . discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups."[42] The Court observed:

> The treatment accorded to 'Unatra' was based on the special position of that Company under the supervision of the Belgian Government. The special advantages and conditions resulting from the measures of June 20, 1931, were bound up with the position of Unatra as a Company under State supervision and not with its character as a Belgian Company.[43] These measures, as decreed, would have been inapplicable to concerns not under government supervision, whether Belgian or foreign nationality. The inequality of treatment could only have amounted to a discrimination forbidden by the Convention if it had applied to concerns in the same position as Unatra, and this was not the case.[44]

In its strict literal interpretation of the Convention, the Court thus leaned towards the view that equal treatment is required only between entities in like situations. One may wonder whether that was the end of the matter. Was there something more to do with the spirit of the Convention beyond the mere literal interpretation of the relevant provisions of the Convention? The answer to this query may not be all in the negative.

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40. 1934 P.C.I.J. (ser. A/B) No. 63. *See* WORLD COURT REPORTS: A COLLECTION OF THE JUDGMENTS ORDERS AND OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, vol. 3, 416 (Manley O. Hudson ed., 1938) [hereinafter WORLD COURT REPORTS].

41. Articles 1, 3 and 11 of the Convention of Saint-Germain. *Id.* at 437-38.

42. *Id.* at 438.

43. On June 20, 1931, the economic depression in the Congo caused the Belgian Government to order the radical reduction of river transport rates, to an extent that was uneconomic from the point of view of the trading companies. Unatra's resultant losses were recompensed by the Belgian Government, which refused to subsidize any other company, Belgian or foreign, pointing out that "governmental assistance must be confined to transport undertakings over whose rates the Government has a right of supervision." *Id.*

44. *Id.*

Perhaps the Belgian action was further justified because it was intended to address one aspect of the prevailing economic depression and was aimed at the welfare of the country in difficult circumstances.[45] Sir Hirsch Lauterpacht, in his comment on the case, seemed sympathetic to "the action of the State, apparently of a discriminatory nature, . . . taken with the view to meeting an economic emergency of some gravity."[46] He observed that "it is conceivable that a claim to equality of treatment, if pushed to the logical extreme of its apparent meaning, may operate in a way calculated to defeat considerations of justice and the intention of the parties."[47] Thus in both international and national case law there is support for the view that the principle of non-discrimination does not necessarily prevent a State from justifiably treating like persons differently in some situations.[48]

The jurisprudence of the European Court of Justice follows the above discussion. Thus in *Italian Government v. E.E.C. Commission*[49] the Court held that

> [t]he different treatment of non-comparable situations does not lead automatically to the conclusion that there is discrimination. An appearance of formal discrimination may therefore correspond in fact to an absence of material discrimination. Material discrimination would consist in treating either similar situations differently or different situations identically.[50]

In today's world of heterogeneous situations no absolute concept of non-discrimination can thus garner any warm support. In other words, absolute equality is not required, as the United States Supreme Court once said in *Douglas v. California*.[51] Weston has aptly put it that "no unqualified doctrine of non-discrimination could be constituted part of customary international law without sacrificing

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45. *See id.* at 430.

> The circumstance which, according to the Belgian Government, was the determining cause of the measure which it took on June 20th, 1931, was the general economic depression and the necessity of assisting trade, which was suffering grievously from the fall in prices of colonial products, and of warding off the danger which threatened to involve the whole colony in a common disaster.

Id.

46. SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 265 (1982).

47. *Id.* at 264.

48. *See, e.g.*, Acsyngo v. Compagnie De Saint-Gobain, 82 I.L.R. 128 (Comm. Ct. of Namur, Belg. 1990).

49. Case 13/63, [1963] 2 C.M.L.R. 289.

50. *Id.* at 311-312.

51. 372 U.S. 353, 357 (1962).

important community values."[52] One may reasonably think that instead of applying traditional principle of non-discrimination in its rigid form, application of the principle should depend on reasonable, just and equitable basis in the particular situation concerned. The standard has been reflected in the American Law Institute's Restatement that "[c]onduct discriminates against an alien . . . if it involves treating the alien differently from nationals or from aliens of a different nationality *without a reasonable basis for the difference.*"[53]

McDougal, Lasswell, and Chen have rightly advised that "whether a particular differentiation of aliens and nationals has a reasonable basis in the common interest of the larger community must . . . depend not only upon the value primarily at stake in the differentiation but also upon many particular, and varying features of the context in which the differentiation is made."[54] An important case in point was the nationalisation of the American Independent Oil Company (Aminoil) by the Government of Kuwait by virtue of a Decree Law Number 124 of September 1977.[55] Aminoil suggested that the act of rationalization was tainted with discrimination because another foreign oil company called the Arabian Oil Company (AOC), which operated offshore in both sectors of the divided zone under a joint concession granted by the Governments of Kuwait and Saudi Arabia, had not been nationalized under the Decree Law. The tribunal rejected outright any suggestion of discrimination. It said:

> First of all, it has never for a single moment been suggested that it was because of the American nationality of the Company that the Decree Law was applied to Aminoil's concession. Next, and above all, there were adequate reasons for not nationalising Arabian Oil. At the press conference held on 20 September, 1977[56] the Minister for Oil had touched upon this question and had given the following reasons for the non-nationalisation of AOC.[57]
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> AOC's high-cost off-shore production operations are such as to give it a special position which requires a high degree of expertise. At the same time, it is working within the framework of a concession granted by both Kuwait and Saudi Arabia, so its position is

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52. Weston, *supra* note 11, at 445.

53. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 (1986) (emphasis added).

54. M.S. MCDOUGAL, ET AL., HUMAN RIGHTS AND THE WORLD POLITICAL ORDER 761-65 (1980).

55. Kuwait v. American Indep. Oil Co., 66 I.L.R. 519 (1987).

56. *See Aminoil Pleadings* vol. VII, Exh. 3.

57. *Kuwait*, 66 I.L.R. at 585.

> completely different. Any modification of the concession must be agreed to by both countries.[58]

This is very plausible.

Another instance of reasonable differentiation may be found in a fairly recent case decided by the Iran-United States Claims Tribunal. Thus, in *Amoco International Finance Corp. v. Iran*,[59] the claimant argued that Iran's expropriation of its interest in Khemco, a joint venture company, was based on discrimination against United States interests and hence unlawful.[60] According to the claimant, the discrimination was evidenced by the fact that in another of National Petrochemical Company's joint ventures, the Japanese share of a consortium, the Iran-Japan Petrochemical Company (IJPC), was spared.[61] Although Article IV, paragraph 2 of the Treaty of Amity of 1955 does not expressly prohibit a discriminatory expropriation, paragraph 1 of the same article obliges each party to "refrain from applying unreasonable or discriminatory measures that would impair [the] legally acquired rights and interests of the nationals and companies of the other party."[62] The respondents denied that the expropriation was discriminatory in the instant case.[63] In its justification of the action, the respondents asserted that:

> [T]he Single Article Act [of 8 January 1980 which is expressly designed to implement the original Nationalisation Act of 1951] applied to the entire oil industry, irrespective of the nationality of the foreign companies involved in this industry. In the event, it was applied to non-United States corporations as well as United States Corporations. Therefore, it can not be held to be discriminatory. That the Special Commission did not include the contract with IJPC among those which were nullified, the Respondents submit, was an exception due to specific circumstances. They mention specifically the fact that the operation of the IJPC joint venture was not closely linked with other contracts relating to the expropriation of oil fields, whereas the operation of the Khemco plant was linked to the supply of gas from the oil fields operated jointly by Amoco and NIOC pursuant to the JSA [Joint Structural Agreement of 1958]. Furthermore, the Respondents emphasise that IJPC was not yet an operational concern at the relevant time, a point that was confirmed by the claimant.[64]

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58. *Id.*
59. Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987).
60. *See id.* ¶ 139.
61. *See id.*
62. *Id.* ¶ 140.
63. *See id.* ¶ 141.
64. *Id.* ¶ 141.

The Tribunal supported the peculiarities discussed by the parties in their explanation of why IJPC was treated differently than Khemco and held that Khemco's expropriation by Iran was not discriminatory.

Recent developments suggest that the presence of discrimination should be determined by evaluating the individual factual circumstances of each particular case. Thus, the legal notion of discrimination is more contextual than hypothetical. Professor Brownlie has suggested that the concept "calls for more sophisticated treatment in order to identify unreasonable (or material) discrimination as distinct from the different treatment of non-comparable situations."[65] In the Third Restatement of the Foreign Relations Law of the United States, the American Law Institute has neatly summarized the position thus:

> Discrimination implies unreasonable distinction. Takings that invidiously single out property of persons of a particular nationality, would be unreasonable; classifications, even if based on nationality, that are rationally related to the State's security or economic policies might not be unreasonable. Discrimination may be difficult to determine where there is no comparable enterprise owned by local nationals or by nationals of other countries, or where nationals of the taking State are treated equally but discrete actions separated in time.[66]

It must be acknowledged that in all the above cases, the crucial test is whether the concerned State acts in good faith.[67] This good faith criterion is implicit in one writer's objective formulation that "[d]istinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aim sought to be realised and the means employed."[68] International law imposes a duty on a State to exercise rights in good faith.[69] Thus, in Sir Fitzmaurice's words:

> The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have

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65. BROWNLIE, *supra* note 1, at 531.

66. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. f (1987).

67. *See* A.F.M. Maniruzzaman, *State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law*, 9 J. INT'L ARB. 141, 165-68 (1992).

68. MCKEAN, *supra* note 7, at 287.

69. *See* Case Concerning Rights of Nationals of the United States of America in Morocco, 1952 I.C.J. 176, 212 (concerning the States obligation to use power "reasonably and in good faith."); *see also* Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253, 268.

> *bona fide* reasons for what it does, and not act arbitrarily or capriciously.[70]

Dr. Mann adopted a similar view when he said "[i]t is certainly not always easy to define the circumstances in which lack of equality amounts to unlawful discrimination under international law. But given an inequality which is discriminatory in law, which is arbitrary or constitutes an abuse, no one has attempted to defend it."[71] Thus, it seems as appropriate to apply the international law principles of good faith and abuse of rights[72] in determining the legality of discrimination in the matter of expropriation of alien property as in any other field.[73] Although both the principles are subjective, their objective application to concrete factual circumstances may prove simple in determining the reasonableness or unreasonableness of discrimination and hence the legality or illegality of it. Discrimination purely based on racial hatred is unjustifiable.[74] However, discrimination on the basis of race or ethnic origin may sometimes be tolerable on justifiable grounds.[75] It is crucial that discriminatory acts be actionable, both those that are intentionally discriminatory and those discriminatory in effect.[76] In his "fairness" discourse, Professor Franck notes:

> The agreed rules increasingly allow governments to take actions which promote distributive justice within their societies, providing

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70. SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 12-13, vol. 1 (1986). *See also* Kurt J. Hamrock, *The ELSI Case: Toward an International Definition of "Arbitrary" Conduct*, 27 TEX. INT'L L.J. 837 (1992).

71. F.A. MANN, STUDIES IN INTERNATIONAL LAW 476 (1973).

72. *See* BROWNLIE, *supra* note 3, at 51-52, 70, 81. Professor Ian Brownlie maintains that the doctrine of abuse of rights is the alter ego of the principle of nondiscrimination. However, he has reservations concerning the precise role, as an independent and necessary principle, of the doctrine. *See also* JEAN-DAVID ROULET, LE CARACTÈRE ARTIFICIEL DE L'ABUS DE DROIT EN DROIT INTERNATIONAL PUBLIC (1958). *But see generally* B.O. Iluyomade, *The Scope and Content of a Complaint of Abuse of Right in International Law*, 16 HARV. INT'L L.J. 47 (1975).

73. Article 300 of the Law of the Sea Convention has thus linked 'good faith' and 'abuse of rights' together "Good faith and abuse of rights" which provides that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights." UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 104 (1983). Some writers do not seem to find any real difference in international law between the prohibition of abuse of right and the obligation to exercise a right reasonably and in good faith. *See* Vladimir Paul, *The Abuse of Rights and Bona Fides in International Law*, 28 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRECHT 107-130 (1977); *see also* Rights of Nationals of the United States of America in Morocco, 1952 I.C.J. 176.

74. *See generally* LUSTGARTEN, *supra* note 7.

75. *See* SORNARAJAH, *supra* note 19, at 183-87.

76. *See* KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 77 (1992); RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 62 (1995).

> they are bona fide, that they mitigate harm to aliens acting in good faith, are not in violation of specific international obligations assumed by these governments to attract foreign investors, and are not discriminatory.[77]

Unreasonable, arbitrary, or invidious distinctions are undoubtedly prohibited by international law, and are actionable. The State's exercise of sovereign authority is subject to the restrictions imposed by international law such as the principle of non-discrimination. As Professor Brownlie notes, "[w]here a state acts within what is prima facie a right, power, or privilege, but there is evidence that the precise occasion or mode of exercise of the right . . . was based upon a selection contrary to the principle of non-discrimination, responsibility will arise on the ground of unlawful discrimination."[78] As indicated earlier, the principle of permanent sovereignty over natural resources cannot shield a State's wrongful acts.

Having thus examined the principle of non-discrimination in customary international law, it is necessary to address it in the context of conventional international law, where the concept has a wider connotation.[79] One writer has coined the phrase 'non-discrimination *lato sensu*' to refer to the "lack of discrimination both among aliens and foreign countries and products, and between aliens and nationals (and corresponding products)."[80] Thus the concept in its wider sense encompasses "most-favoured-nation (MFN) treatment"[81] as well as "national treatment."[82] However, both standards are treaty-made and neither is recognized as part of customary

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77. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 473 (1995).

78. BROWNLIE, *supra* note 3, at 81.

79. *See Key Concepts in International Investment Arrangements and their Relevance to Negotiations on International Transactions in Services, in* TRANSNATIONAL CORPORATIONS: THE INTERNATIONAL LEGAL FRAMEWORK 439, 446 (A.A. Fatouros ed., 1994).

80. A.A. Fatouros, *Towards an International Agreement on Foreign Direct Investment?*, 10 ICSID REV: FOREIGN INV. L.J. 181, 196 n.47 (1995). "[M]ost-favoured-nation (MFN) treatment . . . signifies that nationals (and, in recent practice, residents), companies or products of a specific country are to be treated no less favourably than the nationals, companies, and products of any third country." *Id.* "National treatment," on the other hand, signifies equality of treatment as between aliens and host country nationals. *See id.*

81. In many Bilateral Investment Treaties "MFN treatment" and "National Treatment" standards are combined. For example, see Article 3(1) of Austria-Model Bilateral Agreement (Draft February 1994): "Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favourable than *that accorded to its own investors and their investments or to investors of any third State and their investments.*" DOLZER & STEVENS, *supra* note 76, at 169 (emphasis added).

82. *See, e.g.*, U.K.-Belize Bilateral Investment Treaty (1982), article 3(1) of which provides that "[n]either Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favorable than *that which it accords in the same circumstances to investments or returns of its own nationals.*" DOLZER & STEVENS, *supra* note 76, at 63 (emphasis added).

international law.[83] In Professor Schwarzenberger's words, they are "optional standards . . . developed in State practice."[84] The contents and scope of both are determined by treaties and by their Contracting Parties' reservations and exceptions applicable in their respective cases.[85] As Kronfol notes, "[t]hey function within the framework of specific commitments undertaken in treaties and unlike the compulsory standards of international law, do not operate automatically."[86] In various nonbinding Declarations and Guidelines the modalities of the applications of these standards are also prescribed.[87] The common basic feature of both these concepts is equality of treatment or, in another word, non-discrimination. As opposed to customary international law, these treaty-made standards provide the contour of the principle of non-discrimination or equality of treatment in specific cases concerned. In this sense the treaty-made standards are more concrete than abstract; the reverse is often true in customary international law. However, in the context of such treaty-made standards various issues may still arise. Some comments on the standards are in order.

Although the standard of national treatment of foreign investment has been well recognized by States,[88] the determination of its

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83. *See* David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 407 (1998); P. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 626-27 (1995); KHURSID, *supra* note 8, at 82-83.

84. G. Schwarzenberger, *Equality and Discrimination in International Economic Law*, *in* THE YEARBOOK OF WORLD AFFAIRS 164 (1971).

85. *See* DOLZER & STEVENS, *supra* note 76, at 66-76. The Protocol to the Mutual Promotion and Protection of Investment between China and Switzerland, signed Nov. 12, 1986, includes such an exception where it states that "because of the difference between the two countries in economic and legal systems and the needs for the development of its national economy on the part of the People's Republic of China, the Swiss investors are not supposed to claim, under all circumstances, the same treatment as Chinese investors." Qingjiang Kong, *The Foreign Direct Investment Regime in China*, 57 ZEITSCHRIFT FUR AUSLANDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 869, 891 (1997).

86. KRONFOL, *supra* note 16, at 16.

87. *See, e.g.*, the OECD Declaration of June 21, 1976:

> Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country (hereinafter referred to as 'Foreign-Controlled Enterprises') treatment under their laws, regulations and administrative practices, consistent with international law and no less favorable than that accorded in like situations to domestic enterprises.

5 I.L.M. 968 (1976). *See also* NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES 9 (1985); R. Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. PA. J. INT'L BUS. L. 263 (1998).

88. *See generally* ALLAN ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 72-74 (1949).

precise scope and content has given rise to some controversy.[89] The concern and trouble in determining the contour of national treatment is not only of a weary and vulnerable Third World country to protect its national interests[90] but also of the developed capital-exporting countries that prioritize their public order or national security interests that lie at the very foundation of a State's self-preservation.[91]

It will be useful to examine the formulations of the national treatment standard in both treaty and non-binding instruments. In various documents the standard is couched mostly in similar, or often identical, terms. For example, Article 3(1) of the United Kingdom-Belize Bilateral Investment Treaty provides that: "[n]either Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment *less favourable than that which it accords in the same circumstances to investment or returns of its own nationals.*"[92] In 1976, the governments of the OECD member countries enshrined their commitment to national treatment in the Declaration on International Investment and Multinational Enterprises thus:

> Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country . . . treatment under their laws, regulations, and administrative practices consistent with international law and *no less favourable than that accorded in like situations to domestic enterprises.*[93]

Or, in short, national treatment is the commitment by a country to treat enterprises operating on its territory, but controlled by the nationals of another country, no less favorably than domestic enterprises in like situations. The Expert Advisors of the United Nations Center for Transnational Corporations recommended the formulation of national treatment in the U.N. Draft Code of Conduct on Transnational Corporations, said to be mainly representative of developing countries' viewpoints, in the following words:

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89. *See generally* Aaditya Mattoo, *National Treatment in the Gats: Corner-Stone or Pandora's Box?*, 31 J. WORLD TRADE 107 (1997).

90. *See* Samuel K.B. Asante, *The Concept of the Good Corporate Citizen in International Business*, 4 ICSID REV.: FOREIGN INV. L.J. 1, 31 (1989).

91. *See generally* Bhala, *supra* note 87; Frederick P. White & M. Roy Goldberg, *National Security Review of Foreign Investment in the Unites States*, 6 FLA. J. INT'L L. 191 (1991).

92. DOLZER & STEVENS, *supra* note 76, at 63 n.177 (emphasis added).

93. OECD, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: THE OECD GUIDELINES FOR INTERNATIONAL ENTERPRISES 9-10 (1986) (emphasis added).

> Subject to national requirements for maintaining public order and protecting national security and consistent with national constitutions, and without prejudice to measures specified in legislation relating to declared development objectives of the developing countries, *entities of transnational corporations should be given treatment accorded to domestic enterprises in similar circumstances.*[94]

It is noticeable that all the formulations require treatment not identical to that accorded to the investment of nationals or companies of the host State but that which is no less favorable.[95] This may mean that foreign investors may be treated more favorably than their host country's domestic counterparts. This is clear when foreign investors are offered incentives or other special treatment by the host country or state.[96] Such incentives are evidently discriminatory in favor of foreign investors. Thus, the national treatment standard is not opposed to discriminatory treatment if it is in the form of investment incentives to foreign investors. This is arguably justified upon the assertion that foreign investors and the host country's domestic investors are not "in like situations."[97] Therefore the meaning of the terms "in like situations," "in similar circumstances," and "in the same circumstances" is highly relevant, and problematic unless clearly defined in the relevant documents.[98] Such an attempt was made in the protocol to the Germany-Kenya Bilateral Investment Treaty which stated "the term 'any similar investment' . . . shall be deemed to comprise any investment of a like nature in the territory of the Contracting Party concerned regardless of whether such investments have been made by nationals or companies of any third State or by any other individual or company."[99] In reality, this definition may prove to be naïve in certain circumstances because two investments of like nature may not always be comparable in all respects and in all situations. This difficulty is then acute when the investment concerned is unique and non-comparable in the host

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94. U.N. CTR. FOR TRANSNAT'L CORPS., THE UNITED NATIONS CODE OF CONDUCT ¶ 52 (1988), U.N. Sales No. E.86.II.A.15.

95. *See* VANDEVELDE, *supra* note 76, at 74.

96. *See generally* Michael Daly, *Investment Incentives and the Multilateral Agreement on Investment*, 32 J. WORLD TRADE 5 (1998); Y. Kodama, *The Multilateral Agreement on Investment and its Legal Implication for Newly Industrialising Economics*, 32 J. WORLD TRADE 181, 196-97 (1998).

97. A.A. Fatouros, *Toward an International Agreement on Foreign Direct Investment?*, 10 ICSID REV.: FOREIGN INV. L.J. 181, 196-97 (1995).

98. *See* Mattoo, *supra* note 89, at 122-29.

99. DOLZER & STEVENS, *supra* note 76, at 64 n.80.

country, as where the alien's investment is the only one of its kind in the host State.[100]

The national treatment standard may be applicable at both the pre- and post-investment stages. Many U.S. bilateral investment protection treaties[101] and the NAFTA[102] have provided for this. Such standard of treatment is perceived as beneficial to foreign investors in two important ways.[103] First, it is common sense that a host State may afford better protection in various ways to its own nationals than to foreign ones, which in fact a State tends to do for political reasons or otherwise. Second, national treatment may be a "more stable standard of protection, since a host State might be less likely suddenly to alter the treatment of its own nationals than the treatment of foreign nationals."[104] This is an obvious restraint on the host State's authority if it wants to discriminate between domestic and foreign investors.

Many western jurists support the notion that the national treatment standard applicable to foreigners shall not fall below the minimum standard recognized in international law. In this conceptual terrain, national treatment is understood as reflective of international treatment, i.e., the minimum standard concerning the foreigner. This stance may also backfire with the additional obligations upon foreign entities entitled to a "privileged national treatment standard" (as it may properly be described). For example, suppose the foreign entities operating in the host State may be required to observe higher standards of environmental protection than their domestic counterparts. The rationale for this view could be that the foreign entities are better equipped with knowledge and technology for environmental protection than their host State national counterparts (which is the usual case if the host is a developing country). As the former can claim the right to "privileged national treatment," they also have the duty counterbalanced by such privilege. Thus, the matter tends to reflect the Holfeldian philosophy of right and duty.[105] For example, although the international minimum standard of human right

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100. *See* the Anglo-Iranian Oil Co. Case, I.C.J. Rep. 1952; WHITE, *supra* note 3, at 144; THE SUEZ CANAL SETTLEMENT 11 (E. Lauterpacht ed., 1960).

101. *See* U.S. Model Bilateral Investment Treaty, art. 2. *See generally* Ibrahim F.I. Shihata, *Recent Trends Relating to Entry of Foreign Direct Investment*, 10 ICSID REV.: FOREIGN INV. L.J. 47 (1995).

102. *See* 32 I.L.M. 289 (1993), art. 1104.

103. *See* VANDEVELDE, *supra* note 76, at 70; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 250-51 (1994).

104. VANDEVELDE, *supra* note 76, at 72.

105. *See* Wesley Newcomb Holfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

to education is afforded to foreign students in the United Kingdom and Australia, they must pay higher fees than their fellow classmates from those countries to avail themselves of the privilege of a better education there. If such a privilege entails certain additional duties, then why should this same reasoning not apply to other contexts? Of course, by virtue of sovereignty a State may decide what is good for it. In the same way, a State should be entitled to impose additional obligations when it renders the international minimum standard treatment in the "privileged national treatment" package. The practice of reciprocal treatment between States is prevalent.[106] This is likely to strike an equitable balance between the interests of the States concerned.

However, since the content and scope of the international minimum standard itself is controversial, its role as the yardstick for the application of the national treatment standard to foreigners is further complicated. Different schools of thought have propounded different ideas of the concept's scope and content,[107] while the Latin American States have historically resisted the role of such an external standard to scrutinize the national standard.[108] The formulation of the international minimum standard has been marred by conflicting interests of jurist representing a western concept of civilization and value judgements[109] and the Third World countries' needs and development perspectives.[110] To avoid this conflict some jurists have invented a new thesis which propounds a synthesis of the notion of international minimum standard and standards of fundamental

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106. *See* Note, *The Reciprocal Alien Provision of the Mineral Leasing Act of 1920: An Examination of the Reciprocity Standard and Permissible Alien Stock Holdings*, 17 GEO. WASH. J. INT'L L. & ECON. 437 (1983).

107. *See* A.O. Adede, *The Minimum Standards in a World of Disparities*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 1001, 1004-05 (R.S.J. Macdonald & D.M. Johnston eds., 1983); Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 MICH. L. REV. 445 (1940); *see generally* ROTH, *supra* note 88.

108. *See* F.V. GARCIA-AMADOR, THE CHANGING LAW OF INTERNATIONAL CLAIMS 356 (1984). *See also generally* C. LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES (1985).

109. The General Claims Commission, established by the United States and Mexico, stated in the *Neer Claim Case* that

> the propriety of governmental acts should be put to the test of international standards . . . . The treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

Neer v. United Mexican States, 4. R.I.A.A. 60 (1926).

110. *See* Adede, *supra* note 107, at 1004-05.

human rights.[111] This thesis, however, has met with considerable juristic criticism.[112]

Apart from the safety net of the international minimum standard there is another beneficial aspect of national treatment: when a State accords much better treatment to its own nationals than the international standard delineates, the foreigners can take advantage of such national treatment. From this angle, national treatment is a strategy for favorable treatment for the investor, which is also an incentive for his investment in the host State. Thus, as far as the alien is concerned, the national treatment standard is a double-edged sword for the protection of his interest in the host State. The national treatment standard thus seems ambivalent in the sense that what national treatment means to a foreigner is not what it means to a national of the State. It is arguable that in the same State the question of the status of foreigners impinges on the well-established principle of equality before the law. In response to this, the Latin American Calvo doctrine endeavored to clarify the position by equating national treatment to equality of treatment which means that foreigners should receive equal, and only equal, treatment with nationals. Carlos Calvo, the principal exponent of the doctrine stated, "[a]liens who established themselves in a country are certainly entitled to the same rights of protection as nationals, but they cannot claim any greater measure of protection."[113]

Thus, the juristic views are varied and often conflicting on the issues of national treatment. At any rate, a State cannot avoid its responsibility for breach of its international obligations to aliens under international law. Although this is easily said in the context of conventional international law, the controversy still remains in customary international law as far as the national treatment standard is concerned.

In the context of foreign investment the most-favored-nation (MFN) treatment principle[114] has also attracted severe criticism from

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111. *See* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 112 (1957); RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 17 (1984); Richard B. Lillich & Stephen C. Neff, *The Treatment of Aliens and International Human Rights Norms: Overlooked Developments at the UN*, 21 GERM. Y.B. INT'L L. 97, 97-118 (1978); MCDOUGALL, *supra* note 54, at 761-65.

112. *See, e.g.*, BROWNLIE, *supra* note 1, at 529-33; SORNARAJAH, *supra* note 103, at 130-33.

113. C. CALVO, LE DROIT INTERNATIONAL 231 (5th ed. 1885), quoted in 2 Y.B. INT'L L. COMM. 201 (1956), U.N. Doc. No. A/CN.4/96.

114. The International Law Commission defined it thus:

> Most-favoured-nation treatment is treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

jurists.[115] The suitability of its application to foreign investment has been questioned. The most-favored-nation treatment is basically considered an international trade law concept and its infiltration into the domain of foreign investment law is felt unwarranted.[116] As Waelde observes

> It would mean that investors can benefit from another investor's subsequent bargaining achievements. It would be very hard to make such a standard operational, since particular elements of an investment agreement (e.g. fiscal regimes, investment requirements, risk/reward functions, and geological attractiveness) are usually inextricably intertwined. A more favourable production-sharing ratio or recovery mechanism, for example, in one agreement, may be counterbalanced by higher investment obligations and higher risk taken.[117]

This view may not find favor with the protagonists of the doctrine of non-discrimination *lato sunsu*, the central tenet of which is liberalization of foreign investment and capital flow.

Finally, there are writers who widen the notion of non-discrimination to incorporate in it the concept of "fair and equitable treatment." As Professor Muchlinski observes:

> The concept of fair and equitable treatment is not precisely defined. 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 being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most it can be said that the concept connotes the principle of non-discrimination and proportionality in treatment of foreign investors.[118]

In Dr. Mann's view, fair and equitable treatment is a much wider conception.[119] As the underlying notion of all the standards such as national treatment, MFN treatment, and fair and equitable treatment is equality of treatment or non-discrimination. Dr. Mann considered, because of the encompassing character of the expression of fair and equitable treatment, "it is unlikely that the two well-known

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Art. 5, Codifications and Progressive Elaboration of International Rules of Law Applicable to Most-favoured-nation clause. *See* INTERNATIONAL LAW COMMISSION YEARBOOK 21 (1978).

115. *See* Thomas W. Waelde, *International Investment under the 1994 Energy Charter Treaty: Legal, Negotiating and Policy Implications of International Investors within Western and Commonwealth of Independent States/Eastern Countries*, 29 J. WORLD TRADE 5, 46-47 (1995).

116. *See id.*

117. *Id.*

118. MUCHLINSKI, *supra* note 83, at 625.

119. *See* F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT'L L. 241, 243 (1982).

standards [i.e., national treatment and MFN treatment] . . . will add anything substantial."[120]

Thus, the principle of non-discrimination in both customary and conventional international law must be understood in the context to which it is applied. The principle has no blanket application in disregard of the factual circumstances concerned; in applying it, the judge or arbitrator must weigh cautiously all the relevant circumstances. It remains to be seen whether a future Multilateral Agreement on Investment will clarify and settle the many issues arising in the context of non-discrimination.

120. *Id.* at 245. *See also Key Concepts in International Investment Arrangements and their Relevance to Negotiations on International Transactions in Services, in* TRANSNATIONAL CORPORATIONS: THE INTERNATIONAL LEGAL FRAMEWORK 447-48 (A.A. Fatouros ed., 1994).