Chapter 2.3.4
Access to Justice, Denial of Justice, Access to Courts, and Fair Procedures

by Gustavo Guarin

A. INTRODUCTION

Denial of justice, access to justice, access to courts , and procedural fairness are notions of public international law which have been incorporated into international investment law to provide minimum guarantees of procedural justice for foreign investors and their investments before the administrative and judicial entities of a host state. "Denial of justice" is a concept that typically encompasses a violation of the "Minimum Level of Treatment" section of Bilateral Investment Treaties (BITs) and International Investment Agreements (IIAs). The nature, content, scope, and level of protection required to avoid denial of justice depend on the text of the respective treaty itself. Some IIAs do not mention denial of justice,[1] although it may not be necessary[2] to do so because they may be sheltered, at least in part, by the Fair and Equitable Treatment (FET),[3] or the Full Protection and Security (FPS) standards of protection.[4] Most IIAs include a clause on the denial of justice within their description of the FET standard.[5] Others include it as an independent standard.[6]

The concepts in international law of denial of justice, access to courts, fair procedures, and access to justice (hereinafter DAFA) share definitional elements with those of domestic regulations.[7] When

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1 Among others: *Agreement between the Government of the Arab Republic of Egypt and the Government of Kazakhstan for the Promotion and Reciprocal Protection of Investments*, signed on 14 February 1993, in force since 8 August 1996; *Agreement between the Government of the Argentine Republic and the Government of New Zealand for the Promotion and Reciprocal Protection of Investments*, signed on 27 August 1999, not in force.

2 Dolzer and Schreuer, *Principles of International Investment Law,* Oxford Univ. Press 2008, p. 162.

3 For details see Chapter 2.3.2 on FET.

4 For details see Chapter 2.3.3 on FPS.

5 For example, Colombia's Model IIA establishes "Fair and Equitable Treatment. […] 2. The fair and equitable treatment granted to Investors and Covered Investments refers only to: a. the prohibition of denial of justice in criminal, civil or administrative proceedings; b. fundamental violation of procedural guarantees in judicial or administrative proceedings; c. manifest arbitrariness; d. selective discrimination on manifestly unlawful grounds, such as sex, race or sex, religious beliefs; or e. abusive treatment of investors, such as coercion, duress and harassment." *Draft Agreement for the Promotion and Reciprocal Protection of Investments of the Republic of Colombia*. Colombia Model Project 2014. Published for Consultations.

6 For example, Article 3.1 of the 2015 Indian Model BIT establishes that the parties shall not subject investments to measures which violate customary international law through denial of justice in judicial or administrative proceedings, fundamental breach of due process, targeted discrimination on manifestly unjustified grounds, or manifestly abusive treatment, such as coercion, duress and harassment.

7 Paulsson, *Denial of Justice in International Law*, Cambridge Univ. Press 2005, p. 11.

referring to the sources of public international law, there is a fine line between the recognition of these obligations in customary international law and their recognition in investment law.

Through examining ISDS cases, it can be determined that the concepts of DAFA under international law can serve two functions. First, they can have an independent role in the investment regime. Second, they may serve a complementary role in filling gaps when the individual concepts of denial to justice (access and denial of justice, access to courts, and fair procedures) under the IIAs are insufficient.

This chapter will explain the origins of these concepts, their scope of protection, and their relationship with other standards.

B. ORIGINS OF THE STANDARD

References to denial of justice in international law date back to the medieval regime of private reprisals, which arose when empires, kingdoms, or principalities could no longer impose their authority, or in situations where ordinary legal remedies failed. In these cases, individuals would carry out reprisals which would usually be authorized by an order of the sovereign.[8]

Prior to the formation of the modern nation-state, domestic authorities treated persons who were established in or visiting from a foreign country differently from their domestic citizens, especially when aliens were involved in a court case.[9] By the end of the Middle Ages, the practice of differential treatment towards foreigners had become a problem,[10] particularly within the context of the fishing industries of the European maritime republics and the Arab territories, which were under Muslim rule of law.[11] Due to the regulatory and jurisdictional conflicts that existed with regard to foreign merchants, authorities needed to develop special extraterritorial legal regimes to protect foreigners. These were enshrined in international agreements[12] called "capitulations," which

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8 See, for example, Freeman, *The International Responsibility of States for Denial of Justice,* Longman 1938, p. 55; Paulsson, *Denial of Justice in International Law,* Cambridge Univ. Press 2005, p.13.

9 The concept of "foreigner" for the Romans (peregrinus) implied a limitation on the right of access to justice in certain matters, a different procedure, and a different impartial third party (praetor peregrinus). See Mendez Chang, *The Notion of Foreigner in Roman Law*, Ius et Veritas 1996, Vol. 12, pp.185-194, at 194.

10 William Cleveland & Martin Bunton, *A History of the Modern Middle East*, Westview Press, 4th ed. 2009, p. 50.

11 At the time of the Ottoman Empire, in Muslim trade areas such as Crete, Cyprus, or Rhodes, European merchants encountered difficulties and marginalization from local communities and had to reconcile their need for personal and economic security with the rigid legal system of the Islamic world. The system was an obstacle to the enforcement of legal guarantees of property and the contract rights of non-Muslims. Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, European Journal of Int'l Law 2009, Vol. 20, No. 3, p. 731.

12 *Id.*

exempted European citizens from liability for damage caused in the host state; this was the origin of diplomatic protection.[13]

Faced with the need to clarify and specify protections for their citizens abroad, states began to conclude commercial agreements (Friendship, Commerce, and Navigation or FCN agreements) with with their allies, particularly in relation to maritime trade and fishing. The first FCNs[14] were signed between the United States and France (1778),[15] the United States and the Kingdom of Prussia (1785),[16] and the United States and Great Britain (1794).[17] Although the text of these treaties did not expressly establish rights of access to justice or due process, the contracting parties were obliged to seize, detain, or arrest for debts accrued or crimes committed, using procedures established by their respective authorities. For example, the FCN between Prussia and the United States stated that:

> *And in all cases of seizure, detention or arrest, for debts contracted or offences committed by any citizen or subject of the one party, within the jurisdiction of the other, the same shall be made & prosecuted by order & authority of law only, and according to the regular course of proceedings usual in such cases.*[18]

In the 19th century, capital-exporting countries' discussions about the protection of their citizens in foreign lands centered around a proposal to establish a minimum international standard of treatment.[19] While the former colonies ensured a standard no higher than that recognized by their internal laws,[20] capital exporting states understood the standard as an international standard.[21]

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13 Cleveland and Bunton, *A History of the Modern Middle East*, supra note 10, p. 50.

14 The treaties of Friendship, Commerce, and Navigation were a sample of international diplomacy created by the United States. These treaties regulated a considerable number of issues: human rights, trade, intellectual property, investments, immigration, and taxes, among others. For more on the subject see Coyle, *The New Age Treaties of Friendship, Commerce and Navigation*, Columbia Journal of Transnat'l Law 2013, Vol. 51, p. 302.

15 *Treaty of Friendship and Commerce between the United States and France*, concluded on 6 February 1778.

16 *Treaty of Friendship, Commerce, and Navigation between the Kingdom of Prussia and the United States of America* of 1785.

17 *Treaty of Friendship, Commerce, and Navigation between the United States of America and the Kingdom of Great Britain* of 1794.

18 *Treaty of Friendship, Commerce, and Navigation between the Kingdom of Prussia and the United States of America* of 1785. Article 16.

19 Elhiu, *The Basis for the Protection for Citizens Residing Abroad*, American Journal of Int'l Law 1910, Vol. 4, pp. 517-528, at 527.

20 The Calvo doctrine, mostly supported by Latin American countries, rejected the idea of a minimum international standard of protection. The doctrine, formulated by the Argentine-Uruguayan jurist Carlos Calvo in his book *Theoretical and Practical International Law of Europe and America* (1868), proposed that foreign investment in Latin American States should not exist, and foreigners living in those countries should be offered legal equality with its nationals. See also Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (NED, University of Minnesota Press, Minneapolis, MN 1955). Professor

Prior to World War I, a significant number of FNCs began to establish a "customary" minimum standard that equated foreigners' access to justice with that of the nationals or citizens of a country. For example, the FCN between the United States and Colombia (Republic of New Granada) established that the parties undertook to:

> *[…] leaving open and free to them the tribunals of justice for their judicial recourse, on the same terms which are usual and customary with the natives or citizens of the country; for which purpose they may either appear in proper person or employ in the prosecution or defense of their rights such advocates, solicitors, notaries, agents and factors as they may judge proper in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions or sentences of the tribunals, in all cases which may concern them, and likewise at the taking of all examinations and evidence which may be exhibited in the said trials.*[22]

The FCN of the United States with Argentina stipulates that the citizens of the Parties enjoy the right of "free and open access to the courts of justice [...] for the prosecution and defense of their just rights, and they shall be at liberty to employ in all cases such advocates, attorneys or agents as they may think proper; and they shall enjoy, in this respect, the same rights and privileges therein as native citizens."[23]

The destructive nature of the two world wars led to the need to conclude trade agreements that would protect citizens and their property abroad at the level required by law in the victorious countries. The prevailing ideological division and the rise of the so-called developing countries encouraged the United States to promote a policy of international protection of its investments and investors. Newer versions of the FCN treaties followed the trend of incorporating customary international law[24] into an obligation to provide access to justice, to refrain from denying justice, and to establish fair procedures.[25] Latin American countries took comprehensive measures to impose

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Santiago Montt, however, maintains that this nineteenth-century position was not originally formulated by Carlos Calvo but by Andrés Bello. See Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation,* Hart Publ. 2009, p. 416.

21 Id. since the previous fn has multiple sources, this reference is unclear

22 *General Treaty of Peace, Friendship, Navigation, and Commerce between the United States and Colombia*, signed in Bogotá on 12 December 1846, Article 13.

23 *Treaty of Friendship, Commerce, and Navigation between Argentina and the United States* of 27 July 1853, Article VIII, available in Frank Emmert (ed), *World Trade and Investment Law - Documents*, CILP 2018, pp. 70-73. See also the *Treaty of Friendship, Commerce, and Navigation between the United States of America and the Republic of Costa Rica*, Washington, 10 July 1851, Article VII.

24 See, for example, the *Treaty of Friendship, Navigation, and Commerce between the United States and China* of 2 February 1946, Article V.

25 The *Treaty of Friendship, Commerce, and Navigation between Italy and the United States* of 2 February 1948 stipulates in Article V that "... [t]he nationals of each contracting party will receive, within the territory of the other contracting party, constant protection and security for people and their property and will enjoy, in this sense, the full protection and security required under international law ...".

the exhaustion of domestic remedies as a precondition for the exercise of any action for diplomatic protection.[26] The great debates of the 1960s and 1970s about supposed sovereignty over natural resources suggested that a deeply skeptical attitude was widespread in a large number of new and insecure states that achieved their independence in the two decades following World War II.

From its origins, the interpretation of the principle of access to justice vis-à-vis customary law has been linked to the concept of a minimum standard of fair procedures and the right to be heard;[27] concepts that were typically later codified in human rights instruments.[28]

The right of action and exception, the right to representation, and the right to evidence are manifestations of the principle of denial of justice. It is important to point out that these rights are enriched by internal regulations. In *Ambatielos* (1919),[29] a Greek citizen signed a contract with the Government of the United Kingdom for the purchase of ships. After several breaches and liability claims, the plaintiff alleged, among other things, that as a result of a series of judgments against him by the English courts, there was a violation of international law, in particular the obligation to allow access to the courts, which was established by the FCN between the United Kingdom and Greece in 1886.[30] The Arbitration Commission established on the matter stated:

> *[…] the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defenses, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.*[31]

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26 Paulsson, *Denial of Justice in International Law*, Cambridge Univ. Press 2005, p. 24.

27 See *Treaty between the Argentine Republic and the United States of America on the Promotion and Reciprocal Protection of Investments* signed on 14 November 1991, in force since 20 October 1994, Art 2.a).

28 See, for example, in the *Universal Declaration of Human Rights,* adopted and proclaimed by the UN General Assembly in its Resolution 217 A (III) of 10 December 1948, Articles 8, 9 and 10. Similar provisions can be found in the Inter-American Convention on Human Rights (Article 8), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6).

29 United Nations, *Reports on Arbitral Awards, The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland and Ireland)* (1956) XII, pp. 83-153.

30 The *Treaty of Friendship, Commerce, and Navigation between Greece and the United Kingdom* of 1886 stipulates in Article XV. "[…] The subjects of each of the two Contracting Parties in the domains and possessions of the other will have free access to the Courts of Justice for the prosecution and defense of their rights, without other conditions, restrictions, or taxes beyond taxes on native subjects and, like them, they will be free to employ, in all cases, their defenders, lawyers or agents, from among the persons admitted to exercise these professions in accordance with the laws of the country."

31 United Nations, *Reports on Arbitral Awards, The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland and Ireland)* (1956) XII, pp. 83-153, at 111.

Consequently, by virtue of the right of access to justice, the host state is obliged to establish a judicial system that allows for the effective exercise of substantive rights through procedural guarantees. This includes the rights of action or defense, compensation, legal representation, the right to evidence, and fair resources, among others.

In the attempts to codify international law, several legal definitions of a denial of justice have been enshrined. For example, the Harvard Project of 1929 on the Convention on the Responsibility of States for Damage Caused in their Territory to the Person or Property of a Foreigner established:

> *[…] denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.*[32]

The standard was also incorporated into the first BIT signed between Germany and Pakistan in 1959, which established the investor's right of "free access to the courts."[33] However, it was in the IIAs of the 2000s that denial of justice emerged as an integral part of FET.[34]

In conclusion, the state obligation to procedurally protect their foreign investors, through ensuring proper access to justice, access to courts, protections from a denial of justice, and procedural fairness, has its origins in the customary international laws on the protection of foreigners and their property,[35] diplomatic protection, and the Treaties of Friendship, Commerce, and Navigation of the 18th and 19th century.

C. SCOPE OF PROTECTION

History and practice of arbitral tribunals have shown that the content and scope of the investment treaty concepts of DAFA tend to be confused with these principles within customary international law. However, utilizing the text of the treaty as the main element of interpretation, customary international law may serve an integrative function or a complementary function with respect to investor

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32 See Harvard Project of 1929 of the *Convention on the Responsibility of States for Damage Caused in their Territory to the Person or Property of a Foreigner*, Annex 9, Article 9. Paragraphs 90, 150, 169, 171, 175, and 180, and the conclusions of the report, contain the amendments made by Mr. Gustavo Guerrero as a result of the discussion in the Committee of Experts.

33 Pakistan and Federal Republic of Germany, *Treaty for the Promotion and Protection of Investments*, Bonn, 25 November 1959, available in Frank Emmert (ed), *World Trade and Investment Law - Documents*, CILP 2018, pp. 86-90, Protocol, para. 1.

34 See the 2004 US Model BIT, Article 5: Minimum Standard of Treatment, para. 2 (a).

35 Garcia-Amador, *Second Report on the Responsibility of the States for Damages Caused in the Territory to the Person or Property of Foreigners*, Document A/CN 4/106, 1957, p. 122.

protection standards, particularly regarding the FET standard, which has incorporated the aforementioned concepts.

An integrative function is found to exist when the IIA defines these standards as manifestations of customary international law, a typical clarification made in contemporary IIAs.[36] Examples of the integrative function in relation to the denial of justice and due process can be found in the CPTPP,[37] the investment chapter of the Pacific Alliance protocol,[38] the CETA,[39] the United States Model IIA,[40] the Free Trade Area Agreement between the Association of Southeast Asian Nations (ASEAN), New Zealand and Australia,[41] the FTA between Japan and the Philippines,[42] the FTA between China and Peru,[43] the Malaysia–New Zealand FTA,[44] the United States–Rwanda IIA,[45] the IIA

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36 See, for example, the *Free Trade Agreement between the United States of America, the Mexican States, and Canada (USMCA)*, signed by the parties on 30 November 2018 (the successor to NAFTA), specifically Article 14.6: Minimum Standard of Treatment: "1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law."

37 See the *Comprehensive and Progressive Agreement of Trans-Pacific Partnership* (CPTPP), texts that make up the official document signed by the State parties on 4 February 2016 in Auckland, New Zealand. Article 9.6, not in force.

38 See the *Additional Protocol of the Pacific Alliance*, signed on 10 February 2014, in force since 1 May 2016. Chapter 10. Investment, Article 10.6.

39 See the *Comprehensive Economic and Trade Agreement* (CETA) between the European Union and its Members and Canada, signed by the parties on 30 October 2016, Article 8.10.5.

40 See the 2012 United States Model BIT, available in Frank Emmert (ed), *World Trade and Investment Law - Documents*, CILP 2018, pp. 109-134, Article 5 (2).

41 See *Agreement Establishing the Free Trade Area between the Association of Southeast Asian Nations (ASEAN) and Australia and New Zealand*, signed on 27 February 2009, in force since 10 January 2010. Chapter 11 – Investments, Article 6.3.

42 See the *Economic Cooperation Agreement between Japan and the Republic of the Philippines*, signed on 9 August 2006, in force since 11 December 2008, Chapter 8 – Investments, note to Article 91.

43 See the *Free Trade Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China*, signed on 28 April 2009, in force since 1 March 2010, Chapter 10 – Investment, Article 132.

44 See the *Economic Cooperation Agreement between New Zealand and Malaysia*, signed on 26 October 2009, in force since 1 August 2010, Chapter Ten – Investment, Article 10.10.

45 See the *Agreement Between the United States and Rwanda for the Promotion and Reciprocal Protection of Investments*, signed on 19 February 2008, in force since 1 January 2012.

between Croatia and Oman,[46] and the Singapore–EU IIA,[47] among others. In these treaties, the FET standard includes "not denying justice in criminal, civil or administrative proceedings, in accordance with the principle of due process incorporated in the main legal systems of the world."

Additionally, some treaties establish that FET and FPS are manifestations of customary international law (CIL). In this case, customary law has an integrative function by incorporating CIL definitions of denial of justice and due process into the FET standard.

The complementary function is found when international law establishes related standards that complement those established in the IIAs and gives content and scope to the obligations.[48] Typical concepts of international law, such as access to justice or courts, the right to be heard, and fair procedures, provide guidance as to the possible scope of the IIA procedural safeguards.

In the following sections, the concepts of denial of justice and due process will be examined. Subsequently, the author addresses the notions of access to justice, access to the courts, exhaustion of domestic remedies, and the concept of statutory immunities.

I. Denial of Justice

An investor who has suffered a loss because judicial remedies are not available or because the administration of justice is so inadequate, deficient, or so manipulated that it deprives the injured foreigner of an effective corrective process can invoke "denial of justice." The mere fact that the covered investor's claim was rejected, dismissed or failed does not in itself constitute a denial of justice.[49]

Denial of justice includes investor protection at all stages of a judicial proceeding. In *Azinian v. Mexico*, the court established that according to the minimum standard of treatment of Article 1105 of NAFTA, "it would be possible to allege a denial of justice if the competent courts refused to hear the matter, if it suffered an undue delay or if they administered justice in a seriously inadequate way."[50] Additionally, the court noted:

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46 See the *Agreement between Croatia and Oman for the Promotion and Reciprocal Protection of Investments*, signed on 4 May 2004. Article 3.2: "Investments and income of either Contracting Party in the territory of the other Contracting Party shall enjoy fair and equitable treatment in accordance with international law and the provisions of this Agreement." The agreement is not in force.

47 See the *Agreement between the European Union, its Member Countries and Singapore for the Promotion and Reciprocal Protection of Investments*, signed on 19 October 2018, not in force.

48 For example, the arbitration tribunal in CMS against the Argentine Republic, in analyzing the notion of "necessity" convergent with customary international law, proposed two different concepts of necessity, that established in the text of the treaty and that which is complementary to customary international law. *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB /01/8.

49 See the *Agreement between the European Union, its Member Countries and Singapore for the Promotion and Reciprocal Protection of Investments*, supra, note 47, Chapter Two – Investment Protection, Article 2.4 Standard of Treatment, fn. 9.

50 *Robert Azinian & Others v. United Mexican States*, ICSID ARB (AF) / 97/2, Award of 1 November 1999, pp.

> *There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law. In the present case, not only has no such wrong-doing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.*[51]

Thus, the protection from a denial of justice is a procedural guarantee that comprises the obligation to abstain from the prevention, obstruction, or unjustifiable delay of judicial proceedings by judicial organs, which includes: i) the refusal of the courts to hear the matter; ii) undue delay; iii) inadequate administration of justice by the issuance of openly unfair judgments or decisions; and iv) inadequate, inefficient, and malicious application of the law.

Denial of Justice is a key concept of customary international law.[52] From the perspective of the international responsibility of the state,[53] denial of justice caused by a harmful act or omission is attributable to any branch of the state.[54] García Amador argued that denial of justice is attributable to all kinds of illicit conduct of the state towards foreigners.[55]

Throughout the evolution of the standard, the notion of denial of justice has also been used in a more restrictive way, where its scope is limited to instances of a state refusing foreigners access to its courts, or to a court's lack of a pronouncement of a sentence involving a foreign party.[56] Yet other cases have seen an intermediate use of the concept, where it is used in relation to the improper administration of civil rights and criminal justice as it relates to foreigners, including the

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102-103.

51 *Id.*

52 M. Sornarajah, *The International Law on Foreign Investment*, Cambridge Univ. Press, 5th ed. 2021, p. 457.

53 *Draft Articles on State Responsibility for Internationally Wrongful Acts*, text approved by the International Law Commission at its 53rd session in 2001 and presented to the General Assembly as part of the Commission's report on the work of that session (A /56/10), Article 4.

54 "The State violates international law if it arbitrarily violates the private rights of foreigners, even though a legislative act. And this, even if such acts are not directed against these people because they are foreigners, but are based on general laws, applicable to nationals." Verdross, *Règles Internationales Concernant Traitement des Étrangers*, Recueil des Cours de l'Académie de Droit International de La Haye, 1931, Vol. 37, pp. 323-412, at 358-359; Shaw, *International Law*, Cambridge Univ. Press, 8th ed. 2017, p. 591. See also Paulsson, *Denial of Justice in International Law,* supra note 26, pp. 38-53.

55 Garcia Amador, *Second Report on the Responsibility of the States for Damages Caused in the Territory to the Person or Property of Foreigners*, Document A / Cn.4 / 106.

56 Denial of justice is a violation of the international duty to judicially protect foreigners. It is not very important that this deficiency originated from a fact other than from national law. Accioly, *Principes Généraux de la Responsabilité Internationale d'Aprés la Doctrine et la Jurisprudence*, Recueil des Cours de l'Académie de Droit International de La Haye, 1959, Vol. 96, pp. 349-441, at 416 et seq.

denial of access to the courts,[57] inadequate procedures, and unfair decisions.[58] Most claim cases address the standard,[59] as reflected in the latest IIAs, which establish protections from a denial of justice in civil, administrative, and criminal proceedings. In Dan Cak v. Hungary, the tribunal found denial of justice in insolvency proceedings when the court required additional documents within a short period of time, which were not required by law, were hard to procure, and were factually unnecessary.[60]

Denial of justice also includes the prohibition of the abuse of domestic law to deny *international* justice. In *Saipem SpA v. People's Republic of Bangladesh,* the tribunal found that decisions issued by the Bangladeshi courts were illegal because they violated the prohibition of abuse of rights in international law:

> *The Tribunal considers that the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process. It is true that the revocation of an arbitrator's authority can legitimately be ordered in case of misconduct. It is further true that in making such orders national courts do have substantial discretion. However, they cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct and the risks it carries for the fair resolution of the dispute. Taken together, the standard for revocation used by the Bangladesh courts and the manner in which the judge applied that standard to the facts indeed constituted an abuse of right.*[61]

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57 In *Azinian vs. the United Mexican States*, the court held that: "A denial of justice may be alleged if the pertinent courts refuse to consider such a claim, if they subject it to undue delay, or if they administer justice in a seriously inappropriate manner… There is a fourth type denial of justice, namely, the clear and malicious application of the law. This type of error undoubtedly overlaps with the notion of "pretense of form"; to indicate a violation of international law." *Azinian vs. the United Mexican States*, ICSID Case No. ARB (AF)/97/2, paras. 102-103.

58 Garcia-Amador, *Second Report on State Responsibility for Damages Caused in the Territory to the Person or Property of Foreigners*, Document A/CN 4/106, 1957, p. 122.

59 See the *Agreement between the European Union, its Member Countries and Singapore for the Promotion and Reciprocal Protection of Investments*, supra, note 47, Chapter Two – Investment Protection, Article 2.4 Standard of Treatment, para. 2.

60 *Dan Cak Portugal S.A v. Hungary*, ICSID Case No. ARB /12/09, Decision on Jurisdiction and Liability of 24 August 2015, paras. 145-146.

61 The Italian company Saipem SA contracted with Bangladesh Oil Gas and Mineral Corporation (a public–private consortium) to build a pipeline and transport and condense gas in various locations in northeast Bangladesh. Disputes arose under the contract over compensation for project delays and payments due to Saipem. Saipem submitted the dispute to arbitration before the International Chamber of Commerce in accordance with the dispute resolution procedure established in the contract. After the merit hearing was concluded, the Bangladeshi oil company filed a lawsuit in the local courts of Dhaka requesting revocation of the authority of the ICC tribunal. After the suspension of the arbitration was ordered in 2000 by the Bangladeshi court, Saipem filed an investment protection claim resulting in *Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No. ARB /05/07, Award of 30 June 2009, para. 159.

Thus, the Arbitral Tribunal concluded that denial of justice can also occur when national law is abused for illegitimate interference in international arbitral proceedings.

In conclusion, the notion of denial of justice underlines the obligation upon a state to administer justice in an impartial and objective manner, and to refrain from arbitrarily denying access to the courts, establishing inadequate procedures, and making unfair decisions. Denial of justice includes: i) the courts' refusal to hear a matter; ii) undue delay or impeding, obstructing, or unjustifiably delaying judicial or administrative processes; iii) inadequate administration of justice; and iv) inappropriate, inefficient, and malicious application of the law. Lastly, it also obliges the host state not to abuse its right to use legal action to otherwise sabotage the administration of justice.

II. Due Process

In the most recent IIAs, the FET standard requires the host state to respect due process,[62] which means it must comply with minimum procedural guarantees. Different interpretations of the FET standard in relation to local procedures have established a bifurcated protection of due process: i) before an administrative authority[63] and ii) in court proceedings. It is with respect to this second parameter that due process and the concept of denial of justice overlap. Thus, the state must carry out the necessary actions in order for an investor to have access to domestic jurisdiction and courts; provide investors with a fair and impartial procedure, and refrain from illegitimately hampering an investor's access to justice and procedural fairness. If a judicial system does not remedy a violation of these procedural guarantees, there would be a denial of justice.[64]

Due process in international law requires states to follow certain minimum standards in the administration of justice.[65] International institutions have identified some of these elements, among which

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62 *Técnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 1547.

63 See, for example, the cases of *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award of 30 August 2000; and *Middle East Cement Shipping and Handling Co. SA v. The Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of 12 April 2002,

64 See Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law Int'l 2009, p. 244.

65 See Charles Kotuby, *General Principles of Law, International Due Process and the Modern Role of Private International Law*, Duke Journal of Comparative & Int'l Law 2013, p. 427.

are: the right to a fair trial;[66] transparency and good faith;[67] the right to an independent, autonomous, and unbiased judge; the right of defense; and, in situations where contradictions arise in pre-established judicial processes, adherence to the principle of legality or rule of law in the context of state conduct and sanctions.[68]

In the BIT between Austria and Georgia, there is an attempt to define due process in the context of expropriation as the right to a prompt review when an expropriation and claim to compensation occurs, including when the valuation of the investment and the payment of compensation by a judicial authority or another competent and independent authority.[69]

The arbitration tribunal in *Saluka v. Czech Republic* ruled that the host state must never ignore the principles of procedural fairness or due process, and must guarantee that an investor will be free from coercion or harassment from the state's regulatory authorities.[70] Similarly, in *ADC v. Hungary*, the tribunal ruled that basic mechanisms, such as reasonable advance notice, a fair hearing, and an unbiased and impartial adjudicator that is accessible to the investor to make such legal procedure meaningful, are part of due process.[71]

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66 A similar rule is enshrined in Article 6 – Right to a Fair Trial, of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Modern codifications of soft law, such as the *ALI / UNIDROIT Principles of Transnational Civil Procedure*, offer an even clearer example of many of the principles on which international due process is based: 1. Independence, impartiality, and suitable qualifications of the court and its judges; 2. Jurisdiction over the parties; 3. Procedural equality of the parties; 4. Right to engage a lawyer of the party's choice; 5. Due notice of the proceedings and right to be heard; 6. Access to translations if a party or witness is not competent in the court's language; 7. Prompt rendition of justice; and 8. Availability of provisional and protective measures if needed. See https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/.

67 M. Sornarajah, *The International Law on Foreign Investment*, Cambridge Univ. Press, 5th ed. 2021, p. 458.

68 Charles Kotuby, *General Principles of Law, International Due Process and the Modern Role of Private International Law*, Duke Journal of Comparative & Int'l Law 2013, p. 427.

69 "Due process of law includes the right of an investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this Article by a judicial authority or another competent and independent authority of the latter Contracting Party." *Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investments*, signed on 1 October 2001, in force since 1 March 2004, Article 5. 3.

70 *Saluka Investments BV v. Czech Republic*, UNCITRAL Rules (1976). Partial Award of 17 March 17, 2006.

71 *ADC Affiliate Limited and ADC & Management Limited v. Republic of Hungary,* ICSID Case No. ARB/03/16, Award of 2 October 2006, para. 435.

In *Loewen v. United States of America*,[72] despite rejecting claims of a lack of exhaustion of local remedies, the court established that partial and inadequate procedures undermine due process.[73] Furthermore, it noted that the domestic court allowed the jury to be influenced by persistent biases towards local favoritism against the foreign litigant.[74] Furthermore, the damages were exaggerated, and the judge-approved methods utilized by the jury were contrary to due process.[75]

In *Petrobart v. Kyrgyz Republic*,[76] a dispute over the FET standard under the Energy Charter Treaty, the Deputy Prime Minister of the Kyrgyz Republic, in reference to the critical financial situation of the public–private consortium, requested the President of the local court to postpone the execution of the sentence of damages. A few days later, the court granted the request that the execution be suspended. The Arbitral Tribunal considered that the intervention of the government in the judicial proceedings was not in accordance with the rule of law in a democratic society and that it showed a lack of respect for the treaty's investment rights, especially in regard to the due process rights of Petrobart as an investor.[77]

In *Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican State*s, the Tribunal established that the right of the parties to due process requires an impartial procedure which must not be subject to any undue delay.[78]

Thus, due process is the obligation upon the state to conduct itself in such a way that an investor has access to an independent, autonomous, and unbiased judge. Moreover, an investor must have an assured right of defense, with guarantees in place that the investor will be free from coercion or harassment by regulatory authorities, or any other interference from the state, which includes no undue delays or the imposition of disproportionate rulings.

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72 *Loewen Group, Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/ 98/3, Award of 26 June 2003. The dispute arose from various broken contracts between O'Keefe and the Loewen companies, competitors in the Mississippi funeral home business. The Mississippi jury convicted Loewen of $500 million in damages. In the case, the trial judge repeatedly allowed O'Keefe's attorneys to make lengthy, irrelevant, and highly damaging references to the Plaintiffs' foreign nationality. Furthermore, after allowing those references, the trial judge refused to issue any instruction to the jury on the irrelevance of distinctions of race and nationality.

73 "By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's attorneys, particularly Mr. Gary, were inadmissible. By any criteria of evaluation, the trial judge did not grant Loewen due process." *Id.*, para. 119.

74 *Id.*, para. 121.

75 *Id.*, para. 122.

76 *Petrobart Limited v. Kyrgyz Republic, Stockholm Chamber of Commerce*, Case No. 126/2003.

77 *Id.*, p. 75.

78 "A denial of justice could be alleged if the competent courts refused to hear the matter, if it suffered an undue delay or if they administered justice in a seriously inadequate way. There is no evidence, not even allegations, that such defects can be imputed to the Mexican judicial processes in this case." *Robert Azinian, Kenneth Davitian, & Ellen Baca against the United Mexican States*. ICSID Case No. ARB (AF)/97/2, para. 102.

III. Access to Justice and the Complementary Function of Public International Law

In its complementary role, public international law gives content, scope, and limits to IIA obligations. Typical concepts of international law, such as access to justice or courts, fair procedures, and the exhaustion of domestic remedies, provide guidance to the possible scope of the substantial guarantees of the FET.

1. Access to Justice

The violation of the right of access to justice is the most obvious form of denial of justice. The most inherent manifestation of any substantive right is a procedural mechanism to make it effective. The right of access to justice is embodied in the obligation to guarantee access to the courts and the right to an effective remedy to enforce rights and "to be heard."[79] In a broad sense, it is defined as the right of every person to have an arena in which to enforce the right to be assisted and to achieve its satisfaction.[80] In investment law, access to justice protects the investor's right of action within the jurisdiction of the host state.

The concept of access to justice or to the courts includes the international obligation of every state to guarantee the access of foreigners to its courts and to administer justice in accordance with minimum standards of fairness and procedural guarantees.[81] The principle of access to justice forms an integral part of the customary international law on the treatment of foreigners, but it only guarantees access to reparation processes within the territory, in accordance with the laws of the host country. International law does not provide for an individual right of access to justice before international courts, nor does it provide for the right of access to the courts of a third state.[82]

In *NIOC v. Israel,*[83] the International Chamber of Commerce (ICC) settled via arbitration a dispute over a 1968 Agreement on the construction, maintenance, and operation of an oil pipeline in Israeli territory. The Agreement contained an arbitration clause which stated that one arbitrator would be appointed by each of the parties and that the third arbitrator should be appointed by consensus of the first two. In case the two arbitrators could not agree upon a third arbitrator, the President of the ICC would be asked to appoint the third arbitrator. The NIOC appointed its arbitrator, but the State

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79 See *International Covenant on Civil and Political Rights*, adopted by the UN General Assembly in its Resolution 2200 A (XXI) of 16 December 1966, in force since 23 March 1976, in accordance with Article 49. Article 14 stipulates: "Every person shall have the right to be heard publicly and with due guarantees by a competent, independent and impartial court, established by law, in the substantiation of any criminal accusation made against him or for the determination of his rights. or civil obligations […]." Similarly, Article 8 of the Inter-American Convention on Human Rights.

80 See, for example, Article 8 of the *Universal Declaration of Human Rights*, adopted and proclaimed by the UN General Assembly in its Resolution 217 A (III) of 10 December 1948.

81 Marabotto, *An Essential Human Right: Access to Justice,* Yearbook of Mexican Constitutional Law 2003, p. 1.

82 Francioni, supra note 11, at p. 731.

83 *National Iranian Oil Company (NIOC) v. State of Israel,* International Chamber of Commerce. Swiss Court ruling on Israel's request to annul the 2012 Award and set aside the ruling (English).

of Israel refused to do the same. Faced with this refusal, the NIOC appealed to the French courts and, after seven years of proceedings, obtained the appointment of an arbitrator by the Paris Court of Appeal in 2001, a decision that was confirmed by the Court of Cassation in its decision of 1 February 2005. Thus, the arbitration, initiated in 1994 and seated, by decision of the arbitrators in Geneva, could finally begin. However, Israel still attempted to block the procedure by calling on the Swiss courts to prevent the appointment of the arbitrators, including questioning their independence and impartiality. The Swiss Federal Tribunal, however, did not even entertain the point. The arbitrators had already pointed out "that the Appellant had the opportunity to put its arguments before the French Courts four times, that the right to be heard of all parties has been more than complied with, and that the decision of the Paris Court of Appeal to appoint an arbitrator on the Appellant's behalf, taken in order to avoid a possible denial of justice, was confirmed by the French Cour de Cassation."[84] What this case shows is the possible conflict between the right to be heard by one party and the right to due process by the other.

In conclusion, the principle of access to justice, or to the courts, establishes the content and scope of the investor's right to go before the jurisdiction of the host state, who subsequently has the obligation to guarantee the right to action. Additionally, it can be applied to the right of the investor to initiate arbitration proceedings.

2. Fair Procedures

In *Mondev v the United States,*[85] the Court expressly mentioned Article 6 (1) of the *European Convention on Human Rights* (ECHR), which establishes the right to a fair procedure,[86] despite the fact that the Convention is part of a different legal system whose rules are alien to that of Article 1105 (1) of NAFTA on the protection of FET and the FPS. However, the Court established that the ECHR provides guidance through analogy as to the possible scope of the NAFTA guarantee of treatment, in accordance with international law, which includes FET and FPS requirements.

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84 Judgment of the Swiss Federal Tribunal on Israel's Request to Annul the 2012 Award and to Stay the Enforcement (English) of 10 January 2013, 4A_146/2012, p. 4. See also the commentary by Scherer and Baizeau, *Swiss Federal Supreme Court Confirms NIOC vs. Israel Award - No Review of French Court Decision to Appoint Arbitrator in Order to Avoid International Denial of Justice*, ASA Bulletin 2013, Vol. 31, pp. 400-403.

85 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF) / 99/2, para 144.

86 Right to a fair trial: 1. "Every person has the right to have their case heard fairly, publicly and within a reasonable time, by an independent and impartial Court, established by law, which will decide disputes regarding their rights and obligations of character. civil or on the basis of any accusation in criminal matters directed against her. The sentence must be pronounced publicly, but access to the courtroom may be prohibited to the press and the public during all or part of the process in the interest of morality, public order or national security in a democratic society. when the interests of the minors or the protection of the private life of the parties in the process so require or to the extent that it is considered strictly necessary by the court, when, in special circumstances, advertising could be detrimental to the interests of justice." A similar rule is found in Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms.*

However, since officials were covered by statutory immunity[87] (a matter of Massachusetts law), the existence of immunity was to be classified as a matter of substance and not of procedure within the terms of distinction under Article 6 (1) of the European Convention.[88]

Thus, it is possible to find instruments that complement the scope and content of the principles of denial of justice and due process, such as the rights to judicial protection, effective recourse, the prohibition of arbitrary detention, the right to be heard, and the right to an independent court, as established in the Universal Declaration of Human Rights,[89] the European Convention on Human Rights, the Inter-American Convention on Human Rights,[90] and the African Charter on Human and Peoples' Rights,[91] among other instruments of international law for the protection of Human Rights.

3. Exhaustion of Domestic Remedies

Before constituting a denial of justice, the customary norm is to require the prior exhaustion of domestic remedies.[92] Since denial of justice implies that the national legal system *as a whole* does not meet minimum standards, the wrongdoing does not occur until reasonable attempts are made[93] to obtain the resources available within that system. Therefore, the latest IIAs establish that "the mere fact that the claim of the covered investor has been rejected, dismissed or the lack of success

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87 The impact of statutory immunities will be discussed further in section IV.

88 *Mondev,* supra note 85, para 144.

89 *Universal Declaration of Human Rights*, supra note 80, Articles 8, 9 and 10.

90 *Inter-American Convention on Human Rights*, Article 25 – Right to Judicial Protection: "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Con vention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. To ensure that any person claiming such remedy shall have his rights deter mined by the competent authority provided for by the legal system of the state; b. To develop the possibilities of judicial remedy; and c. To ensure that the competent authorities shall enforce such remedies when granted."

91 *African Charter on Human and Peoples' Rights*, Article 7 – Right to Fair Trial:
"1. Every individual shall have the right to have his cause heard. This comprises:
1) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
2) The right to be presumed innocent until proved guilty by a competent court or tribunal;
3) The right to defence, including the right to be defended by counsel of his choice;
4) The right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

92 *Universal Declaration of Human Rights*, supra note 80, Article 8.

93 The term "reasonableness" in international law is explained in Chapter 2.3.3 on Full Protection and Security (FPS).

does not in itself constitute a denial of justice."[94] On the other hand, applicants do not have to resort to resources that do not offer reasonable prospects of success.[95]

Thus, denial of justice in international law requires the exhaustion of domestic remedies. However, in some cases, compliance with national law on justice does not mean that the parameters of the standard have been met.[96] It is the plaintiff's responsibility to prove that they tried to utilize all reasonably available local mechanisms.[97] In the *ELSI* case,[98] the International Court of Justice rejected Italy's claim that the US investor had not exhausted its domestic tort remedies, since the Italian subsidiary had already exhausted all civil and administrative actions against local and national authorities. In *AS Diallo,*[99] on the expropriation and expulsion of a Guinean citizen investor in the Democratic Republic of the Congo, the country prohibited the investor from entering the country, thus deprived him of any possibility of judicial or administrative recourse. This led the Court to conclude that the Democratic Republic of the Congo's argument could not be based on the fact that local avenues were not exhausted, because it was impossible for the plaintiff to go to Court. The Court determined that there were no effective remedies for the investor to exhaust.

In conclusion, the exhaustion of available local and national remedies is a limitation on the principle of denial of justice.

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94 See the *Agreement between the European Union, its Member Countries and Singapore for the Promotion and Reciprocal Protection of Investments*, supra, note 47, Chapter Two – Investment Protection, Article 2.4 Standard of Treatment, fn. 9.

95 Paulsson, *Denial of Justice in International Law*, supra note 26, p. 130.

96 In *Dan Cake SA v. Hungary*, the Portuguese company Dan Cake claimed that the FET provision of the IIA between Portugal and Hungary (Article 3.1) had been breached because the Hungarian insolvency law was not compatible with international standards. Despite the fact that the Court did not make findings on this argument, it concluded that none of the omissions made by the insolvency proceedings constituted a remedy that should have been exhausted and the fact of failure to act before the decision cannot be equated to the lack of exhaustion of an appeal against the decision. *Dan Cake SA against Hungary*. ICSID Case No. ARB / 12/9. Decision on Jurisdiction and Responsibility. *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF) / 99/2. p. 85.

97 Malcolm Shaw, *International Law*, Cambridge Univ. Press, 8th ed. 2017, p. 215.

98 Italy argued that Raytheon and Matchlett could have based such an action before the Italian courts on Article 2043 of the Italian Civil Code, which states that "any act… causing damages to another person implies that the offender is obliged to pay compensation for those damages…. " In the present case, however, it was for Italy to demonstrate that, in fact, a remedy existed that was open to the US shareholders and that they did not use. "The Chamber does not consider that Italy has fulfilled this obligation." International Court of Justice, *Electronica Sicula SpA (ELSI) (United States v. Italy),* Rep (1989) 15, para. 44.

99 International Court of Justice, *Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo* (Preliminary Objections), Judgment of 24 May 2007.

IV. Statutory Immunities and Denial of Justice

Case law also shows that statutory immunities can become limitations on the principle of denial of justice. It is important not to confuse this concept with the immunities that diplomats enjoy under international law in the country where they reside and officially function.[100]

The concept of statutory immunities, which exempts government officials from certain obligations, has been interpreted as a limitation on the concept of denial of justice. In the NAFTA[101] case *Mondev v the United States,*[102] the tribunal had to decide on the compatibility of the Massachusetts Torts Act with the FPS and FET standards as enshrined in Article 1105 (1) of NAFTA.[103] The law granted immunity to public employees,[104] – as long as they were not organized as independent corporate entities – in case of intentional actions which generated damages.[105] The investor, Mondev, argued that "for a NAFTA Party to confer on one of its public authorities immunity from suit in respect of wrongful conduct affecting an investment was in itself a failure to provide full protection and security to the investment, and contravened Article 1105(1)."[106]

The court determined that the application of the doctrine of governmental immunity for a local authority is not a denial of justice. The court adopted a restrictive notion of denial of justice and concluded that a state could make a difference between contracts with investors – where immunity could not be granted – and alleged tortuous interference with contractual relations – where immunity could be granted. It concluded that the exercise of regulatory powers by local government

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100 *Vienna Convention on Consular Relations*, signed on 24 April 1963, in force since 19 March 1967, Chapter II – Facilities, Privileges and Immunities Relating to Consular Offices, Career Consular Officers, and other members of the Consular Office.

101 North American Free Trade Agreement. Now United States Mexico and Canada Agreement (UMCA). North American Free Trade Agreement - NAFTA.

102 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002.

103 Article 1105 (1) NAFTA, now Article 14.6 of the United States-Mexico-Canada Agreement (USMCA): "1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

104 The case concerns a claim brought by a Canadian company against the United States for the alleged discriminatory expropriation without compensation of the claimants' rights arising from a commercial real estate development contract entered into with the City of Boston and the Boston Redevelopment Authority. The investor successfully filed for damages in Massachusetts courts only to see the favorable jury verdict overturned by the State Supreme Court on the basis of national statutory immunity from local regulatory authorities. *Id.*

105 A public employer that is not an "independent, political and corporate body" is immune from any willful wrongdoing, including assault, injury, false imprisonment, false arrest, intentional mental anguish, malicious prosecution, malicious abuse of process, defamation, slander, misrepresentation, deception, invasion of privacy, interference with privacy, interference with privacy, relationships or interference in contractual relationships." Massachusetts Tort Claims Act (PL 258) Paragraph 10 (c).

106 *Mondev*, supra note 102, para. 140.

authorities and the application of statutory immunity with respect to the exercise of their official functions could not give rise to a claim under NAFTA.[107]

D. DENIAL OF JUSTICE AND FULL PROTECTION AND SECURITY

As already indicated, the concept of denial of justice is generally an integral element of the FET standard. However, due to the proximity of the FPS to the FET standard, some courts have analyzed it as one.[108]

Some courts have included the denial of justice, access to courts, procedural fairness, and the access to justice standards within the FPS standard.[109] In general, the difference between these two standards is that FPS does not concern the decision-making procedures of state bodies. Rather, it concerns the failure to protect investments and investors from damages caused by agents of the state, or third parties, in situations where the state has failed to exercise due diligence.[110] Neither the FPS nor the FET standard amount to a legal stability clause or prevent the parties from adapting their legislation.[111]

In the case of *ELSI,*[112] the standard of "constant protection and security" served as the legal underpinning for allegations that it took a long time to render a decision on the appeal of a search warrant for the factory. The International Court of Justice concluded that despite being considered long, the decision period (16 months) did not violate the standard.

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107 *Mondev*, supra note 102, paras. 151-156.

108 *Saluka Investments BV (Netherlands) v. Czech Republic, UNCITRAL*, Partial Award of 17 March 2006, paras. 483, 484; *Czechoslovakia Obchindi Banka AS v. Slovak Republic*, Award of 29 December 2004, para. 170.

109 For example, in *Cekoslovenska Obchodnı Banka AS v. Slovak Republic*, supra note 107; and *Waguih Elie George Slag and Clorinda Vecchi v. Arab Republic of Egypt*, Award of 1 June 2009, paras. 445–448.

110 McLachlan, Shore, and Weigner, *International Investment Arbitration, Substantive Principles. Oxford International Arbitration Series*, Oxford Univ. Press 2010, para. 7241.

111 *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v. Argentine Republic*, ICSID case No. ARB / 03/17, Decision on liability of 30 July 2010, para. 207; *Total v. Argentina*, ICSID case No. ARB / 04/1, Decision on liability of 27 December 2010, para. 1. 122.

112 International Court of Justice, *Electronica Sicula SpA (ELSI) (United States v. Italy),* 1989, p. 109.

In the context of the IIA between the Czech Republic and the Kingdom of the Netherlands,[113] the arbitral tibunal in *CME v. Czech Republic* established that: (...) "The host State is obliged to ensure that neither by modification of its laws, nor by actions of its administrative bodies, the security and protection of the foreign investor's investment agreed and approved is withdrawn or devalued..."[114] The regulatory entity had created a legal situation in which the partner in the host country could unilaterally terminate the contract with the investor, so that at the time of exercising such power, it was in violation of the FPS standard.

In Lauder v. The Czech Republic,[115] the arbitral tribunal established with respect to the FPS standard that:

> *The Respondent's only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law. There is no evidence - not even an allegation - that the Respondent has violated this obligation. On the contrary, the numerous Czech court proceedings initiated by CNTS, CME and Mr. Lauder against CET 21 and Mr. Železný show that the Czech judicial system has remained fully available to the Claimant. In particular, the 4 May 2000 decision by the Regional Commercial Court in Prague that CET 21 was obligated to procure all services for television broadcasting exclusively through CNTS (Exhibit C54) is conclusive evidence of this availability. While this decision was later annulled by the High Court in Prague (Exhibit R134) an appeal is now pending before the Czech Supreme Court, which may still rule in favor of CNTS.*

Thus, for the tribunal, the only obligation of the host state under the FPS clause[116] was to allow the investor access to the judicial system.

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113 *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic*, signed on 29 April 1991, and in force from 1 October 1992 until termination in 2021. Article 3 provided "1) Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. 2) More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned."

114 *CME Czech Republic v Czech Republic*, Partial Award of 13 September 2001, UNCITRAL, Case 121, paragraph 613.

115 *Ronald S. Lauder v. Czech Republic*, UNCITRAL (1976), Award of 3 September 2001, paragraph 314.

116 See Article II (a) of the *Treaty Between the Czech and Slovak Federal Republic on Reciprocal Promotion and Investment Protection*. After the disintegration of Czechoslovakia in 1993, the Treaty continued in force for the successor States, the Czech Republic, and Slovakia. It was signed on 22 October 1991, entered into force on 19 December 1992, and was terminated on 14 July 2003.

In conclusion, the standard of access to justice, and its derivatives, coincides and overlaps with either the FET or the FPS. The most widely accepted thesis is that access to justice and its derivatives are generally included in the FET standards and not the FPS.[117] However, due to the proximity of the FPS to the FET standard, it has sometimes been analyzed as a single standard of minimal treatment.

E. CONCLUSION

The concepts of access to justice, access to the courts, non-denial of justice, and fair procedures (DAFA) recognize minimum guarantees of treatment for foreign investors and their investments in matters of procedural justice before the jurisdictional and administrative entities of the host state. These concepts are overlapping; however, they both complement and limit the protection standards of investment law, especially the FET and the FPS standards.

As evidenced by recent IIAs and relevant jurisprudence, denial of justice and due process are manifestations of the integrative function of customary international law, while the concepts of access to justice, access to courts, and procedural fairness complement and limit these standards.

These notions are manifested in the procedural stages before jurisdictional and administrative entities, where the arbitrator must use the criterion of reasonableness: (i) The right of access to a judicial protection mechanism before an impartial judge who does not unjustifiably refuse to hear a matter it should know about; (ii) The right of the parties to impartial due process, including not subjecting proceedings to any undue delay; (iii) The right to an adequate administration of justice, including the right to an impartial judgment. Finally (iv) The incorrect application of the law in an unclear and malicious way (non-transparent or in absence of good faith) is also a denial of justice.

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117 For example, Colombia's Model IIA establishes “Fair and Equitable Treatment. […] 2. The fair and equitable treatment granted to Investors and Covered Investments refers only to: a. the prohibition of denial of justice in criminal, civil or administrative proceedings; b. fundamental violation of procedural guarantees in judicial or administrative proceedings; c. manifests arbitrariness; d. selective discrimination on manifestly unlawful grounds, such as sex, race or sex, religious beliefs; or e. abusive treatment of investors, such as coercion, coercion and harassment." Draft Agreement for the Promotion and Reciprocal Protection of Investments of the Republic of Colombia. Colombia Model Project 2014. Published for Consultations.