Principles of International Investment Law

Second Edition

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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and education by publishing worldwide. Oxford is a registered trade mark of
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First Edition published in 2008
Second Edition published in 2012

Impression: 1

British Library Cataloguing in Publication Data

Data available

ISBN 978–0–19–965179–5 (HB)
ISBN 978–0–19–965180–1 (PB)

Printed in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment *conform* to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty's fair and equitable treatment standard.[51]

There are growing doubts about the relevance of this whole debate.[52] Tribunals have indicated that the difference between the treaty standard of FET and the customary minimum standard 'when applied to the specific facts of a case, may well be more apparent than real'.[53] The Tribunal in *El Paso*[54] pointed out that the discussion was somewhat futile since the content of the international minimum standard is 'as little defined as the BIT's FET standard'.[55]

Depending on the specific wording of a particular treaty, it may overlap with or even be identical to the minimum standard required by international law. The fact that the host state has breached a rule of international law may be evidence of a violation of the fair and equitable standard,[56] but this is not the only conceivable form of breach.

The emphasis on linkages between FET and customary international law is unlikely to restrain the evolution of the FET standard. On the contrary, this may have the effect of accelerating the development of customary law through the rapidly expanding practice on FET clauses in treaties.[57] The Tribunal in *Chemtura v Canada*[58] said in this respect:

> the Tribunal notes that it is not disputed that the scope of Article 1105 of NAFTA must be determined by reference to customary international law. Such determination cannot overlook the evolution of customary international law, nor the impact of BITs on this evolution.... [I]n determining the standard of treatment set by Article 1105 of NAFTA, the Tribunal has taken into account the evolution of international customary law as a result *inter alia* of the conclusion of numerous BITs providing for fair and equitable treatment.[59]

[51] At paras 7.4.6, 7.4.7. Emphasis in original; footnote omitted.

[52] See S W Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in S W Schill (ed), *International Investment Law and Comparative Public Law* (2010) 152–4.

[53] *Saluka v Czech Republic*, Partial Award, 17 March 2006, para 291. See also *Azurix v Argentina*, Award, 14 July 2006, para 361, 364; *Occidental v Ecuador*, Award, 1 July 2004, para 190; *CMS v Argentina*, Award, 12 May 2005, paras 282–4; *Biwater Gauff v Tanzania*, Award, 24 July 2008, para 592; *Rumeli v Kazakhstan*, Award, 29 July 2008, para 611; *Duke Energy v Ecuador*, Award, 18 August 2008, paras 332–7; *Impregilo v Argentina*, Award, 21 June 2011, paras 287–9.

[54] *El Paso v Argentina*, Award, 31 October 2011.

[55] At para 335.

[56] See *SD Myers v Canada*, First Partial Award, 13 November 2000, para 264: 'the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105.'

[57] R Dolzer and A von Walter, 'Fair and Equitable Treatment and Customary Law—Lines of Jurisprudence' in F Ortino, L Liberti, A Sheppard, and H Warner (eds), *Investment Treaty Law: Current Issues* (2007) 99; I Tudor, *The Fair and Equitable Treatment Standard in International Law of Foreign Investment* (2008) 83–5.

[58] *Chemtura v Canada*, Award, 2 August 2010.

[59] At paras 121, 236.

The Tribunal in *Merrill & Ring* went one step further and stated that FET had become part of customary international law:

> A requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*.[60]

(e) The evolution of the fair and equitable treatment standard

Obviously, the standard of FET is a broad one, and its meaning will depend on the specific circumstances of the case at issue.[61] The Tribunal in *Mondev v United States* pointed out that '[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case'.[62] Similarly, the Tribunal in *Waste Management v Mexico* noted that 'the standard is to some extent a flexible one which must be adapted to the circumstances of each case'.[63]

NAFTA tribunals have been inclined to see the standard against a historical-evolutionary background. Other tribunals have dealt with it more directly from a contemporary perspective.[64] The historical starting point for a discussion on the standard of treatment for foreigners is often seen in the *Neer* case of 1926.[65] The case did not concern an investment but the murder of a US citizen in Mexico. The charge was that the Mexican authorities had shown a lack of diligence in investigating and prosecuting the crime. The Commission said:

> 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.[66]

The Commission found that the facts did not show such a lack of diligence as would render Mexico liable and dismissed the claim.

[60] *Merrill & Ring Forestry v Canada*, Award, 31 March 2010, para 210.

[61] See eg G Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 *Recueil des Cours* 251, 346; UNCTAD Series on issues in international investment treaties, 'Fair and Equitable Treatment' (1999) 22.

[62] *Mondev v United States*, Award, 11 October 2002, para 118.

[63] *Waste Management v Mexico*, Final Award, 30 April 2004, para 99. See also *Lauder v Czech Republic*, Award, 3 September 2001, para 292; *CMS v Argentina*, Award, 12 May 2005, para 273; *Noble Ventures v Romania*, Award, 12 October 2005, para 181. See also P T Muchlinski, *Multinational Enterprises and the Law* (1999) 625.

[64] R Dolzer and A von Walter, 'Fair and Equitable Treatment and Customary Law—Lines of Jurisprudence' in F Ortino, L Liberti, A Sheppard, and H Warner (eds), *Investment Treaty Law: Current Issues* (2007) 99.

[65] *Neer v Mexico*, Opinion, US–Mexico General Claims Commission, 15 October 1926 (1927) 21 *AJIL* 555; IV RIAA 60–2. See P G Foy and R J C Deane, 'Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement' (2001) 16 *ICSID Review-FILJ* 299, 314; J C Thomas, 'Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators' (2002) 17 *ICSID Review-FILJ* 21, 29–32; J Paulsson and G Petrochilos, '*Neer*-ly Misled?' (2007) 22 *ICSID Review-FILJ* 242.

[66] At 556.