

Recent Investment Arbitration Decisions on the Standard of Fair and Equitable Treatment

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Fair and Equitable Treatment

- “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”
- Article 1105 NAFTA

Fair and Equitable Treatment

- “Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment [...] in the territory of the other Contracting Party.”
- Article 3(1) Denmark Model BIT.

Historic Origin

- US Friendship, Commerce and Navigation (FCN) treaties
- 1948 Havana Charter for an International Trade Organisation
- 1967 OECD Draft Convention on the Protection of Foreign Property
 - “Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Party.”

Fair and Equitable and the International Minimum Standard

- Identical
 - Fair and equitable treatment as an expression of the international minimum standard
 - or
- Different
 - Fair and equitable treatment as an autonomous standard

Fair and Equitable Treatment

- “The broad concept of fair and equitable treatment imposes obligations beyond customary international requirements of good faith treatment.”
- *CME Czech Republic B V v The Czech Republic, Partial Award*, UNCITRAL Award 2001, para. 156.

Fair and Equitable Treatment

- “1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
- 2. 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 the customary international law minimum standard of treatment of aliens.”
- NAFTA Free Trade Commission, Clarifications Related to NAFTA Chapter 11 (2001)

The *Neer* Standard

- “[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency.”

Neer v. Mexico, US-Mexican Claims Commission 1927.

Level of Protection – Low

- “[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”
- *Waste Management v. Mexico*, ICSID 2004

Level of Protection – High

- “[fair and equitable treatment] should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – “to promote”, “to create”, “to stimulate”- rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.”
- *MTD Equity v. Chile*, ICSID 2004

Elements of Fair and Equitable Treatment

- The Rule of Law and Due Process
- Predictability and Stability
- Transparency
- Legitimate expectations

The Rule of Law and Due Process

- “In the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays “a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety”. [...] The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection.”
- *Mondev v. USA*, ICSID Add. Facility 2002, para. 127.

Stability and Predictability

- “[...] stability of the legal and business framework is an essential element of fair and equitable treatment in this case ...”
 - *LG&E v. Argentina*, ICSID Award 2003, para 124.

Transparency

- “The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relation with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”

– *Tecmed v. Mexico*, ICSID AF Award, 2003, para. 154.

Legitimate expectations

- Fair and equitable treatment “requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”
 - *Tecmed v. Mexico*, ICSID AF Award, 2003, para. 154.

A Correct Summary?

- “Thus, this Tribunal, having considered, as previously stated, the sources of international law, understands that the fair and equitable standard consists of the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.”

LG&E v. Argentina, ICSID Award 2006, para 131.

A Correct Summary?

- “The [host state], without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor’s investment in a way that does not frustrate the investor’s underlying legitimate and reasonable expectations. A foreign investor [...] is entitled to expect that the [host state] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances.”
- *Saluka*, Partial Award 2006, para. 309.

Violations of Fair and Equitable Treatment – Abrogation of Guarantees

- “The measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. The discussion above, about the tariff regime and its relationship with a dollar standard and adjustment mechanisms unequivocally shows that these elements are no longer present in the regime governing the business operations of the Claimant. It has also been established that the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision.”
- *CMS v. Argentina*, ICSID Award 2005, para. 275.

Violations of Fair and Equitable Treatment – Lack of Due Process

- “[...] the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.
- [...] the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.”
- *Loewen v. USA*, ICSID Add. Facility 2003, paras. 136, 137.

Violations of Fair and Equitable Treatment – Revocation of a License

- “The lack of transparency in INE’s behavior and intention throughout the process that led to the Resolution, which does not reflect in full the reasons that led to the non-renewal of the Permit, cover up the final and real consequence of such actions and of the Resolution: the definitive closing of the activities at the Las Víboras landfill without any compensation whatsoever, whether Cytrar agreed or not, in spite of the expectations created, and without considering ways enabling it to neutralize or mitigate the negative economic effect of such closing by continuing with its economic and business activities at a different place.”
- *Tecmed v. Mexico*, ICSID Add. Facility 2003, para. 164.

Violations of Fair and Equitable Treatment – Discrimination

- “[T]he Czech Republic’s conduct towards IPB and Saluka/Nomura in respect of Saluka’s investment in IPB shares was unfair and inequitable. [...] The Czech Government failed to deal with IPB’s as well as Saluka’s/Nomura’s proposals in an unbiased, even-handed, transparent and consistent way and it unreasonably refused to communicate with IPB and Saluka/Nomura in an adequate manner.”
- *Saluka*, Partial Award 2006, para. 407.

Violations of Fair and Equitable Treatment – Mismanagement

- “The fact that key points of disagreement went unanswered and were not disclosed in a timely manner, that silence was kept when there was evidence of such persisting and aggravating disagreement, that important communications were never looked at, and that there was a systematic attitude not to address the need to put an end to negotiations that were leading nowhere, are all manifestations of serious administrative negligence and inconsistency. The Claimants were indeed entitled to expect that the negotiations would be handled competently and professionally, as they were on occasion.”
- *PSEG*, ICSID Award 2007, para. 246.

Conclusions

- Fact-specific inquiry
- Approximation of customary international law standard and fair and equitable
- Due Process, predictability, transparency and legitimate expectations as main elements of the fair and equitable treatment standard