Chapter Seven

Fair and Equitable Treatment and Arbitrary or Discriminatory Measures

While the NAFTA provided fertile ground for debate over the use and abuse of CIL and the FET standard, it was by no means the only source available. As noted in the previous chapter, the U.S. volte face on the fair and equitable treatment standard had repercussions beyond North America. It was bound to have greater impact because U.S. officials could not admit that anything really had changed with the 2001 FTC Statement or subsequent revisions to its Model BIT. If they could not successfully prevaricate on the point, NAFTA Article II03 would immediately provide a clear path for NAFTA investors to obtain the better treatment offered by the U.S. using a handful of post-NAFTA BITs, in which “fair and equitable treatment” clauses were phrased in a manner even less amenable to re-interpretation as a Calvo-flavoured CILMSTA.

At the end of the day, however, fair and equitable treatment must mean something, regardless of whether it has been dubiously conjoined with the CILMSTA or it is seen as an autonomous or additive obligation, or something in between. There are two complimentary ways to construe FET provisions in a manner consistent with the IIL Grundnorm of equality and non-discrimination. The first is to frame the standard in the same light as the U.S. negotiators who first employed it. A handful of awards feature the FET standard as a backstop to ensuring that some degree of equality of treatment and non-discrimination is maintained, in the absence of more powerful equality provisions. The other approach involves an inductive analysis of the function of IIL in public international law generally, with particular attention paid to the principles of sovereign equality and good faith as they relate to the equality and non-discrimination Grundnorm.

The latter analysis can also be applied to the interpretation of the other treaty provisions adopted in the 20th Century to bolster the rights of foreign investors beyond a weaker CILMSTA. These provisions prohibited measures that were ‘arbitrary’ or ‘unreasonable,’ or that were ‘discriminatory’ (typically resulting in language such as “arbitrary and discriminatory” or “unreasonable or discriminatory,” etc., i.e. ‘ADT’ provisions). ADT provisions were intended to be absolute in
orientation – establishing a floor, below which the treatment of foreign investors and their investments could not fall. As explained in Chapter 4, these provisions were introduced to serve as a fortified version of the Root approach to the CILM-STA, amplifying the type of protection otherwise potentially available under an abuse of rights theory. The ADT standard must thus be understood as being derived from the CIL P&S standard, rather than the FET standard. Indeed, as noted above, ADT clauses first started appearing in commercial treaties decades before the first FET clause arrived.

In assessing the construction of ADT as an IIL standard, I propose to employ the same functional approach I adopted to interpret provisions based upon the FET and P&S standards. After acknowledging the doctrinal interplay that appears to exist between the FET and ADT standards, I will turn to examining the role that denial of justice doctrine has played in relation to the IIL Grundnorm of equality and non-discrimination. I will then return to give additional consideration to the nexus that exists between the principles of sovereign equality and good faith, in the construction of FET or ADT provisions. The chapter will close with additional consideration of the concept of deference to host State decision-making, which is closely related to the good faith – sovereign equality nexus. The chapter will conclude with some consideration of how the deference question has been considered by tribunals in practice.

1. The FET Standard as a Backup or Proxy for Treatment No Less Favours

Occasionally a BIT will contain FET provisions without an accompanying provision requiring TNLF, such as a MFN standard or a NT standard. One of the earliest examples of such an instrument was the 1959 Abs-Shawcross Draft, which

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792 One textual distinction that can be made, as between FET provisions and ADTs provisions, is that the latter are addressed to cases involving the impairment of activities normally undertaken by the foreign investor with respect to its investment (such as its operation, augmentation or alienation). In contrast, the FET standard is addressed directly to treatment received by the investment or investment enterprise. However, in practice arbitrators have played down the investor/investment distinction when considering absolute standards of IIL.

793 By now it should be apparent that this functional approach, with which we attempt to unpack the underlying function of a given IIL standard, in light of the equality and non-discrimination Grundnorm, is – in turn – informed by our continued consideration of the complex relationship that exists between the general international law principles of sovereign equality and good faith.

794 There are very few cases in which it the FET provision is missing. See: UNCTAD, International Investment Agreements: Key Issues, 217. The author of this study also listed treaties in which a FET clause was not used: