CUSTOMARY INTERNATIONAL LAW IN ACTION: FROM THE INTERNATIONAL MINIMUM STANDARD TO FAIR AND EQUITABLE TREATMENT

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A. Historical Roots of Contemporary Issues

Since its inception in investment treaties, Fair and Equitable Treatment has given rise to an extended and continuing debate about its meaning and extent. It is not implausible to assume that in the beginning this concept meant nothing other than reasonableness, that is, the obligation to treat investments and investors in a fair and equitable manner as opposed to arbitrariness and bad faith. This simple meaning, however, appears to have been lost in the midst of complex legal arguments accompanying disputes and claims.

The fact is that in many contemporaneous investment arbitrations tribunals have been confronted with the need to determine the extent of this standard of treatment so as to reach a conclusion about its application to the case at issue. Prominent in this discussion has been the question whether Fair and Equitable Treatment is any different from the international minimum standard of treatment, supposedly embodied in customary international law, or whether it is rather the result of an evolving customary law standard. The view that it might be considered an autonomous standard which has a legal life of its own, separate and distinct from that of other international standards of treatment, has also been expounded.

While the question may at first sight appear new, this is in reality an old problem in international law, as old as the standards of treatment themselves. Different views have traditionally been held by those

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3 UNCTAD, Fair and Equitable Treatment, at 37–42 (1999).
willing to restrict the protection of investors, on many occasions the 
host State, and those willing to expand such treatment, usually the 
investors or other beneficiaries of a more protective legal framework. 
The very concept of an international minimum standard of treat-
ment was born as a protective measure as compared to the more 
restrictive standard of national treatment. No differently, Fair and 
Equitable Treatment has on occasions been conceived as affording 
protection greater than that available under the international mini-
mum standard. As international protection has increased over the dec-
ades, so too have the standards moved to new levels of treatment, but 
the underlying interest in restriction or enlargement has been kept 
very much alive. 

This evolution is what this contribution wishes to explore in the light 
of the literature and recent jurisprudential developments concerning 
Fair and Equitable Treatment, particularly in light of its connections to 
customary law.

B. The Need to Overcome Abuses in Diplomatic Protection

Throughout the nineteenth and early twentieth centuries international 
claims were often associated with diplomatic protection, and with it the 
powerful influence of States granting such protection was exercised. As 
a significant number of international claims related to events in Latin 
America, it would not take long for some countries in the region to 
emphasize the view that claims should be resolved by national courts 
and not by means of diplomatic protection and the abuses that on occa-
sions accompanied it. The “Calvo Clause” was thus born as a reaction 
against what was considered to be a manifestation of political power 
rather than the resort to a legal mechanism.4

In the midst of that confrontation the possibility of having claims 
adjudicated by international claims commissions and tribunals gradu-
ally emerged as an alternative which would ensure that the disputes 
at issue would be adjudicated under legal standards. A first balance 
was thus attempted between the interests of aliens and their support-
ing governments and the interests of host States. While this bal-
anced approach did not always work satisfactorily, it was certainly an