Recent Practice on Fair and Equitable Treatment

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I. INTRODUCTION

The international investment law standard requiring fair and equitable treatment of foreign investors by host States is an area of international law that has developed significantly in recent years. It is now the most used standard by claimants in investment arbitrations and therefore worthy of further review. Nevertheless, the objective nature of the standard means there is no exact definition of fair and equitable treatment and judicial practice continues to shape the content of the standard.

There is also disagreement about whether the need to accord investors fair and equitable treatment as set down in a treaty is independent from the requirement to give the minimum protection under customary international law. That is, fair and equitable treatment can be interpreted using an ordinary or plain meaning approach with fair and equitable treatment seen as an autonomous treaty-based standard, or one can equate fair and equitable treatment with the minimum standard of treatment under customary international law.

This question was resolved for disputes arising under the North American Free Trade Agreement (NAFTA) in 2001 when the three party governing body, the Free Trade Commission (FTC), issued an interpretation of the treaty’s fair and equitable treatment standard (Article 1105, Minimum Standard of Treatment). Outside the NAFTA context, the meaning of “fair and equitable treatment” as it appears in other investment treaties remains contentious.

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3 A third approach is nominated by the OECD, supra, footnote 1, which distinguished between fair and equitable treatment as part of the minimum standard required by customary international law and fair and equitable treatment as a part of international law including all sources. However, this distinction is not widely adopted and for ease of explanation it will not be discussed in this article.

4 NAFTA FTC Note of Interpretation, 31 July 2001. Schreuer, supra, footnote 1, p. 363 includes the FTC statement.
It has long been debated which of these interpretations should be used and several important decisions in the last eighteen months suggest further evolution in judicial thinking. These recent arbitrations and their consequences, as well as parallel developments in treaty negotiations that are likely to shape trends in arbitral practice in years to come, are the focus of this article.

Section II begins with some brief historical context and outlines two key themes taken up in Sections III and IV: the tension between fair and equitable treatment and the minimum standard, and State behaviour that violates fair and equitable treatment, in particular breach of legitimate expectations.

Section III provides a catalogue of Tribunal awards on fair and equitable treatment in the last two years and includes additional analysis of four awards: CMS v. Argentina5, Saluka Investments v. Czech Republic6, Azurix Corp. v. Argentina7 and LG&E v. Argentina8. These awards cement legitimate expectations and business stability as core elements of fair and equitable treatment. They also suggest a new approach to interpreting fair and equitable treatment outside NAFTA with Tribunals showing a preparedness to find no difference between the modern-day minimum standard of treatment and an autonomous fair and equitable treatment treaty provision. This article argues that whilst this practice presents a workable solution to the long-standing debate, it is an unsatisfactory outcome.

Section IV considers the consequences of these awards on future use of fair and equitable treatment and on future negotiating practice. It contends that despite clear evidence of an autonomous fair and equitable standard,9 recent arbitral interpretation throws doubt on the suitability of current treaty fair and equitable provisions.

II. ORIGINS AND CONTENT OF THE STANDARD

1. TREATIES and JUDICIAL PRACTICE

The standard of fair and equitable treatment first appeared in draft multilateral instruments and treaties from the 1950s and became commonplace in bilateral investment treaties (BITs) from the early 1960s.10 It is now included as a matter of course

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5 CMS Gas Transmission Company v. The Argentina Republic (CMS), Award, 12 May 2005, ICSID Case No. ARB/01/8 (US/Argentina BIT).
6 Saluka Investments B. V. v. The Czech Republic (Saluka), Partial Award, 16 March 2006, UNCITRAL (Netherlands/Czech BIT).
7 Azurix Corp v. The Argentine Republic (Azurix), Award, 14 July 2006, ICSID Case No. ARB/01/12 (US/Argentina BIT).
8 LG&E v. The Argentine Republic (LG&E), Decision on Liability, 3 October 2006, ICSID Case No. ARB/02/1 (US/Argentina BIT).
9 Saluka, supra, footnote 6.
10 The first known reference to "equitable treatment" appears in the draft Havana Charter for an International Trade Organization (1948). United States' bilateral treaties on Friendship, Commerce and Navigation (FCN treaties) from 1950 and a private initiative, the Abs-Shawcross Draft Convention on Investment Abroad of 1959, are amongst the earliest places where "fair and equitable treatment" appears. See Schreuer, supra, footnote 1, p. 357; and OECD Working Paper 2004/3, supra, footnote 1, pp. 3–4.