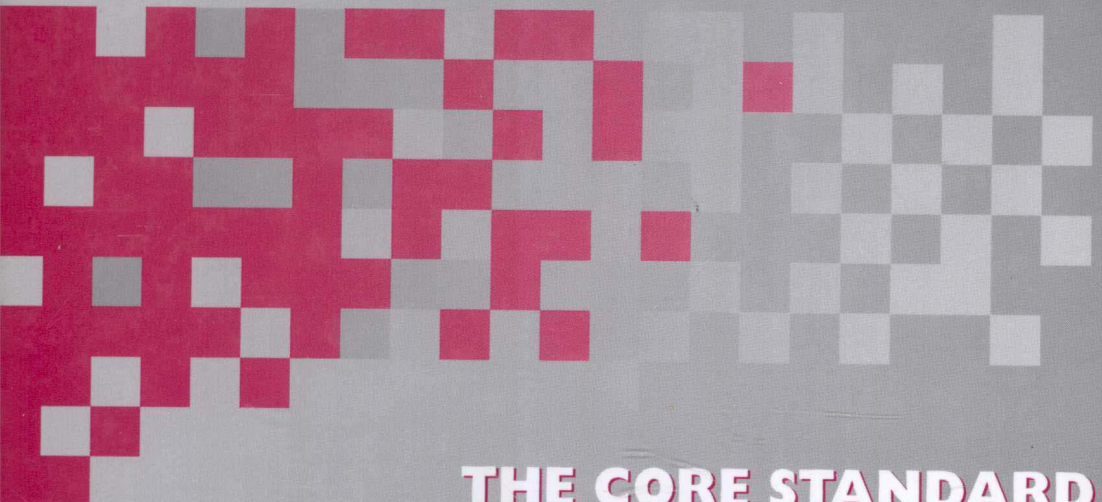


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**THE CORE STANDARD
OF INTERNATIONAL
INVESTMENT
PROTECTION**

FAIR AND EQUITABLE TREATMENT

BY ALEXANDRA DIEHL



Wolters Kluwer
Law & Business

The Core Standard of International Investment Protection

Fair and Equitable Treatment

Alexandra Diehl



Wolters Kluwer
Law & Business

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Meinen Eltern

List of Abbreviations

ADR	Alternative Dispute Resolution
AJDA	<i>Actualité juridique. Droit administratif</i>
ALBA	<i>Alternativa Boliviana para la America Latina y el Caribe</i>
Art(s).	Article(s)
ASEAN	Association of South East Asian Nations
ATS	Australian Treaty Series
AU	African Union
BCBS	Basel Committee on Banking Supervision
BISD	Basic Instruments and Selected Documents (WTO)
BIT(s)	Bilateral Investment Treaty(ies)
BVerwGE	<i>Amtliche Sammlung der Entscheidungen des Bundesverwaltungsgerichtes</i> (Official Compilation of the Decisions of the Highest Administrative Court of Germany, the <i>Bundesverwaltungsgericht</i>)
CAFTA-DR	Central American-Dominican Republic-United States Free Trade Agreement
CDU	<i>Christlich Demokratische Union</i> (Christian Democratic Union, party in Germany)
CEMSA	<i>Corporación de Exportaciones Mexicanas S.A. de CV</i> (Feldman case)
CFI	European Court of First Instance
Comecon	Council for Mutual Economic Assistance
CSD	Claims Settlement Declaration
CTS	Canadian Treaty Series
DIN	<i>Deutsches Institut für Normung e.V.</i>

List of Abbreviations

DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Understanding (WTO)
EC	European Community
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECT	Energy Charter Treaty
EHRR	European Human Rights Reports
ETS	European Treaty Series
Et seq.	<i>Et sequi</i>
F 2d	Federal Reports Second Series
F Supp	Federal Supplement
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIPA	Foreign Investment Promotion and Protection Agreement (term used for Canadian BITs)
FIC	Foreign Investment Commission (Chile)
FLGR	Mexican Federal Law on Games and Raffles of 1947 (<i>Thunderbird</i> Case)
FLR	Family Law Reports (Great Britain)
FTA	Free Trade Agreement
FTC	Free Trade Commission
GA Res	General Assembly Resolution
GATT	General Agreement on Trade and Tariffs
GATS	General Agreement on Trade in Services
IBA	International Bar Association
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of the International Chamber of Commerce
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICLQ	<i>International and Comparative Law Quarterly</i>
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
<i>ICSID Rev.-FILJ</i>	<i>ICSID Review-Foreign Investment Law Journal</i>
IEA	International Energy Agency
IEPS	<i>Impuesto Especial Sobre Producción y Servicios</i> (Mexican law of relevance in the <i>Feldman</i> Case)
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials

ILR	International Law Reports
IMF	International Monetary Fund
Imm AR	Immigration Appeal Reports (Great Britain)
IMS	International Minimum Standard
Inc.	Incorporated
ILO	International Labour Organization
INECEL	<i>Instituto Ecuatoriano de Electrificación (Duke Energy case)</i>
ISO	International Organization for Standardization
LCDs	Least Developed Countries
LCIA	London Court of International Arbitration
Ltd	Limited (Limited Liability Company in the United Kingdom)
MAI	Multilateral Agreement on Investment
MERCOSUR	<i>Mercado Comun del Sur</i>
MFN	Most-Favoured Nation
MNE	Multinational Enterprise
No.	Number (Referring to Preceding Footnotes)
NAFTA	North American Free Trade Agreement
NGO(s)	Non-governmental Organization(s)
NIEO	New International Economic Order
NT	National Treatment
OAS	Organization of American States
OEA	<i>Organización de los Estados Americanos</i>
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Communities
OJ L	Official Journal L Series
PCB	Polychlorinated Biphenyl (at issue in <i>S.D. Myers</i> case)
P & CR	Property and Compensation Records
Para(s).	Paragraph(s)
PCA	Permanent Court of Arbitration
PCAOB	Public Company Accounting Oversight Board
PCIJ	Permanent Court of International Justice
PCIG Rep.	PCIJ Reports
QB	Queen's Bench (Judiciary Division in the English High Court)
Stat	Statutes at Large (United States)
SCC	Stockholm Chamber of Commerce
SCC Institute	Arbitration Institute of the Stockholm Chamber of Commerce
<i>TDM</i>	<i>Transnational Dispute Management</i>
TRIMs	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights

List of Abbreviations

UC	University of California
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UN/CEFACT	United Nations Center for Trade Facilitation and Electronic Business
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Commission on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNRIAA	United Nations Report of International Arbitral Awards
UK	United Kingdom
UKTS	United Kingdom Treaty Series
US	United States
USCA	United States Code Annotated
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
Vol(s).	Volume(s)
VwVfG	<i>Verwaltungsverfahrensgesetz</i> (German Administrative Procedure Law)
WLR	Weekly Law Reports (England)
ZPO	<i>Zivilprozessordnung</i> (German Code of Civil Procedure)

Foreword

‘The past two decades have seen international investment law come into its own. It is a fixture of international arbitration and as a serious consideration in transnational commercial activity. The numbers speak largely for themselves. There were only 400 Bilateral Investment Treaties negotiated worldwide before 1991. By the end of 2008 this number had mushroomed to 2676, forming what Dr Diehl describes in this volume as a ‘Regime of Networks’. Investment treaties now link more than 170 different countries representing every geographic region, differing stages of economic development, and disparate political and domestic situations. This growth in treaties has been followed by a commensurate growth in investment arbitrations. As Dr Diehl notes, there were 36 new cases registered with ICSID in 2011 alone, which is more than in the first thirty years of the ICSID Convention.

To the extent that increasing numbers of arbitrations are representative of conflicts between states and companies, it may initially be thought that the growth of investment arbitration is perhaps not something to be celebrated. However, it ought to be welcomed, especially given that investor-state arbitration acts as a proxy for the state-state conflict that often occurred as a result of diplomatic protection – the alternative to investment arbitration. Moreover, the increasing jurisprudence on investment law has enabled the development of the field. There have now been more than 280 investment arbitrations since the inception of ICSID. This book naturally takes note of the few flawed decisions that number among these 280 arbitrations as part of its survey of the treatment by arbitral tribunals of the fair and equitable treatment standard. To a large extent, these decisions represent the missteps that inevitably occur when arbitral tribunals and national courts alike begin to develop a hitherto unexplored legal field. What is undeniable, however, is the achievement of successive arbitral tribunals in crafting an increasingly sophisticated and fine-grained law of international investment. When faced by questions of protections for international investors thirty-five years ago in the *Barcelona Traction Case*, the International Court of

Justice expressed surprise at the lack of progress in the evolution of international investment law. The position has certainly been remedied.

The process has been aided by a growing literature on the subject, which has not only sought greater doctrinal rigour, but has also prompted a more critical self-awareness of the strengths and weaknesses of the international investment arbitration regime. This book makes a very valuable contribution to this jurisprudence. It usefully supplements the more generalist volumes that populate the field with an in-depth analysis of what has emerged as arguably the most important aspect of modern international investment law – the fair and equitable standard.

The book's analysis is divided into two main sections, and in each Dr Diehl reaches conclusions that may well inform arguments before future tribunals, and at the very least will stimulate discussion in the investment law community. It begins with a survey of the role of the fair and equitable treatment standard within the constituent parts of the international investment regime. It is suggested that as Bilateral Investment Treaties have proliferated, they function less as inducements by which individual countries seek to attract capital flows, and more as instruments for liberalizing capital flows and globalization. Dr Diehl takes note of this over-arching interest in a healthy investment climate and the behaviour of states within it, and proposes that the fair and equitable treatment standard has entered into customary international law, and further represents a general principle of international law. The second section constitutes an exploration of the content and scope of the fair and equitable treatment standard. Dr Diehl seeks to give meaning to the terms 'fair' and 'equitable' by reference to the concept of legitimate expectations. Having observed the hybrid nature of the investment arbitration regime, she suggests that tribunals ought to make greater use of domestic sources of law when making sense of the often vaguely worded Fair and Equal Treatment clauses contained within Bilateral Investment Treaties.

These ideas represent only a few of the more contentious conclusions suggested in this volume. The author sets out her assumptions at the close of each chapter, which enables the reader to not only interrogate their own beliefs but also to come to an independent conclusion about the material discussed. This is aided immeasurably by the comprehensive treatment of material within. Of particular note are the detailed analyses of cases such as the *S.D. Myers* Case, the *Saipem* Case, the *Loewen* Case and the *Mondev* Case, which succeed in unpacking some of the less well-recognized aspects of those decisions. As such, this book has much to commend it to practitioners and commentators alike.

Just as the face of international investment law has changed significantly over the last two decades, it is likely to change again over the next two decades. Most obviously, the divide between capital importing and capital exporting nations, which was previously a source of tension in the development of investment law, is being slowly eroded. Claimant investors are now increasingly likely to originate from what were previously less developed nations. Developed nations similarly number amongst the respondents on the ICSID case list. Irrespective of how these and other changes impact the nature of international investment law, the comprehensive analysis of the fair and equal treatment standard contained in this book is a valuable contribution to the area.

Doug Jones

Preface

Is the Fair and Equitable Treatment (FET) Standard a pitfall or a safeguard for investors and States?

This question forms the starting point of my analysis. When I started working on this book in 2007, no comprehensive analysis of the FET standard had been published. In the meantime, not only several comprehensive studies dealing with the FET standard, but a multitude of books and articles on international investment protection and arbitration have appeared. As evidenced by the great increase in scholarly literature and also the number of awards, international investment law has grown considerably in importance.

Nevertheless, the doctrinal implications of international investment law in general and the FET standard in particular have remained contested and unclear. It is one of the objectives of this book to explore and further define the doctrinal foundations of the FET standard. However, the book is also geared to offer practical solutions to in-house counsel and practitioners dealing with FET cases.

This book suggests to base the FET standard within the framework of municipal law and asks counsel and tribunals to be less hesitant in applying domestic law or allowing themselves to be inspired by domestic law. Doing so will not only help to clarify the doctrinal foundations of the FET standard, but also offer clear-cut practical solutions in many instances. This is especially true in the context of reviewing administrative decisions.

Generally, the review of host State behaviour pursuant to the FET standard is to be divided into two sets of cases. The first set concerns administrative decisions of all kinds – among them the revocation of decisions, the introduction of new environmental regulations or the refusal to grant certain licenses for investments. The second set of cases concerns the treatment of investors by the courts of the host State (denial of justice). This book deals with both sets of cases in depth.

Preface

When assessing administrative actions by host States, special attention should be given to the protection of legitimate expectations as this notion is an inherent element of fairness. This book suggests that the concept of protection of legitimate expectations should also be grounded within the framework of municipal legal systems, as various domestic legal systems have a rich tradition of protecting legitimate expectations.

This book is, therefore, in line with the recent work of scholars like Stephan Schill and Monique Sasson who have suggested to tackle problems arising under investment treaties by means of a comparative method, paying attention not only to international law but also to domestic administrative and constitutional law. In this regard – when it comes to the merits of an investment case – investment treaty arbitration is more akin to administrative or constitutional review than to commercial arbitration.

Overall, however, the function which investment arbitration should ultimately have is a double one: On the one hand, it is a mechanism to settle disputes about reciprocal promises, just as in any commercial setting. Parties have come together and agreed to something, and an arbitral tribunal has to make sure that promises are kept. This is essentially a private law function that does not depend on any specific constitutional or administrative system or other public law surroundings. But on the other hand, investment arbitration is also a mechanism to channel and constrain the use of sovereign regulatory or adjudicative power and must therefore guarantee that the public interests, for which this power is normally employed, are appropriately taken into account when drawing the limits of its authority. This guarantee is essential for the sustainability of the system as a whole because the actors that created the system are different from its users – States mutually agree to bilateral investment treaties (BITs) because they expect them to serve the public interest in the long run, and investors can only benefit from this system as long as this fundamental, legitimate expectation is met.

Having occupied myself with the concept of legitimate expectations and other doctrinal underpinnings of the FET standard for a long time, I now sincerely hope that the legitimate expectations of the readers of this book will be met. I also hope that my readers will find answers to the question whether the FET standard is a pitfall or safeguard for investors and States in this book – and that they will develop their own answers when considering my suggestions. Fifty-five assumptions presented throughout this book and compiled at its end are supposed to facilitate this process.

Acknowledgments

As Gilbert Keith Chesterton already recognized, gratitude is happiness doubled by wonder. I am very grateful to those people without whose support this book would never have been written and am happy to express my gratitude here.

This book is an updated version of my doctoral thesis written under the supervision of Prof. Dr. Stefanie Schmahl. I am very grateful to her for her many valuable comments and especially her suggestion to include a chapter dealing with the relationship of the FET standard and human rights. I believe that this chapter makes the whole book more complete. I am also grateful to my second doctoral advisor, Prof. Dr. Eckhard Pache, for having reviewed my thesis so quickly.

Special thanks go to the current President of the Chartered Institute of Arbitrators, Prof. Doug Jones, for having written the foreword to this book despite his busy time schedule. As this book is both an academic and a practical piece of work, I could not have found a better person to write this piece. As most of you will know, Prof. Jones, a partner at Clayton Utz, likes to wander between the academic world and the world of practitioners. Not surprisingly, Prof. Jones holds professorial appointments at three Australian universities.

I am also grateful to my colleague in the London office of Clifford Chance, Audley Sheppard, for having suggested to publish my doctoral thesis with Kluwer Law International, and to Prof. Julian M. Lew, 20 Essex Street Chambers and Queen Mary University of London, for having agreed to publish my thesis in his series. Working together with Eleanor Taylor of Kluwer Law International and turning my thesis into a book was a great and inspiring experience.

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