

# Principles of International Investment Law

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light of the clear intention of the respondent to deprive CME of its contractual rights. In *Enron v Argentina*<sup>467</sup> the Tribunal denied the existence of arbitrariness since the measures adopted 'were what the Government believed and understood was the best response to the unfolding crisis'.<sup>468</sup> By contrast, in *Occidental v Ecuador*,<sup>469</sup> the Tribunal determined that the standard was violated 'to some extent' not because of certain impugned actions but because of the 'very confusion and lack of clarity that resulted in some form of arbitrariness, even if not intended'.<sup>470</sup>

*cc. Relationship to fair and equitable treatment and to customary international law*

Given the nature and the breadth of the concept of arbitrariness, it is not surprising that it has been said that any arbitrary action will also violate the standard of fair and equitable treatment.<sup>471</sup> The matter has surfaced especially under the NAFTA which contains a clause on fair and equitable treatment (Art 1105),<sup>472</sup> but no explicit prohibition of arbitrary treatment. Tribunals established under NAFTA have considered that arbitrary treatment also violates the requirement of fair and equitable treatment.<sup>473</sup> The tendency to merge the two standards can also be found in the application of bilateral treaties.<sup>474</sup>

Despite this tendency, there are weighty arguments in favour of treating the two standards as conceptually different. There is no good reason why treaty drafters would use two different terms when they mean one and the same thing. Equally, it is difficult to see why one standard should be part of the other when the text of the treaties lists them side by side as two standards without indicating that one is merely an emanation of the other. Of course, there may be considerable overlap and one particular set of facts may violate both the FET standard and the rule against arbitrary or discriminatory treatment.<sup>475</sup>

A number of tribunals have, in fact, examined compliance with the standards of fair and equitable treatment and unreasonable or discriminatory treatment

<sup>467</sup> *Enron v Argentina*, Award, 22 May 2007.

<sup>468</sup> At para 281. See also *Sempra v Argentina*, Award, 28 September 2007, para 318.

<sup>469</sup> *Occidental v Ecuador*, Award, 1 July 2004.

<sup>470</sup> At para 163.

<sup>471</sup> S Vascannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 *BYBIL* 133.

<sup>472</sup> See pp 136 et seq.

<sup>473</sup> See eg *SD Myers v Canada*, First Partial Award, 13 November 2000, para 263; *Mondev v United States*, Award, 11 October 2002, para 127; *Waste Management v Mexico*, Final Award, 30 April 2004, para 98.

<sup>474</sup> See *CMS v Argentina*, Award, 12 May 2005, para 290; *Impregilo v Pakistan*, Decision on Jurisdiction, 22 April 2005, paras 264 et seq; *MTD v Chile*, Award, 25 May 2004, para 196; *Noble Ventures v Romania*, Award, 12 October 2005, para 182; *Saluka v Czech Republic*, Partial Award, 17 March 2006, para 460; *PSEG v Turkey*, Award, 19 January 2007, para 261; *MCI v Ecuador*, Award, 31 July 2007, paras 366–7, 371; *Rumeli v Kazakhstan*, Award, 29 July 2008, paras 679–81; *Lemire v Ukraine*, Decision on Liability, 14 January 2010, paras 259, 356–7, 418.

<sup>475</sup> *Lemire v Ukraine*, Decision on Liability, 14 January 2010, para 259.

separately.<sup>476</sup> Although there is often no explicit discussion of the relationship of the two concepts, their sequential and separate treatment in awards indicates that the tribunals regarded them as distinct standards.

The Tribunal in *Duke Energy v Ecuador*<sup>477</sup> had to interpret a provision in the Ecuador-US BIT that afforded protection against impairment by arbitrary or discriminatory measures. The respondent argued that this was part of the FET standard; however, the Tribunal disagreed and said:

In view of the structure of the provisions of the BIT, the Tribunal has difficulty following Ecuador's argument that there is only one concept of fair and equitable treatment which encompasses a non-impairment notion. The Tribunal will thus make a separate determination to decide whether the contested measures were arbitrary...<sup>478</sup>

As with all broad standards in BITs, the relationship of the rule to customary international law may be raised. The traditional understanding of the customary minimum standard seems to have covered actions deemed arbitrary.<sup>479</sup> It would follow that the treaty standard against arbitrariness is also covered by customary international law.<sup>480</sup>

**(b) Discriminatory measures**

Discrimination can take a number of forms. It can be based on race, religion, political affiliation, disability, and a number of other criteria. In the context of the treatment of foreign investment, the most frequent problem is discrimination on the basis of nationality. Consequently, most of the practice dealing with discrimination focuses on nationality. In fact, discrimination on the basis of nationality is addressed in investment treaties by way of two specific standards: national treatment and MFN treatment. These standards are dealt with in separate sections of this chapter.<sup>481</sup> But this does not mean that the issue of discrimination is necessarily restricted to nationality.

<sup>476</sup> See *Occidental v Ecuador*, Award, 1 July 2004, paras 159–66; *Lauder v Czech Republic*, Award, 3 September 2001, paras 214–88; *Genin v Estonia*, Award, 25 June 2001, paras 368–71; *Noble Ventures v Romania*, Award, 11 October 2005, paras 175–80; *Azurix v Argentina*, Award, 14 July 2006, paras 385–93; *LG&E v Argentina*, Decision on Liability, 3 October 2006, paras 162–3; *Siemens v Argentina*, Award, 6 February 2007, paras 310–21; *BG Group v Argentina*, Final Award, 24 December 2007, para 342; *Biwater Gauff v Tanzania*, Award, 24 July 2008, paras 586–676; *Plama v Bulgaria*, Award, 27 August 2008, para 184.

<sup>477</sup> *Duke Energy v Ecuador*, Award, 18 August 2008, paras 367–83.

<sup>478</sup> At para 377.

<sup>479</sup> See A Verdross, 'Les règles internationales concernant le traitement des étrangers' (1931-III) 37 *Collected Courses of the Hague Academy of International Law* 323, 358–9; *Restatement (Third) of the Foreign Relations Law of the United States*, vol 2 (1986) 196–7.

<sup>480</sup> As regards the understanding of the concept in the WTO, see *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, 38 ILM 121 (1999).

<sup>481</sup> See Sections 8 and 9.