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7. Treatment of Investors

1. Basis and Character of Treatment Obligations

A. The Rule of Law in International Investment Protection

7.01 Of all the catalogue of rights vouchsafed to investors under bilateral investment treaties (BITs), none has proved more elusive, or occasioned as much recent controversy as the guarantee of 'fair and equitable treatment'. (1) The provision lies at the centre of a set of interlocking treatment obligations that will form the subject of this chapter: the non-contingent standards of fair and equitable treatment, full protection and security; and the contingent standards of national treatment, most-favoured-nation treatment (MFN), and non-discrimination. (2)

7.02 The assurance of fair and equitable treatment simply provides, with Delphic economy of language, that investments shall 'at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory [of the reciprocating host State]'. (3)

7.03 No doubt the beguiling simplicity of the phrase secured its easy passage into treaty practice. What State seeking to attract foreign investment could fail to agree to make such provision? Indeed, what State would concede that its legal system might fail to provide such an elementary protection? Yet, despite having been included almost universally in the modern investment treaty lexicon, this guarantee has until the recent development of investment treaty arbitration received scant attention or analysis. The extent of the neglect was such that one commentator concluded an exhaustive survey of the practice in 1999 by observing 'the paucity of jurisprudence'. (4) BITs, he observed 'are yet to generate a substantial flow of international litigation, and, even where litigation has occurred, the fair and equitable standard has not been decisive in the proceedings.' (5) The most that could be said on the meaning of the standard was the tentative conclusion that it barred 'host countries from treating foreign investors unfairly and inequitably'. (6)

7.04 The investment arbitration experience has turned a drought into a flood. It has produced an important stream of jurisprudence, in which the fair and equitable standard has often emerged as the outcome-decisive right, such that it has been described as 'the most important and frequently adjudicated question in international investment law.' (7) National treatment and MFN treatment have also figured in recent awards. But a determination of their content has, on the whole, proved less controversial, (8) even if their application has on occasion produced results that may not have been anticipated
P 269 by host State or investor. (9) By ● contrast, fair and equitable treatment has emerged from the shadows of investment law to become a potent tool in the assessment of the adequacy of the judicial and administrative systems of host States. For that very reason, its dangers have also become apparent, perhaps especially when the legal systems placed under the microscope of the international arbitral process are those of developed Western States.

7.05 In the course of this process, arbitral tribunals have had to determine for themselves the content of the concept and its application to the many and various contexts of the State regulation of the modern globalised economy. Hazardous waste disposal in Mexico; (10) populist television channels in the Czech Republic; (11) the building of a new town in Chile; (12) and the conduct of a jury trial in Mississippi (13) have all provoked international investment disputes. These cases of the early twenty-first century are a far cry from the mistreatment of aliens in jail, or the failures in the investigation of crimes against the person, which populate the early twentieth-century reports of arbitral awards.

7.06 The transformation of the standard in the theatre of rights and duties that is international arbitration has exposed the relative poverty of the interpretation process when applied to the open-textured language of an investment treaty. Tribunals have turned to dictionaries for definitions of the concepts of 'fair' and 'equitable'. But, because these terms are general descriptors of the qualities of a system of justice, it is essential first to ask: by reference to what system of law are these concepts to derive their meaning? One can look in vain for guidance from *travaux préparatoires*. The bilateral process does not typically produce informative guidance on the public record as to the parties' intentions, and when such information does become available, (14) the results are often inconclusive.

7.07 The process of the adjudication of these rights has also exposed considerable divergencies in approach, both between arbitrators, and between arbitrators and contracting States. Some of these differences have had serious consequences for litigants, as well as for the future development of the law in this area. In *Metalclad v Mexico*, the Tribunal's finding that Mexico had failed to provide such treatment because

7.177 These categories should not be treated as a code. They are a useful means of giving more specific content to the circumstances in which an administrative failure by the host State may rise to the level of an international delict. As such they serve to distinguish a merely unfavourable or disappointing outcome of an administrative process from one that fails to meet a baseline of internationally acceptable State conduct.

7.178 In making such an evaluation, the tribunal must consider both the private interests of the investor and the public interest factors that may justify the State action. An objective basis for the State's decision will likely support compliance with the standard, unless the decision had a disproportionate impact on the particular investor. In other cases, tribunals have declined to find a breach, because the alleged right for which the investor contended had no basis in international law.

7.179 Legitimate expectations The doctrine of legitimate expectations is concerned with due process in administrative decision-making: ensuring the consistent application of the law and enforcing representations by the host State where these were made specifically enough to the particular investor to justify reliance. (280) It is a relevant factor in the application of the investment treaty's guarantee of fair and equitable treatment and does not supply an independent treaty standard of its own. (281) Seen in this way, legitimate expectations supports the application of host State law and the liberty of the host State to determine the content of that law. (282) It does not substitute for it.

7.180 In the first phase of investment treaty arbitral case law, a number of tribunals
P 315 referred to the formulation of legitimate expectations given in *Tecmed v Mexico*:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. (283)

7.181 This formulation cannot be taken at face value. As Douglas put it:

> The Tecmed 'standard' is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain. But in the aftermath of the tribunal's correct finding of liability in Tecmed, the quoted obiter dictum in that award, unsupported by any authority, is now frequently cited by tribunals as the only and therefore definitive authority for the requirements of fair and equitable treatment. (284)

7.182 Aspects of the *Tecmed* formulation have also attracted criticism from later arbitral tribunals and annulment committees. The Annulment Committee in *MTD v Chile* considered *Tecmed*'s reliance on the foreign investor's expectations as the source of the host State's obligations to be questionable. The Committee pointed out that the obligations in fact derive from the terms of the applicable investment treaty. (285) Although the Committee did not ultimately decide that the Tribunal had manifestly exceeded its powers on this point, (286) the critique of the broad definition in *Tecmed* did not go unnoticed by other tribunals. (287)

7.183 The interpretation of the treaty standard is guided by the general principle of good faith and the requirement to take account of other relevant rules of international law applicable in the relations between the parties. This includes all of the relevant sources of international law, including general principles of law. The protection of legitimate expectations within carefully defined limits is a general principle of law, anchored in the world's major legal systems and linked to the general principle of good faith in public international law. (288) As such, tribunals have endorsed comparative reference to the scope and limits of the principle in relation to the exercise of State power in public law
P 316 as a benchmark. (289) In this context, the doctrine is concerned with protection from the abuse of administrative powers when the private party has received precise and specific representations from the public authority. (290) Only exceptionally has the doctrine been the basis of redress when the State's legislative action was at stake, given the importance of the States' freedom of action to legislate in the public interest. (291)

7.184 In order to find the existence of a legitimate expectation, tribunals have generally required the presence of three (interlocking) elements:

(a) The existence of a promise or assurance attributable to a competent organ or representative of the State, which may be explicit or implicit;