

## 1 Introduction

'International economic relations are front page news.'<sup>1</sup> In the aftermath of one of the severest economic crises of the ever-globalising world economy, Schwarzenberger's statement has forfeited nothing of its truth. In the process of managing economic globalisation and crises, international investment law plays an important role. This area of law has contributed many front page stories over the past decades and, most likely, will continue to do so in the future. While early international investment stories often had a post-colonial plot, the emergence of multinational corporations, post-Cold War economic liberalisation, the proliferation of international investment agreements and the establishment of a relatively privatised system of investment dispute settlement procedures have injected the system with new dynamics. Recurring themes of these stories are the perpetual quest for new markets, resources and production sites, as well as the ongoing competition between states to receive private capital flows to foster their economic development. If at the end of a story a conflict between a foreign investor and a host state arises, this may involve a large scale of possible actions, reaching from the technocratic fine-tuning of complex economic regulations to dark politico-economic intrigues or dramatic economic shifts with a whiff of revolution in the air.

In such investment conflicts, the guarantee to provide 'fair and equitable treatment' to foreign investors often takes centre stage. This is especially because fair and equitable treatment is enshrined in virtually all international investment agreements having increased enormously in number and importance. Thus international investment law has

<sup>1</sup> G. Schwarzenberger, 'The Province and Standards of International Economic Law', *Int'l L.Q.* 2 (1948), p. 402 at p. 402.

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developed from a highly specialised field of international law possessing a marginal scope of application to one that is of augmenting relevance for international economic relations as a whole. The success story of international investment law is mainly based on the fact that the pertaining treaties comprise a relatively simple set of standards protecting foreign investments abroad. Besides fair and equitable treatment, such standards guarantee, for instance, the payment of compensation in case of expropriation, non-discriminatory treatment, most-favoured-nation and national treatment, full protection and security as well as the abidance to contractual promises between the foreign investor and the host state.

Another important feature contributing to the ascent and singularity of international investment law is constituted by the establishment of an international and independent arbitration procedure. In this vein, many international investment agreements endow foreign investors with the right to sue the host state for an alleged violation of an investment protection standard. The investment arbitration system constitutes an interesting example revealing the legal subjectivity of individuals in international law. Such a dispute settlement mechanism promises, on the one hand, a level of neutrality that appears unachievable before domestic courts and, on the other hand, a degree of efficacy and economic professionalism that is often missing in other areas of international law. Accordingly, the investment arbitration system has produced, within the last decade, a rapidly increasing number of awards dynamically developing international investment law.

Despite this dynamic development, the evolution of international investment law has also faced noticeable obstacles, especially with regard to the negotiation of multilateral investment agreements. These setbacks are mainly due to long-standing political controversies on the protection of foreign investors between traditionally capital-exporting, industrialised countries and traditionally capital-importing, developing countries. Interestingly, political concerns about the system of investment protection have recently also been raised by major developed countries. Even though these controversies could not stop the rise of international investment law in the past, they are nevertheless evinced by the fact that international investment law is still mainly composed of a network of bilateral investment treaties. Additionally, many of the substantive investment protection standards appear to have been intentionally drafted in vague terms in order to conceal differing perceptions on the value of investment protection.

This vagueness is both a blessing and a curse for international investment law. While it ensures the adaptability and flexibility of the investment protection standards, it also entails a certain degree of indeterminacy and even vacuity. Fair and equitable treatment appears as the most vaguely formulated investment protection standard. As such, although this guarantee is frequently discussed in a rapidly growing body of investment arbitration awards and scholarly literature,<sup>2</sup> it is surrounded by some of the most controversial questions of international investment law. Thereby, each of the awards or treatises is confronted with the same challenge to extract some kind of meaning from the terms 'fair and equitable treatment'.

Addressing this challenge by looking up terms in a law dictionary reveals, at best, that the terms 'fair' and 'equitable' are almost devoid of any substantial meaning. This textual indeterminacy, combined with some early far-reaching arbitral decisions, has turned the guarantee of fair and equitable treatment into a prominent cause of action inviting the advancement of an almost infinite range of arguments related to a perceived unfairness or injustice in the investor-state relationship. In the meantime, the debate concerning fair and equitable treatment is beginning to display certain argumentative patterns and sub-elements in which arbitral tribunals have established a violation of fair and

<sup>2</sup> See the following selection: S. Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice', *BYIL* 70 (1999), p. 99; UNCTAD, *Fair and Equitable Treatment*, UNCTAD/ITE/IIT/11 (Vol. III) (1999); C. Yannaca-Small, 'Fair and Equitable Treatment in International Investment Law', *OECD Working Papers on International Investment* (2004), No. 3; C. Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', *JWIT* 6 (2005), p. 357; R. Dolzer, 'Fair and Equitable Treatment', *Int'l Law* 39 (2005), p. 87; B. Choudhury, 'Evolution or Devolution? – Defining Fair and Equitable Treatment in International Investment Law', *JWIT* 6 (2005), p. 297; M. Kantor, 'Fair and Equitable Treatment', *The Law & Practice of International Courts and Tribunals* 5 (2006), p. 231; M. Klein Bronfman, 'Fair and Equitable Treatment: An Evolving Standard', *Max Planck UNYB* 10 (2006), p. 609; R. Kreindler, 'Fair and Equitable Treatment – A Comparative International Law Approach', *TDM* 3 (2006), issue 3; P. Muchlinski, "'Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard', *ICLQ* 55 (2006), p. 527; S.W. Schill, "Fair and Equitable Treatment" as an Embodiment of the Rule of Law', in R. Hofmann and C. Tams (eds.), *The International Convention on the Settlement of Investment Disputes (ICSID)* (2007), p. 31; K. Hobér, 'Fair and Equitable Treatment', *TDM* 4 (2007), issue 6; G. Mayeda, 'Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties', *JWIT* 41 (2007), p. 273; T.J. Westcott, 'Recent Practice on Fair and Equitable Treatment', *JWIT* 8 (2007), p. 409; A. Orakhelashvili, 'The Normative Basis of "Fair and Equitable Treatment"', *ArchVR* 46 (2008), p. 74; and I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008).

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equitable treatment. Nevertheless, the scope and conceptual basis of fair and equitable treatment remain controversial. It is especially contentious as to what extent fair and equitable treatment should enable arbitral tribunals to review sovereign acts of host states interfering with the business of foreign investors. While the opposing sides repeat their arguments in a sedulous manner, they seem to achieve hardly any progress in their common challenge to 'find' the concrete meaning of fair and equitable treatment.

Therefore, this book proposes a shift in the way in which fair and equitable treatment is addressed. Rather than trying to find an intrinsic meaning of fair and equitable treatment, it attempts to track its development and search for conceptual schemes underlying this norm that are capable of justifying arbitral decisions and constructions of fair and equitable treatment. Thereby, the conceptual schemes consist of arguments and patterns of arguments being adduced to defend arbitral or scholarly positions with regard to the normative content and contours of fair and equitable treatment. The process of developing an adequate conceptual basis of fair and equitable treatment therefore includes a critical examination of the validity and persuasiveness of these arguments.

In the following chapters, such a conceptual basis is developed in an eclectic fashion and informed by various conceptual approaches and doctrines that are selectively combined in order to provide a more comprehensive picture of fair and equitable treatment. In this vein, the conceptual basis must take into account the vague nature of fair and equitable treatment and discuss the function of the norm in the context of a relatively fragmented international legal system. Furthermore, the conceptual basis of fair and equitable treatment is explored in light of general theories of justice and more specific theories on the rational balancing of competing arguments and interests.

To this end, the book outlines in Part I some fundamentals for the construction of fair and equitable treatment and addresses the basic question from what sources the arguments to justify a particular decision may be derived. The latter question is especially discussed in light of the ongoing controversy surrounding the equation of fair and equitable treatment with the so-called minimum standard of customary international law and the phenomenon of fragmentation of international law. Part II primarily examines which argumentative patterns for the justification of decisions on fair and equitable treatment exist and how a just balance between competing arguments may be achieved. Thereby, the

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emerging sub-elements of fair and equitable treatment and the pertaining arbitral decisions are reviewed using a comparative law background. Subsequently, Part III seeks to specify the position of this conceptual scheme of fair and equitable treatment in the broader context of the international legal system. Accordingly, the position of fair and equitable treatment and its sub-elements is assessed in relation to the system of international law sources as well as the system of other conventional standards of investment protection. Finally, the role of fair and equitable treatment in relation to the idea of constitutionalism in international investment law is discussed.

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## PART I

# The construction of fair and equitable treatment

## 2 Fundamentals for the construction of fair and equitable treatment

### A Conventional basis of fair and equitable treatment

'Fair and equitable treatment' is, at first, a conventional rule that is found in international investment treaties. Any analysis and construction of fair and equitable treatment therefore requires the identification of the conventional basis of such a norm and the different approaches to the formulation of particular clauses. Thereby, while most multilateral and bilateral investment agreements seem to deal with fair and equitable treatment, there is no commonly agreed clause with a fixed wording entailing fair and equitable treatment. However, the structure and content of bilateral investment treaties (BITs) exhibit notable similarities and hence allow for some type of generalisation.<sup>3</sup> In respect of multilateral agreements, this also appears true, since these agreements have mainly incorporated the pattern already established in BITs.<sup>4</sup> Nevertheless, certain variations in relation to the concrete drafting approach and the embedding of fair and equitable treatment into an investment agreement exist, which shall be outlined in the following.

#### 1 No reference to fair and equitable treatment

Fair and equitable treatment is acknowledged as one of the most commonly used standards in investment agreements.<sup>5</sup> However, there are several instances, especially in the early days of investment treaty practice, in which the standard has been omitted. These omissions do

<sup>3</sup> See M. Sornarajah, *The International Law on Foreign Investment*, 2nd edn (2004), pp. 217–218; A. F. Lowenfeld, *International Economic Law*, 2nd edn (2008), p. 555; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* (2009), p. 65; and S. W. Schill, *The Multilateralization of International Investment Law* (2009), pp. 117–120.

<sup>4</sup> See UNCTAD, *International Investment Rule-Making*, UNCTAD/ITE/IIT2007/3 (2008), p. 19.

<sup>5</sup> See, e.g. R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), p. 58.

not seem to be owed to any aversions against the standard, but rather because the general pattern was not fully established when most of these treaties were concluded.<sup>6</sup> Thus, a number of the BITs negotiated, for example, by the Federal Republic of Germany until the early 1960s do not contain references to fair and equitable treatment.<sup>7</sup> Although some BITs which were concluded later, like the 1977 Japan-Egypt BIT, do not incorporate the standard either, BITs without a reference to fair and equitable treatment continue to be a rare exception.<sup>8</sup> As regards multilateral agreements, it is noticeable that several agreements affecting international investments do not contain references to fair and equitable treatment. In particular, such a reference is missing in trade agreements such as the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Investment Measures (TRIMS). While these instruments do not belong to the inner circle of international investment agreements, they have various elements in common, namely the stipulation of most-favoured-nation treatment and national treatment.<sup>9</sup>

Therefore, where the standard of fair and equitable treatment is not incorporated into an investment agreement, a foreign investor in principle may not recur on the level of protection provided by it. In these cases, the foreign investor can only rely on the other standards of treatment encompassed by the particular investment agreement. However, in case a most-favoured-nation clause is available, an investor may also rely on fair and equitable treatment

<sup>6</sup> Vasciannie (above fn. 2), pp. 113–114.

<sup>7</sup> Among them are, e.g. the first modern BIT between Germany and Pakistan of 1959, and other BITs between Germany and Malaysia, Liberia, Morocco, Thailand (renewed in 2002 containing an express reference to fair and equitable treatment), Togo and Guinea; see M. I. Khalil, 'Treatment of Foreign Investment in Bilateral Investment Treaties', *ICSID Rev. – FILJ* 8 (1992), p. 339, at pp. 351–355 detecting that only 28 out of 335 BITs surveyed do not contain the standard; see also Vasciannie (above fn. 2), pp. 126–127; and Tudor (above fn. 2), p. 23, stating that out of 365 BITs reviewed only 19 did not refer to fair and equitable treatment.

<sup>8</sup> Confer UNCTAD (above fn. 2), p. 23; and UNCTAD, *Bilateral Investment Treaties 1995–2006*, UNCTAD/ITE/IIT/2006/5 (2007), p. 28.

<sup>9</sup> See F. Tschofen, 'Multilateral Approaches to the Treatment of Foreign Investment', *ICSID Rev. – FILJ* 8 (1992), p. 384, at pp. 401–404, providing for a more complete list of multilateral agreements and the standards of treatment entailed; see also UNCTAD (above fn. 2), p. 23; and R. Dolzer, 'Wirtschaft und Kultur im Völkerrecht', in W. Graf Vitzthum (ed.), *Völkerrecht*, 4th edn (2007), p. 491, at pp. 509–510, mn. 26–28, admittedly notes that the idea of fairness, although differently shaped, is also included in such trade agreements.