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978-0-521-19771-7 - 'Fair and Equitable Treatment' in International Investment Law

Roland Kläger

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## **'Fair and Equitable Treatment' in International Investment Law**

A breach of fair and equitable treatment is alleged in almost every investor-state dispute. It has therefore become a controversial norm, which touches many questions at the heart of general international law. Roland Kläger sheds light on these controversies by exploring the deeper doctrinal foundations of fair and equitable treatment and reviewing its contentious relationship with the international minimum standard. The norm is also discussed in light of the fragmentation of international law, theories of international justice and rational balancing, and the idea of constitutionalism in international law. In this vein, a shift in the way of addressing fair and equitable treatment is proposed by focusing on the process of justificatory reasoning.

ROLAND KLÄGER is currently a law clerk at the Higher Regional Court of Frankfurt and a research assistant with Clifford Chance, Frankfurt. After his legal studies at the University of Freiburg, he received a Dr. iur. from the University of Tübingen. He was also a research fellow at the Institute for Public Law, University of Freiburg, and a visiting fellow at the Lauterpacht Centre for International Law, University of Cambridge.

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## Foreword

International investment law has grown considerably in importance in recent years, as evidenced by the great increase in the number of international investment agreements, in the scholarly literature and even in the number of awards. Nevertheless, the doctrinal foundations of international investment law have remained highly contested: it is easier to draw up a list of disputed than agreed propositions. Dr Kläger's work seeks to address this problem in respect of fair and equitable treatment, a central norm of international investment law. In doing so he discusses fair and equitable treatment in relation to general theories of international law, legal method and even international justice.

In Part I he argues that exploring these doctrinal foundations gives a broader justificatory basis to the fair and equitable treatment standard and thereby conduces to greater consistency and legal certainty. This contrasts with a persistent trend of opinion that fair and equitable treatment is irreducibly vague, and that it authorises international tribunals to conduct an 'all things considered' examination of host State action or inaction. On this view, arguments derived from the general rules of interpretation are of little use in the application of fair and equitable treatment: the only important question is what the current tribunal decides happened and whether it was – at some adjectival level – unfair or inequitable to the investor. By way of reaction, other tribunals (notably in *Glamis Gold*) have constricted the meaning of the formula to an outdated and excessively rigid version of an international minimum standard, based on cases (especially *Neer*) involving a distinct factual matrix. The oversimplification of traditional approaches towards fair and equitable treatment highlights the growing disunity of the law.

The discussion of 'fragmentation', as it has come to be called (as if international law had once been unfragmented and immaculate),

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suggests an alternative. Dr Kläger suggests ways to integrate arguments from other sub-systems of international law into international investment law. On this view, vague provisions like fair and equitable treatment serve as gateway clauses allowing a systemic exchange between different sub-systems.

Part II looks at the actual argumentation of arbitral tribunals and the ideas of justice behind their decisions. The notion of fair and equitable treatment already implies an affiliation to underlying perceptions of justice. By reviewing international theories of justice, he argues that the application of fair and equitable treatment is the result of a process of balancing of often conflicting arguments and the competing poles of stability and discretion. It is suggested that there is already a series of argumentation patterns or *topoi* which may be considered as sub-elements or principles of fair and equitable treatment. These principles are further explored with respect to their comparative law background, their contours in arbitral jurisprudence as well as their role and weight in decision making. Thereby, it is argued that the structure, intensity and rationality of arbitral review may converge to achieve a convincing construction of fair and equitable treatment.

In a final Part, the book tries to assess the impact of this conceptual scheme of fair and equitable treatment in the broader context of the international legal system. The author argues that, within the system of international law sources, fair and equitable treatment has not undergone transformation of status so as to become a conventional norm: in other words, he rejects the customary law character of fair and equitable treatment. Nevertheless, the principles underlying the idea of fair and equitable treatment disclose an emerging justificatory deep-structure that resembles some elements of a process of constitutionalisation in this area of law.

This is a valuable attempt to give some rigour to a term which has sometimes seemed devoid of meaning and a jurisdiction consequently controversial and insecure. Whether one shares its conclusions, its aim is surely right – and its appearance in Cambridge Studies in International and Comparative Law consequently to be welcomed.

James Crawford  
Lauterpacht Centre for International Law  
University of Cambridge

20 April 2011

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Moreover, I would like to thank Tillmann Rudolf Braun, MPA, and Joachim Steffens for inducting me into the secrets of bilateral investment treaty negotiations at the German Federal Ministry of Economics and Technology. Another important and inspiring experience in the course of toiling over this book has been a stay at the Lauterpacht Centre for International Law at the University of Cambridge. I was fortunate to be a Visiting Fellow at the Centre, offering a great opportunity to have a stimulating exchange with international law scholars from all over the world. Additionally, I am grateful to Isolde Zeiler for her organisational support, as well as to Lewis Enim for language advice. Finally, I would like to thank my parents, my brother, the entire family and Christine Löhr for enabling my academic expeditions and for keeping me grounded at the same time.

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## Abbreviations

AJIL	American Journal of International Law
AJIL Spec. Suppl.	AJIL Special Supplement
ALI	The American Law Institute
Am. U. Int'l L. Rev.	American University International Law Review
Arb. Int'l	International Arbitration
ArchVR	<i>Archiv des Völkerrechts</i>
ARSP	<i>Archiv für Rechts- und Sozialphilosophie</i>
ASIL	American Society of International Law
ASIL Proc.	ASIL Proceedings of the Annual Meeting
Asper Rev. Int'l Bus. & Trade L.	Asper Review for International Business and Trade Law
AWD	Außenwirtschaftsdienst des Betriebs-Beraters
BCSC	Supreme Court of British Columbia
BIICL	British Institute of International and Comparative Law
BIT	Bilateral investment treaty
Bus. L. Brief (Am. U.)	Business Law Brief (American University)
BYIL	British Yearbook of International Law
Cal. L. Rev.	California Law Review
Can. Bus. L. J.	Canadian Business Law Journal
CARICOM	Caribbean Common Market
Chicago J. Int'l L.	Chicago Journal of International Law
Chinese JIL	Chinese Journal of International Law
CMLR	Common Market Law Review
Cmdnd	Command
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review

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COMESA	Common Market for Eastern and Southern Africa
Conn. J. Int'l L.	Connecticut Journal of International Law
Cornell Int'l L.J.	Cornell International Law Journal
DR-CAFTA	Central America-Dominican Republic-United States Free Trade Agreement
Duke L.J.	Duke Law Journal
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
Ecology L. Q.	Ecology Law Quarterly
ECR	European Court Reports
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
EJIL	European Journal of International Law
Ent. L. R.	Entertainment Law Review
EU	European Union
EuR	<i>Europarecht</i>
EuZW	<i>Europäische Zeitschrift für Wirtschaftsrecht</i>
FCN treaty	Treaty of friendship, commerce and navigation
FDI	foreign direct investment
Finnish YIL	Finnish Yearbook of International Law
Fla J. Int'l L.	Florida Journal of International Law
Fletcher F. World Aff.	The Fletcher Forum of World Affairs
Fordham Int'l L.J.	Fordham International Law Journal
Fordham L. Rev.	Fordham Law Review
FTA	Free Trade Agreement
FTC	Free Trade Commission
Ga L. Rev.	Georgia Law Review
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	Grand Chamber
Geo. Int'l Env'tl L. Rev.	Georgetown International Environmental Law Review
Geo. Mason L. Rev.	George Mason Law Review
German L.J.	German Law Journal
GYIL	German Yearbook of International Law
Harv. Int'l L.J.	Harvard International Law Journal

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Harv. L. Rev.	Harvard Law Review
Hastings W.-N. W.	Hastings West-Northwest Journal of Environmental Law and Policy
J. Envtl L. & Pol'y	International Chamber of Commerce
ICC	International Council for Commercial Arbitration
ICCA	International Court of Justice
ICJ	International and Comparative Law Quarterly
ICLQ	International Centre for Settlement of Investment Disputes
ICSID	ICSID Review – Foreign Investment Law Journal
ICSID Rev. – FILJ	international investment agreement
IIA	Institute for International Law and Justice
IIJ	International Institute for Sustainable Development
IISD	International Law Association
ILA	International Law Commission
ILC	International Legal Materials
ILM	International Labour Organization
ILO	ILSA Journal of International and Comparative Law
ILSA J. Int'l & Comp. L.	International Monetary Fund
IMF	Indiana Journal of Global Legal Studies
Ind. J. Global Legal Stud.	International Arbitration Law Review
Int. ALR	International Journal of Cultural Property
Int. J. of Cultural Property	The International Lawyer
Int'l Law.	International Law Quarterly
Int'l L. Q.	International Tax & Business Lawyer
Int'l Tax & Bus. Law.	International Trade Law & Regulation
Int. TLR	Iowa Law Review
Iowa L. Rev.	International Organization for Standardization
ISO	International Trade Organization
ITO	Journal of International Economic Law
J. Int'l Econ. L.	Journal of Transnational Law & Policy
J. Transnat'l L. & Pol'y	Journal of World Investment & Trade
JWIT	

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JWT	Journal of World Trade
JZ	<i>Juristenzeitung</i>
L. & Bus. Rev. Am.	Law and Business Review of the Americas
Law & Contemp. Probs.	Law and Contemporary Problems
Law & Pol'y Int'l Bus.	Law and Policy in International Business
Leiden J. Int'l L.	Leiden Journal of International Law
Maastricht J. Europ. & Comp. L.	Maastricht Journal of European and Comparative Law
MAI	Multilateral Agreement on Investment
Manchester J. Int'l Econ. L.	Manchester Journal of International Economic Law
Max Planck UNYB	Max Planck Yearbook of United Nations Law
MERCOSUR	Mercado Común del Cono Sur (Southern Cone Common Market)
Mich. J. Int'l L.	Michigan Journal of International Law
Mich. L. Rev.	Michigan Law Review
MIGA	Multilateral Investment Guarantee Agency
Minn. J. Global Trade	Minnesota Journal of Global Trade
Minn. J. Int'l L.	Minnesota Journal of International Law
Minn. L. Rev.	Minnesota Law Review
mn.	Margin number
NAFTA	North American Free Trade Agreement
NAFTA FTC	NAFTA Free Trade Commission
N. C. L. Rev.	North Carolina Law Review
NILR	Netherlands International Law Review
NPM	non-precluded measures
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law and Business
NYU Env'tl L. J.	New York University Environmental Law Journal
NYU J. Int'l L. & Pol.	New York University Journal of International Law and Politics
OECD	Organization for Economic Cooperation and Development
OSPAR	Oslo/Paris Convention (for the Protection of the Marine Environment of the North-East Atlantic)
Pace Env'tl L. Rev.	Pace Environmental Law Review

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Pac. McGeorge Bus. & Dev. L. J.	Pacific McGeorge Global Business & Development Law Journal
PCA	Permanent Court of Arbitration
PCB	polychlorinated biphenyl
RdC	<i>Recueil des Cours</i>
RGDIP	<i>Revue Générale de Droit International Public</i>
RIW	<i>Recht der internationalen Wirtschaft</i>
SCC	Stockholm Chamber of Commerce
SchiedsVZ	<i>Zeitschrift für Schiedsverfahren</i>
SLA	Softwood Lumber Agreement
St John's J. Legal Comment.	St John's Journal of Legal Commentary
Suffolk Transnat'l L. Rev.	Suffolk Transnational Law Review
TEU	Treaty on European Union
TDM	Transnational Dispute Management
Tex. Int'l L. J.	Texas International Law Journal
TFEU	Treaty on the Functioning of the European Union
Touro Int'l L. Rev.	Touro International Law Review
TRIMS	Agreement on Trade-Related Aspects of Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
U. C. Davis J. Int'l L. & Pol'y	U. C. Davis Journal of International Law and Policy
UCLA J. Int'l L. & Foreign Aff.	UCLA Journal of International Law and Foreign Affairs
U. Miami Inter-Am. L. Rev.	University of Miami Inter-American Law Review
U. Miami Int'l & Comp. L. Rev.	University of Miami International and Comparative Law Review
UN	United Nations
UNESCO	UN Educational, Scientific and Cultural Organization
UNCITRAL	UN Commission on International Trade Law
UNCTAD	UN Conference on Trade and Development
UNESCO	United Nations Educational, Scientific, and Cultural Organization



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UN RIAA	UN Reports of International Arbitral Awards
UNTS	United Nations Treaty Series
U. Pa J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
Urb. Law.	The Urban Lawyer
US	United States
USD	US dollar
US PPI	US Producer Price Index
Va J. Int'l L.	Virginia Journal of International Law
VAT	value-added tax
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
Wis. L. Rev.	Wisconsin Law Review
VwVfG	Verwaltungsverfahrensgesetz (German Code of Administrative Procedure)
WTO	World Trade Organization
Yale J. Int'l L.	Yale Journal of International Law
Yale L. J.	Yale Law Journal
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>