Fair and Equitable Treatment by **United Nations Conference on Trade and Development** [Geneva United Nations, 1999, viii + 75 pages, ISBN 92-1-1112454-9]

National Treatment by **United Nations Conference on Trade and Development** [Geneva, United Nations, 1999, x + 85 pages, ISBN 91-1-112455-7]

This review examines two publications, the first on *Fair and Equitable Treatment* and the second on *National Treatment.* They are the latest Issues Papers in a Series published by the United Nations Conference on Trade and Development ("UNCTAD").

UNCTAD was established in 1964 as the principal organ of the General Assembly on trade and development. Its main goals are to "maximise the trade, investment and development opportunities of developing states and to help them face challenges arising from globalisation and integrate into the world economy, on an equitable basis."[1] As a part of this brief, UNCTAD has a work program that assists "developing countries to participate as effectively as possible in international investment rulemaking at the bilateral, regional, plurilateral and multilateral levels."[2] The Series on international investment agreements forms part of this work program.

The Series covers 27 topics in international investment agreements (commonly known as "IIAs") and the topics themselves are dealt with in separate handbooks that are presented "in a manner that is easily accessible to end-users".[3] The other topics are:[4]

> (1) Admission and Establishment, (2) Competition, (3) Dispute Settlement (investor – State), (4) Dispute Settlement (State – State), (5) Employment, (6) Environment, (7) Foreign Direct Investment and Development, (8) Funds Transfer (9) Home Country Measures, (10) Host Country Operational Measures, (11) Illicit Payments, (12) Incentives, (13) Investment-related Trade Measures, (14) Lessons from

[1] UNCTAD, "A partnership for growth and development" at http://www.unctad.org/en/aboutorg (visited September 1999).
[2] National Treatment, Preface.
[3] For example see National Treatment at iii.
[4] Ibid.

the Uruguay Round, (15) Modalities and Implementation Issues, (16) Most-Favoured-Nation Treatment, (17) Present International Arrangements for Foreign Direct investment: an Overview, (18) Scope and Definition, (19) Social Responsibility, (20) State Contracts, (21) Taking of Property, (22) Taxation, (23) Transfer of Technology, (24) Transfer Pricing, and (25) Transparency.

The titles reflect the contents of the publications. Although the Papers are published individually the issues are closely linked with one another by subject matter.[5] UNCTAD has attempted to overcome the stand-alone effect of the Papers by highlighting these links.[6] Since there is a logical link between the two latest Papers, the subject matter of these two Papers are often found together in international investment agreements.[7]

UNCTAD seeks to further the understanding of transnational corporations (commonly known as "TNCs") and their contribution to the development of international investment and enterprise development.[8] UNCTAD also seeks to create a suitable environment for these activities.[9]

FAIR AND EQUITABLE TREATMENT

The purpose of this Paper is to address the uncertainty in the meaning of "fair and equitable treatment" in investment relations. The Paper is divided into three main Sections. Section 1 begins with a history of the meaning of the expression "fair and equitable treatment" and shows how this expression relates to international investment law.

At least two different views have been advanced on the meaning of the expression. The first is the "plain meaning approach" and the second equates "fair and equitable treatment" with the international minimum standard.[10] The Paper then goes on to explore the positive and negative aspects of each approach.

---

[5] For example see Fair and Equitable Treatment on Interaction with Other Issues and Concepts in Section III at 43-52.
[6] Ibid.
[7] Ibid.
[8] Introductory Notes at ii.
[9] National Treatment at ii.
[10] Fair and Equitable Treatment 10.

A positive feature of the plain meaning approach is its consistency with international rules of interpretation.[11] On the other hand, the expressions "fair" and "equitable" are very subjective. Parties to a treaty may represent different legal traditions and their approaches may be dependent on subjective cultural assumptions.[12] The Paper notes that if the latter approach was accepted then some of the problems of interpretation encountered by the plain meaning approach may be avoided. The reason for this is the assumption that there is a minimum standard accorded to foreign investors and behaviour that falls short of this standard is unacceptable and actionable.[13]

However, as underlined in the Paper "fair and equitable treatment" is not often equated with the international minimum standard. This may indicate that most states believe that "fair and equitable treatment" and the international minimum standard are not equivalent.[14]

Section II of the paper explores the four models used for the fair and equitable treatment standard found in state practice. They are:[15]

1. the exclusion approach (where there is no reference to fair and equitable treatment);
2. the hortatory approach (where fair and equitable treatment is included but the effect is uncertain);
3. the expressly included approach (where reference is made to "fair and equitable", "just and equitable treatment" or "equitable" treatment); and
4. the inclusive approach (where "fair and equitable treatment" is included in conjunction with other related standards such as most-favoured-nation[16] or national treatment).

The use of historical examples in this chapter to illustrate the practical effects of the different models is particularly helpful.

---

[11] Ibid.
[12] At 11.
[13] At 12.
[14] At 13.
[15] See Section II.
[16] Or "MFN".

Section III discusses the interaction of the "fair and equitable" standard with other issues and concepts that arise in investment practice such as funds transfer and illicit payments.[17] The Paper concludes by providing a decisive statement on the usage of fair and equitable treatment in international investment law. It states that it is unlikely that fair and equitable treatment is a part of customary international law.[18] It outlines the different policy options that may be utilised in international investment agreements. The Paper however deliberately stops short of recommending a favoured approach to international dealings. This accords with its stated aim of providing the reader with a balanced analysis of the issues concerned.[19]

NATIONAL TREATMENT

The format of this second publication is similar to the first. The Paper states:[20]

> In the past the Programme on Transnational Corporations was carried out by the United Nations Centre on Transnational Corporations (1975-1992) and the Transnational Corporations and Management Division of the United Nations Department of Economic and Social Development (1992-1993). In 1993 the Program was transferred to the United Nations Conference on Trade and Development.

It is arguable that the national treatment standard is the most important single element of the entire international investment agreement process.[21] Thus, by definition, this standard is the most difficult to achieve owing to the potential political and economic sensitivities involved. This Paper discusses the national treatment standard and seeks to contextualise its place within the liberalisation process, the reason being that many developed nations have adopted a liberalisation attitude. Further, the Paper highlights the fact that no state has granted national treatment without the inclusion of qualifications.[22]

---

[17] At 43.
[18] At 53.
[19] At v.
[20] At ii.
[21] At 1.
[22] At 7.

This Paper is divided into three Sections, followed by a conclusion on the economic and development implications and policy options relevant to national treatment.

Section I provides a useful executive summary for readers with very little or no knowledge in the area. It directs the reader to two contexts within which the national standard may be invoked under international law. The first is known as the "Calvo doctrine". This standard has enjoyed considerable support particularly in the Latin states. The doctrine is concerned with the treatment of aliens and their property, in a manner equivalent to that enjoyed by nationals of the host country under national laws.[23]

In contrast, developed states prefer to use the doctrine of state responsibility for injuries to aliens and their property as developed under customary international law. This establishes a minimum standard of treatment for aliens. If the prevailing national standard falls below the international minimum standard, the alien will be accorded the higher international standard.[24]

Section II highlights potential difficulties that developing states may face if forced to introduce the higher standard. In effect, This would result in national enterprises and transnational companies adopting different approaches, making the former vulnerable *vis-á-vis* the latter. This is because transnational corporations usually own superior technology and wield greater economic influence.[25]

Section II commences with an overview of the four approaches that are generally adopted when national treatment is implemented. Basically, an international investment agreement will either include the standard on national treatment (at various levels) or exclude it. This Section builds upon the issues that are raised in Section I.

There is an exploration of the substantive content of national treatment and examples are given of real situations where the standard was applied. At this point the two ways in which international investment agreements have

---

[23] Ibid.
[24] At 47.
[25] At 19-24.

defined national treatment are presented, and *de jure* and *de facto* national treatment are explored.

The Section concludes with a broad analysis of the various types of exceptions or reservations that states may place on the inclusion of the standard in international investment agreements. Many illustrations are included, all formatted into a box. Whilst the content is helpful, the presentation is sometimes awkward and tends to detract from the natural or logical flow of the text.

Section III is discussed in the context of the fair and equitable standard. This Section covers the interaction of national treatment with other concepts in the Series on international investment agreements. Again, a table is provided to guide the reader to those issues that have the greatest interaction with the national treatment standard.[26]

Section III presents the incorporation of the national standard within the context of treaty making and foreign direct investment or FDI. This proceeds with an overview of the principal issues that arise from the application of the standard to international investment agreements.[27] This Section deals with this interaction, in the nature of links with other issues in the series.[28]

Section IV is the final Section. It concludes that the national treatment "may be interpreted as formal equality of treatment between foreign and domestic enterprises".[29] Here, further reference is had to the implementation of the standard as it applies to developing states and the potential effects it has on their economies in terms of encouraging (or discouraging) investment. Although the Paper offers various options they are really speculative in nature.

GENERAL OBSERVATIONS

It is evident from the two Papers that the Series is mindful that the "end-user" may require the information to be concise and easily understood.

[26] At 43. See also page 280 above.
[27] At 43.
[28] At 44-52.
[29] Brownlie I, Principles of Public International Law (1998, 5th edition, Clarendon Press, Oxford) 522.

This is achieved. The Papers use plain language and a consistent presentation style. On the other hand, the consistent format risks repetition and may become boring. For example, the equation of fair and equitable treatment to the international minimum standard is dealt with three times in the text on *Fair and Equitable Treatment.*

Generally speaking, the referencing system is adequate and notes are provided at the end of each Section. However, a glossary would be helpful as the acronyms used are confusing to those unfamiliar with international investment agreements and transnational corporations. Some have been referred to above, such as FDI, IIA, MFN and TNC.

Australia is one of the few major contributors to the Series and in this context it is worth considering how these books apply to Australian international investment agreements. For instance, a distinction is drawn between foreign-controlled enterprises seeking to become established in Australia and those that are already established in this country. Further, it is noteworthy that the 1975 Foreign Acquisitions and Takeovers Act (Cth) is incorporated within the broader foreign investment policy and this should not be forgotten.

Another matter worth noting is that the fair and equitable standard may be defined within the much broader concept of trade liberalisation. The OECD Code of Liberalisation of Capital Movements, adopted in 1961, is a legally binding agreement between OECD countries. It was designed to facilitate the movement towards more open policies on foreign investment.[30] As a party to this instrument, Australia is committed to comply with this Code. As such and subject to specified reservations,[31] Australia is bound to incorporate the terms of the Code into its policies and trading framework.

By contrast, the national treatment standard is a post entry instrument designed to improve the investment climate within which multinational enterprises operate. It is also designed to recognise the positive contributions that foreign investment makes to the domestic economy.[32]

---

[30] Refer to http.www.treasury.gov.au/publications...parent%2Danaustralianassessment/attc (visited 7 October 1999).

[31] For an overview of Australia's reservations submitted to the OECD refer to http://www.oecd.org/daf/country/austral/htm (visited 7 October 19). For subsequent amendments refer to note 30 above.

[32] http://www.oecd.org/daf/cmis/codes/declart.htm (visited 7 October 1999).

Broadly speaking, Australia has the right to determine the terms under which it accepts foreign investment.[33] However, it is obliged to spell out its exceptions to the standard.[34] Along with other signatories to the OECD Declaration, Australia has adopted the following standards:[35]

1. the government should be transparent about all laws, regulations and policies concerning foreign policy; and
2. multinationals should be encouraged to come to Australia and the guidelines should be published and promoted. All relevant information pertaining to their structure, activities and policies should also be made known widely.

In conclusion, practitioners involved in international investment would find the Papers particularly beneficial. The reason is that it is difficult to find another explanation for these standards elsewhere, and it may not be as thorough or accurate.

Kristin Bryan and Glen Pitt[36]

[33] See the 1976 OECD Declaration on International Law (1976, 5th edition, Clarendon Press, Oxford) 522.
[34] For an overview of Australia's exceptions to the National Standard see note 21 at 3.
[35] For more information refer to note 30 above.
[36] Special thanks are due to Peter Briggs and Angela McGrath of the Australian Foreign Investment Review Board for providing material relevant to the writing of this review.