

**International Law Weekend 2006
Panel Discussion**

Is the Fair and Equitable Treatment Standard Fair and Equitable?

Date: October 27, 2006

Time: 4 p.m. – 5:30 p.m.

Venue: Association of the Bar of the City of New York

Panelists: Prof. Tai-Heng Cheng (Chairman)
Associate Director, Center for International Law, New York Law School

Guillermo Aguilar-Alvarez, Esq.
Partner, Weil, Gotshal & Manges LLP

Robert H. Smit, Esq.
Partner, Simpson Thacher & Bartlett LLP

Prof. W. Michael Reisman
Myers S. McDougal Professor of International Law, Yale Law School

Opening Remarks by Tai-Heng Cheng:

Good afternoon. It is an honor and pleasure to be in this House chairing this distinguished panel of arbitrators and professors. In 1970, the International Court of Justice observed in *Barcelona Traction, Light & Power Co.*:

Considering . . . the growth of foreign investments and the expansion of international activities of corporations, . . . and considering the way in which the economic interests of states have proliferated, it may appear at first sight surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.¹

The ICJ might have had in mind, among other vague foreign investments norms, the fair and equitable treatment standard. The goal of this panel is to determine whether this standard has now developed into a precise standard and whether it is, in fact, fair and equitable.

The fair and equitable standard undoubtedly forms part of customary investment law.² It was first codified in the Havana Charter of 1948.³ Today, thousands of bilateral investment treaties (“BITS”) and several important multilateral trade-related agreements have

¹ *Barcelona Traction, Light & Power Co.*, 1970 I.C.J. Rep. 46-47 (Feb. 5).

² See OECD Draft Convention on the Protection of Foreign Property, Official Commentary, Art. 1, 2 I.L.M. 241 (1963) (explaining that the fair and equitable treatment standard “forms part of customary law”).

³ United Nations Conference on Trade and Employment, March 1948, Havana Charter For An International Trade Organization, art. 11(2), U.N. Sales No. 48.II.D.4, E/CONF.2/78 (1948).

codified the fair and equitable treatment standard.⁴ But they have not necessarily explicated what this standard entails.

Consequently, although many commentators accept that the fair and equitable treatment standard imposes at least a “minimum standard,”⁵ they have also observed that “its meaning has not been precisely defined.”⁶ In July 2006, the tribunal in *Azurix v. the Argentine Republic* identified two issues requiring clarification: (1) What is the substantive content of the standard; and (2) whether the standard as it is found in treaties includes protections in addition to the customary international standard.⁷

⁴ See, e.g., Convention Establishing the Multilateral Investment Guarantee Agency, Art. 12(d)(iv), Oct. 11, 1985, 24 I.L.M. (1985); North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105, Dec. 17, 1992, 32 I.L.M. 289 (1993); see also generally UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990s 54 (1998) (citing BITs that impose a fair and equitable treatment standard).

⁵ OECD Draft Convention on the Protection of Foreign Property, Official Commentary, Art. 1, 2 I.L.M. 241 (1963).

⁶ UNCTAD, *supra* note 2 at 53.

⁷ *Azurix Corp. v. Argentine Republic* (Award), ICSID Case No. ARB/01/12 (July 14, 2006), ¶ 358; see also OECD, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW 1 (2004) (“Discussion of this standard has focused mainly on whether the standard of treatment required is measured against the customary international minimum standard, a broader international law standard including . . . treaties . . . , or whether the standard is an autonomous self-contained concept in treaties . . .”).

As regards the first issue, commentators such as Prof. Detlev Vagts have argued that the standard's minimal protections only prohibit "the cancellation of . . . authorizations to do business in which the investor relies, except in accordance with its terms; and regulatory action without bona fide government purpose . . . designed to make the investor's business unprofitable."⁸ The tribunal in *Genin v. Estonia* held that the standard only prohibited a "willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."⁹ But some arbitrators take the view that this low customary minimum standard has been raised over time through the state practice of concluding investment treaties with stronger investment protections.¹⁰ According to *Azurix v. Argentine Republic*, the fair and equitable treatment standard now protects legitimate investor expectations even in the absence of bad faith or egregious conduct by the host state.¹¹

As regards the second issue, some arbitrators have held that the fair and equitable standard in treaties includes treaty obligations above and beyond customary obligations. The majority of the tribunal in *S.D. Myers v. Canada* held that the fair and equitable treatment standard in Article 1105 of NAFTA included a principle of non-discrimination, which arose out

⁸ Detlev Vagts, *Coercion and Foreign Investment Rearrangements*, 72 AM. J. INT'L L. 17, 34-35 (1978).

⁹ *Genin v. Estonia* (Award), ICSID Case No. ARB/99/2 (June 25, 2001), ¶ 367.

¹⁰ *See, e.g., Mondev Int'l Ltd. v. United States* (Award), ICSID Case No. ARB(AF)/99/2 (Oct. 11, 2002), ¶ 125.

¹¹ *Azurix Corp. v. Argentine Republic* (Award), ICSID Case No. ARB/01/02 (July 14, 2006), ¶ 372.

of Article 1102 of NAFTA and independently of customary international law.¹² *Pope & Talbot Inc. v. Canada* held that the fair and equitable treatment standard imposed a higher standard of fairness above the minimum standard.¹³ But the *Methanex* tribunal, of which Prof. W. Michael Reisman was a member, concluded the fair and equitable treatment treaty standard did not incorporate protections beyond customary law and that “non-discrimination” was not part of the standard.¹⁴

Beneath positivistic arguments about the evolution of the customary fair and equitable standard and its relation to investment treaties, the disagreements about the content of the fair and equitable treatment standard are really about investors wanting stronger investment protections, and host states favoring weaker restrictions on the exercise of their sovereign powers. Historically, investors have tended to hail from developed states and host states have tended to be developing countries.

This historical context is increasingly obsolete. Capital flows in the world today are changing. China and Chinese corporations are investing in the developed states through bond purchases, direct investments and joint venture vehicles. The United States has had to defend its state actions that affected foreign investments in our territory. In *Loewen Group, Inc. v. United States*, a Canadian corporation sued the United States for denying it justice in state

¹² *S.D. Myers, Inc. v. Canada (Award)*, (Nov. 2, 2000), ¶¶ 266-68 (but stating that in some circumstances a violation of Article 1102 might not constitute a violation of Article 1105).

¹³ *Pope v. Talbot Inc. v. Canada (Award)*, (Apr. 10, 2001), ¶¶ 110-17.

¹⁴ *Methanex v. United States (Award)*, (Aug. 3, 2005), Part IV, Chp. C, ¶¶ 16, 25-26.

court.¹⁵ In *Methanex v. United States*, another Canadian corporation sued the United States for Californian environmental legislation that allegedly diminished the value of Canadian investments in the United States.¹⁶

Considering this global economic change, it may be more than mere coincidence that states that one might expect to champion stronger investment protections appear to have somewhat softened their positions. In *Pope & Talbot, Inc. v. Canada*, the United States government took a position that apparently supported the host state – Canada – and not the U.S. investor in that dispute. It argued that the fair and equitable treatment standard was limited to a minimum international standard and did not require host states to act fairly or in a non-discriminatory fashion beyond that minimum standard.¹⁷

Today, as the lines between investors and host countries blur, and interests shift from investment to investment, the time is ripe for scholars and practitioners to reexamine the fairness debate as one of global policy. The question is not whether investment protections should protect investors over host countries or vice versa. Some relevant questions may instead be: does fair and equitable treatment balance competing interests where states in which investors are domiciled may also be, at different times, also host states? Should the fair and equitable treatment standard crystallize into clear, but rigid, rules? Or should it include flexible, but vague, notions of justice?

¹⁵ *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, 42 I.L.M.811 (2003).

¹⁶ *Methanex Corp. v United States* (Award), (Aug. 3, 2005).

¹⁷ *Pope & Talbot, Inc. v. Canada*, Fourth Submission of the United States (Nov. 1, 2000); Fifth Submission of the United States (Dec. 1, 2000).

The members of this panel will each present their perspectives on these and other issues. Mr. Guillermo Aguilar-Alvarez will discuss the genesis of the NAFTA Notes of Interpretation. Mr. Aguilar-Alvarez is a partner at Weil, Gotshal & Manges LLP. He has acted as party counsel and arbitrator in dozens of international arbitrations, including proceedings under the rules of the ICC, LCIA, AAA, ICSID, NAI and UNCITRAL. He also served as General Counsel of the ICC International Court of Arbitration in Paris as well as principal legal counsel for the Mexican Government in the negotiation and implementation of NAFTA and other trade agreements.

Thereafter, Mr. Robert H. Smit will speak on the application of the fair and equitable treatment standard to state court-issued anti-arbitration injunctions and other “denials of justice.” Mr. Smit is a member of Simpson Thacher & Bartlett LLP. He represents clients in a wide range of complex commercial litigations and arbitrations. He has also served as arbitrator in several ICC, AAA and *ad hoc* international arbitrations in the United States, Europe and Latin America. He is the U.S. member of the ICC International Court of Arbitration.

Finally, Prof. W. Michael Reisman will comment on the foregoing presentations. Prof. Reisman is the Myers S. McDougal Professor of International Law at Yale Law School. He has been a visiting professor in Tokyo, Hong Kong, Berlin, Basel, Paris and Geneva. He is a Fellow of the World Academy of Art and Science and a former member of its Executive Council. He is the President of the Arbitration Tribunal of the Bank for International Settlements. Prof. Reisman has published widely in the area of international law and he has served as arbitrator and counsel in many international cases.

After the panelists have spoken, we will take questions. It is now my great pleasure to turn over the floor to Mr. Aguilar-Alvarez.