The Interpretation and Application of Fair and Equitable Treatment: An Arbitrator's Perspective

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There can be no-one active in the field of investment arbitration who hasn't been challenged, or even perplexed, or at least confronted by the question of the relationship between the guarantee of fair and equitable treatment for foreign investments or investors stipulated in bilateral or multilateral treaties and what is usually referred to as the 'minimum standard' laid down by customary international law. But it won't be possible for that debate to continue in future without reference to Martins Paparinskis's superbly researched monograph. More precisely, no excuse will remain for a failure to bring into the discussion the available materials bearing on the question, all of which are now gathered together between one set of slim covers, both those which are directly relevant to the issue in hand and those which are of interest by way of suggestive analogy.

But it is the very wealth and depth of the analysis that brings the focus back onto the underlying question itself, and how valid or how useful it is. Listening to the argument (as I regularly do) from the arbitrator's chair, about whether the Parties to a particular bilateral investment treaty intended 'fair and equitable treatment' as a reference to the customary law standard, or to mean something else, I find myself wondering just as regularly in my inner mind how that is going to help me solve the dispute in the case before me: if the treaty provision should be understood as referring to customary law, then what is the customary law it is referring to? If it is a reference to something else, then what was it the Contracting States wanted to add to (or subtract from?) the customary standard as they understood it? It is of course possible that those queries might be answered by the travaux préparatoires if one had them (and for bilateral treaties one usually doesn't). But it is equally possible that the Contracting Parties had no common view as to the customary standard, or that they never even bothered to ask themselves the question, but in either case wanted instead to establish a treaty rule on which future investors would be able to rely. That, after all, is one of the purposes of making treaties.

It's for reasons of that kind that most of the arbitral tribunals on which I've sat have come to the conclusion that the question is essentially an academic one, and that their task is not to solve the academic debate but to make sense of the treaty in front of them, on its own terms, profiting for that purpose from the very sensible and practical set of provisions on treaty interpretation which the Vienna Convention offers. The process entails, amongst other things, taking 'fair and

equitable' as the portmanteau phrase it plainly is, and not trying to disaggregate it into a 'fairness' component and an 'equitable' component. Nor have I found that arbitrators experience much difficulty in understanding the import of the phrase, as a broad and general rule enunciated in advance in such a way as to be capable of application to a wide and infinitely variable set of future cases and circumstances which the negotiating Parties couldn't even begin to enumerate or contemplate at the time of their negotiation.

That leads me to a number of observations, not all of them profound.

The first is – and here I do part company with the author – that I see no value at all in delving into previous uses of similar terms, or even of 'fair' and 'equitable' themselves, in diplomatic correspondence etc. The terms are simple ones, which have an ordinary meaning (Vienna Convention Article 3(1)), and their portmanteau conjunction adds a little extra something of its own to the flavour, in the sense of a broad and general rule with built-in flexibility.

The Discretion of the Arbitral Tribunal

Does the built-in flexibility of the rule and its broad and general nature mean, however, that it becomes a matter remitted to the discretion, or even the idiosyncrasies, of individual arbitral tribunals? My answer is no, but at the same time that you simply can't do away with a discretionary element in fitting facts to cases, and cases to standards. The crux is surely that a central and major purpose of investment treaties is not just to lay down standards of treatment, and leave it at that; the purpose is to provide a remedy for claims of breach of those standards at the instance of future investors in respect of future investments unknown and as yet undreamed of. How could any pair of negotiating States have imagined that purpose being achieved except on the basis of endowing eventual tribunals with the necessary discretion – though on the basis that the discretion was to be exercised within the framework of a recognised forensic process, governed by law, and offering all of the procedural guarantees which that implies?

Tribunals will obviously look for, and if they're lucky find, helpful guidance in the way that other tribunals have dealt with comparable cases – on the basis of the same forensic process leading to a reasoned result. Though even that is a mis-statement, because it isn't in the first instance the tribunal that looks for collateral guidance of that kind, but the parties and their counsel in argument, and one of the essential functions of a judicial tribunal is to respond to the claims and arguments that the parties have made to it. Martins Paparinskis seems to feel that some foundational legal authority is needed for this common practice, but I'm not so sure, as it seems to me an inevitable part of the forensic process, and inherent in the way judicial bodies work. At the same time this inevitable habit of collateral reference is in itself a useful corrective against the pure discretion discussed and dismissed above.

The Distinction between Interpretation and Application of the Standard

This leads to a yet further observation, or at least a necessary distinction, though one that is regularly obscured in the published comment, and likewise in this book, the distinction between interpretation and application. You don't commonly encounter this differentiation in the arbitration clauses of investment treaties, which simply make use of the rubric 'disputes between an investor and the State about an investment of the former in the latter'. But it is absolutely commonplace, not to say universal, in the State-to-State dispute settlement provisions of the same treaties, and indeed in similar clauses in all other treaties, which talk in terms of disputes between the Parties over the 'interpretation or application' of the treaty. The two concepts are not of course wholly separate from one another, and the second necessarily presupposes the first, but they are not identical either, as borne out by the disjunctive 'or'. So I think that the book falls into a common

the common heading of 'interpretation'. Only a very small proportion of it is about interpretation; the overwhelming majority of what one finds in the Awards is about 'application' – the application of the treaty standard to the specific factual circumstances of the actual case. And it goes without saying (or at least I think it does) that 'application' (in this sense) quite naturally opens up a far wider scope for case-to-case variation than does 'interpretation' in the proper sense of that term.

That distinction once admitted, it becomes far easier in my view to master the question that causes the author so much anxious concern, namely how to accommodate the decisions of investment tribunals within a formal hierarchy either of customary norm-formation or of treaty interpretation. The idea of formal hierarchies can easily be overdone – and this is especially true in the case of treaty interpretation where the ILC warned again and again about treating its draft Articles that way. And I think that the author is just plain wrong in his idea that there used to exist a freer and more liberal regime of treaty interpretation which the Vienna Convention then changed and cramped. But even if one can limit the enquiry to the formation or ascertainment of substantive customary law, the realization that most of what the many tribunals have been doing is not the ascertainment of the law, but its empirical application to particular sets of facts, makes it easier to avoid dangers like classifying as 'State practice' what counsel for Respondent States assert arguendo in arbitral proceedings; in the specific context of the formation of customary law, 'State practice' means something other than that.

The Authority of Individual Decisions

One final comment about investment treaty tribunals before I close, which goes to the authority of individual decisions. This is not a comment about quality as such, although everyone knows that some decisions are better than others, and gather strength on that account, so that there is a danger in academic commentary in the mere piling up of citations. It's a comment rather about status. Investment treaty tribunals are adventitious, and they're also evanescent. A tribunal is brought into being to settle a particular dispute and then disappears. Its members may never have sat together before and may never do so again, and it's unlikely in the extreme that the same composition will ever sit again together. And the fact that it is called into existence solely and exclusively to dispose of a particular dispute, and usually under the specific rules of a particular bilateral treaty, makes it far more likely that the tribunal will focus its core attention on settling the dispute, not on settling the law; it will be all too conscious that it has a particular mandate to do the former, and no general mandate to do the latter. Its limited mandate will affect also the law it is authorized to apply. In all of these ways its ad hoc nature makes it differ – and maybe decisively so – from a standing court or tribunal (whether national or international), or even from the situation of successive ad hoc tribunals called upon to consider sequentially the provisions of a multilateral treaty as they come into play in successive inter-Party disputes.

I was tempted to add a further acid observation about the absurd notion that there is something so special about investment protection treaties that new rules of interpretation, beyond the principles in the Vienna Convention, are needed to cope with them. But Martins Paparinskis extracts this idea, subjects it to cool examination, and then crushes it underfoot. Quite right too.