Kluwer Arbitration Blog

The Eco Oro and Red Eagle Awards: Recent Divergence on How to Interpret Fair and Equitable Treatment Clauses Linked to the Minimum Standard of Treatment

Patrick Dumberry (University of Ottawa Faculty of Law, Civil Law Section) · Tuesday, July 23rd, 2024

In a recent book and a report published by the OECD ("Expert contribution Prof Dumberry: Cost of inaction – arbitral practice in respect on FET", Track 2 program, "Future of Investment Treaties"), I have examined the way tribunals have assessed the relationship between Fair and Equitable Treatment ("FET") clauses and the Minimum Standard of Treatment ("MST") and the impact their reasonings have had on how they interpreted the content of the standard and assessed matters of liability. Using the IAReporter and ITA Law websites, I have examined all publicly available investment awards (in English, French, and Spanish) rendered by arbitral tribunals in the last 25 years. I have found 279 relevant awards where tribunals have made some analysis of the concept (i.e., beyond merely referring to the parties' position without saying anything else). I have examined awards separately for three types of FET clauses: Those containing an unqualified (or "stand-alone") obligation (i.e., without any reference to any other standard); those containing an explicit reference to the standard existing under "international law"; and those where the obligation is expressly linked to the MST under custom.

This blog post examines how two tribunals have recently interpreted differently an FET clause containing an explicit reference to the MST. In recent years, many States have signed investment treaties containing this type of clause based on the US Model BIT (2004), which itself reflects NAFTA case law following the FTC 2001 Note of Interpretation, which clarified that tribunals must apply the MST and no other standard. In a recent 2023 survey ("'Fair' and 'Equitable' Treatment Provisions in Investment Treaties; A Large-Sample Survey of Treaty Provisions") the OECD found 51 of these treaties (covering a total of 136 bilateral relationships).

Eco Oro Case: The Outlier's View

The question of how to interpret this type of FET clause led to a heated debate between the majority of the tribunal and Philippe Sands in his dissenting opinion in the 2021 *Eco Oro v Colombia* case, decided under the Canada-Colombia FTA containing a FET clause copied from the US Model BIT. At the outset, both the majority and Sands agreed that the provision should not be interpreted as an autonomous FET clause detached from the MST. Yet, the arbitrators fundamentally disagreed on whether to adopt a restrictive approach regarding the content of the standard just like the vast majority of NAFTA tribunals did. The majority adopted a broad

interpretation: “transparency, stability and the protection of the investor’s legitimate expectations play a central role in defining the FET standard” (para. 754). But, at the same time, the majority also referred to the NAFTA-style high threshold of gravity required to find a breach (referring to actions “unacceptable from an international law perspective,” paras. 762, 806). The majority found that Colombia had breached the investor’s expectations and that its “conduct amounts to gross unfairness or manifest arbitrariness falling below acceptable standards” (paras. 820-21). In its final award, the majority of the Tribunal (including Sands this time) nevertheless held that the claimant was not entitled to any damages for that breach.

In contrast, in his dissenting opinion, Sands explained that while the notion of legitimate expectations “has become a recognized element of the FET standard,” “its role in the context of an MST inquiry is not yet established” (para. 12). He noted the specific requirements which have been developed by NAFTA case law to narrow the concept and argued that “the Majority’s analysis fails to acknowledge or address this requirement, and in so doing has in effect conflated the FET and MST” (para. 14). Sands also noted that “the obligation to provide stability or predictability has no foundation in the FTA or in the case law on the MST” (para. 19). He further explained that such an obligation “only exists where the FET provision in question explicitly mentions stability” and that “the decision of treaty parties – as in this FTA – not to include a stability clause in an international agreement is one that a Tribunal must take seriously, as it represents a deliberate choice of the drafters to preserve a greater degree of regulatory discretion” (para. 21). In a rather forceful passage, he asked: “Where is the authority for the proposition that a failure to provide stability or predictability can give rise to a violation of the MST standard? The majority has cited none. I am aware of none” (para. 22). For him, “the Majority has effectively engaged in judicial law-making; it has invented a new element for the identification of the customary standard which no state has appeared to have articulated, in the total absence of any evidence of state practice or *opinio juris*” (*Id.*). His overall conclusion is that “the Majority’s analysis undercuts the plain meaning of the FTA and well-established principles of customary law” and that “the effect of its approach is to significantly lower the bar, and in effect rewrite the FTA and the content and effect of MST” (para. 36). He added that “a finding that a state has breached the MST will be rare and extraordinary” (*Id.*).

Red Eagle Case: The Orthodox Approach

A completely different outcome was reached in the recent 2024 *Red Eagle v Colombia* award, also under the Canada-Colombia FTA. This time Sands sided with the majority of the tribunal (see previous coverage). For the majority, the FET is “not self-standing” because the parties affirmed their obligation to accord the standard “without extending the treatment beyond the MST,” adding that “the conduct of the State has to reach certain level in order for it to rise to a breach of the MST” (paras. 287-90). The majority explained that there was “insufficient evidence to support the proposition that the doctrine of legitimate expectations, which forms a part of the FET standard in other treaties, is part of the customary MST,” adding that the Claimant had not provided “any evidence of either state practice or *opinio juris* to support the existence of such a rule” and the Tribunal was “aware of none” (paras. 292-93).

The majority also said that it was “very far from being persuaded” that the Tecmed’s award’s conclusion that legitimate expectations were part of the MST was “correct or even plausible” because the award “relied on no evidence of state practice or *opinio juris* to support its conclusion

as to the existence of such a customary rule, and it appears there is none" (para. 295). In any event, the Claimant failed to demonstrate that "any legitimate expectations arose, or were relied upon" (para. 302); it concluded that no breach of the FET clause had been committed. In his dissenting opinion, Martinez de Hoz argued that the MST does include an obligation to protect legitimate expectations (para. 128) and that the conduct of the Respondent was arbitrary, using a high threshold (paras. 138, 141).

Conclusion

In my view, the position adopted by the majority in *Red Eagle* better reflects how tribunals have interpreted FET clauses expressly linked to the MST. I have explained elsewhere that two main conclusions emerge from NAFTA case law on the FET clause: (1) the vast majority of tribunals have interpreted the standard narrowly to include only a limited number of elements of protection; (2) they have also required a high threshold of gravity or seriousness to find a breach. As a result of these narrow interpretations, NAFTA tribunals have concluded that the host State violated the FET clause in a limited number of cases. My recent survey of awards shows that the success rate of NAFTA claims is 25%, which is significantly lower than that of claims filed under stand-alone FET clauses where claimants have a 50% chance of being successful (see here). I have also examined here several recent awards decided under the CAFTA-DR, which contains a FET clause with the same language as the US Model BIT. Not surprisingly, CAFTA tribunals have consistently followed NAFTA case law regarding (almost) all major aspects defining the standard. Similarly, almost all of the 42 awards (NAFTA, CAFTA, and others) I have examined interpreting this type of clause did not consider legitimate expectations a stand-alone element of the FET standard, but rather as a factor to be taken into account when assessing other elements (arbitrariness, due process). I have only found a few exceptions: the majority in the NAFTA *Bilcon* award (paras. 444-45, 448-49, 455ff., 470, 589) and the CAFTA *Lopez* award (paras. 420-23). Recently in the *IC Power* case, decided under the Peru-Singapore FTA, the tribunal also took that position (paras. 306, 311). But these few isolated decisions remain outliers. The position adopted by the majority in *Red Eagle*, which must have been influenced by the views of Sands previously expressed in his dissenting opinion in the *Eco Oro* case, is in line with the orthodox approach on how to interpret FET clauses linked to the MST. Its reasoning is likely going to be followed by many future tribunals interpreting similar FET clauses based on the US Model BIT.

This entry was posted on Tuesday, July 23rd, 2024 at 8:49 am and is filed under Colombia, Fair and Equitable Treatment, FET, Investment protection, Minimum Standard of Treatment
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.