Asian Perspectives on International Investment Law

With changes to the international investment law landscape and Asian countries now actively developing their network of bilateral investment treaties (BITs) and free trade agreements (FTAs), this volume studies issues relating to Asian perspectives on international investment law and forecasts the future of Asian contribution to its science and practice.

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This unique collection is exceptionally useful to students, scholars and practitioners of international investment law, international trade law and public international law.

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Edited by Junji Nakagawa

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Preface

The essays in this volume arouse out of the 5th biennial Conference of the Asian International Economic Law Network (AIELN), or AIELN V, held in Xiamen, China, on 16 and 17 July 2017. The conference featured the same theme of the title of this volume, presented by over 20 speakers and ensuing discussions. All of the contributors to this volume attended AIELN V and read his/her paper. The chapters are revised and updated versions of those papers.

I wish to acknowledge first the contribution of all the speakers and attendants at AIELN V for their enthusiasm and their role in ensuring the success of the conference. I also acknowledge the Chinese Society of International Economic Law (CSIEL) and the Institute of International Economic Law (IIEL), Xiamen University, for sponsoring and hosting the conference. Please let me mention the following members and staffs of the CSIEL and IIEL for their generous support: Professor Zeng Huaqun, Professor Chen Huiping, Professor Li Guoan, Professor Zhang Binxin, Professor Yang Fan, Professor Su Yu and Ms. Xiao Bin. Third, I wish to acknowledge the following members of the AIELN Steering Committee for their endorsement and support to the conference: Professor Heng Wang, Professor Bryan Mercurio and Professor Douglas Arner. Last, but not least, I wish to acknowledge our editors, Ms. Yongling Lam and Ms. Samantha Phua of Routledge, for their patience and encouragement, as always.

January 2019 in Tokyo
Junji Nakagawa

9 The ASEAN comprehensive investment agreement approach to due process

Does arbitral case law matter?

Fulvio Maria Palombino and Giovanni Zarra[**]

1. Introduction

Since the late 1980s, investment arbitration has become the most popular method for solving disputes between States and foreign investors (so-called investment disputes).[1] This is because the existence of a forum for the settlement of investment disputes which is not perceived by foreign investors as biased in favour of host States (as, instead, domestic courts might be) has been a strong incentive for commencing foreign investments.[2] Unsurprisingly, most States have negotiated Bilateral Investment Treaties (BITs) with the view, *inter alia*, to ensuring certain standards of treatment to foreign investors and to granting them the possibility to solve disputes related to their violation before arbitral tribunals.[3]

Among those standards, the obligation to provide fair and equitable treatment (FET) proves to be the most invoked one,[4] going so far as to be described as the basic norm of international investment law.[5] However, it is quite difficult to give a precise meaning to such a general label, and it is not by chance that both FET's meaning and normative basis continue to be shrouded in ambiguity and to inspire, as a consequence, a considerable number of interpretations in case law.[6]

In this regard, the lack of certainty as to the FET's content led a number of tribunals to assume investor-oriented approaches, thus generating several doubts concerning the legitimacy of this kind of arbitration and inducing host States to perceive it as a serious threat to their power to regulate on public matters.[7] Unsurprisingly, several calls for reform are taking place in the debate surrounding investor-State dispute settlement (ISDS).

These calls move from the drastic proposal of entirely replacing investment arbitration with a multilateral investment court,[8] to the possibility of re-drafting treaty standards in a narrower way (so as to reduce the abstract possibility of interpreting standards of treatment in favour of investors),[9] passing through the establishment of an appellate body[10] or of a mechanism of preliminary rulings similar to the one existing in EU law.[11] It is worth pointing out that several authoritative scholars have already demonstrated that the solutions which involve a structural reform of investment arbitration (either by replacing it with a new Court or by establishing additional bodies such as an Appellate Body) do not ensure the achievement of the goal of limiting pro-investor interpretations of

treaty standards and also risk reducing the confidence of foreign investors in the dispute settlement mechanism and, as a consequence, in the possibility of starting foreign investments.[12] Quite the opposite, the re-drafting of treaty clauses can be a balanced compromise between the host States' necessity of safeguarding a certain degree of freedom in regulating public matters and the need of ensuring investors' trust in the possibility of safely making foreign investments. It is, indeed, possible to identify a trend which is common to countries all over the world (see for example the 2016 Morocco-Nigeria BIT, Art. 23),[13] which consists of moving away from the traditional FET wording, with a view to accommodating the State power to regulate in the public interest.[14]

In this regard, it is very interesting to note the approach which has been endorsed so far by certain Asian countries in re-drafting their FET obligations.[15] Such an approach is exemplified by Art. 11 of the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement (ACIA), stating that 'each Member State shall accord to covered investments of investors of any other Member State fair and equitable treatment' (para. 1), and, for greater certainty, pinpointing that this same standard 'requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process'.[16]

Now, within the realm of international investment law, the wording of the provision here scrutinized seems to be quite innovative. First of all, it seems to entirely exclude that the FET may involve also violations of legitimate expectations or of proportionality, as instead happens within the framework of the 2012 US Model Bilateral Investment Treaty, where at Art. 5 it is said that 'fair and equitable treatment *includes* the obligation not to deny justice . . . in according to the principle of due process', thus not excluding that other kinds of violations of investors' rights might fall under the spectrum of the FET. Moreover, differently from other treaties affecting the same geographical area, it does not identify the FET content either by means of a reference to the customary international law minimum standard (as in the case of the China-Japan-Korea Trilateral Investment Agreement, Article 5)[17] or by relying on the generally accepted rules of international law (as in the case of the Trans-Pacific Partnership, Article 9.6).

While it is obviously possible that, with the aim of maintaining a wide regulatory space, a group of States make the *political* choice to limit the range of obligations which may fall into the spectrum of FET violations to the sole concept of due process (involving, as we will see in detail in Section 3, both denial of justice and lack of fair administrative proceedings),[18] the ACIA formulation makes us wonder whether there exists any 'ASEAN way' of perceiving due process clauses at treaty law level. Such a solution could be inferred if one thinks, as it has been done e.g. by Diane Desierto, that the reference to 'due process' in Art. 11 of the ACIA is not to such a standard as developed in international law but to the principle as it is recognized by the ASEAN Member States in their domestic laws.[19]The goal of the present chapter is to understand to what extent the ACIA's standard of due process may be considered as isolated from existent investment case law relating to the principle of due process. First, we will discuss the relevance of

arbitral case law in investment arbitration and demonstrate that it is not possible for arbitral tribunals, including the ones established under the ACIA, to completely disregard what has been done by previous tribunals, especially where this is symptomatic of the existence of a rule of general international law (Section 2). Having said the above, we will briefly trace the contours of the due process standard as emerged in the international legal order (Section 3). We will then outline the essential role of arbitrators in ensuring coherence in the application of the due process standard in international investment law (Section 4). Section 5 will be devoted to some concluding remarks.

2. The relevance of arbitral case law of non-ASEAN tribunals in the interpretation of the ACIA

It is well established that international investment arbitration (at least when it is based on a treaty claim)[20] is integrated within public international law and that sources of general international law may be applied in ISDS.[21] Art. 42 of the ICSID Convention, providing that, in the absence of an agreement on applicable law, the Tribunal shall apply the law of the Contracting State party to the dispute *and* such rules of international law as may be applicable, is a clear example of this. BITs usually make reference to principles of international law in their provisions of applicable law.[22] The ACIA is not different in this regard; Art. 40 sets forth that arbitral tribunals shall decide the issues in dispute in accordance with the same ACIA, any other applicable treaty between the Member States *and* the applicable rules of international law. It is therefore possible to say that general international law may find a place in the ACIA context both as a direct source of applicable law and as an interpretative aid for reading the treaty's provisions.[23] It is worth noting, in this regard, that a reference to general international law involves, in these authors' view, custom,[24] general principles common to domestic legal systems (set forth by Art. 38(1)(c) of the ICJ Statute)[25] and general principles of international law, i.e. principles which have developed and are applied in international law. The reference applies, in this regard, to those legal sources, usually with a very broad meaning, which – by themselves or by means of a more specific principle or rule gathered by them – express the key goals and values of international law.[26]

The above implies an additional consideration. Arbitral tribunals applying sources of general international law may not simply ignore the existing case law concerning such sources, which is essential to understand how general principles behave in specific and concrete situations.

Similarly, arbitrators dealing with broadly drafted treaty clauses such as the fair and equitable treatment will necessarily turn to existing case law which already gave a meaning to such clauses. Indeed, as noted by Hervé Ascensio, the meaning of FET 'has emerged thanks to the synthesis carried out by the arbitral jurisprudence, leading to a legal source with a complex but stabilized content'.[27]

It is therefore possible to say that tribunals have a functional duty to *take into account* what has been done by previous tribunals, even if they may obviously

depart from their conclusions by offering a valid motivation for such a departure.[28] Several reasons bring us to this conclusion: (i) the parties' expectations to be treated in accordance with the principle of equality before the law; (ii) the belief that precedents are a repository of legal experience; (iii) the idea that to follow precedent is a way to avoid the appearance of any excess of judicial discretion; and (iv) the circumstance whereby judges are reluctant to admit that they were wrong.[29] Hence, from a practical perspective, arbitrators, first of all, identify prior relevant decisions for the case at hand and then compare the costs of departure from prior decisions with the consequences of following prior decisions, taking into account whether the policies underlying those prior decisions remain relevant under contemporary conditions. On that basis, tribunals decide which prior decisions to follow or depart from, and, finally, articulate reasons for their decision.[30]

In these authors' opinion, arbitrators working in the ACIA framework may not abandon the abovementioned approach, otherwise they would risk losing their legitimacy (in particular from the investors' point of view). Starting from the contours of the fair and equitable treatment as defined by the treaty, which limits the standard's scope of application to the principle of due process, tribunals will in any case have to take into account both general international law and existing arbitral case law as interpretative tools necessary to give an acceptable meaning to Art. 11 of the ACIA.[31]

3. The role of arbitral case law in shaping the due process principle

Having demonstrated, in general terms, the relevance of arbitral case law for the sake of interpreting Art. 11 of the ACIA, we will now specifically turn to the concept of due process. We will, first of all, give evidence of the fact that due process is a general principle of international law which arbitrators (including those acting in the ACIA framework) shall take into consideration as it developed in international investment law. Second, we will briefly outline the content of this principle in accordance with existing arbitral case law.

Some sources seem to equalize the concepts of due process and denial of justice, regarding them as a rule of general international law – in the form of a principle common to domestic systems or of a custom – with a clear-cut content. This would define, at least in part, the FET content. This argument seems to be reflected in the preparatory works to the 2013 Institute of International Law (Institut de Droit International) Resolution ('Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties')[32] and more recently in the 2015 Indian Model Investment Treaty (Article 3).[33]

However, the argument is unconvincing in terms of both the content and the legal nature of due process of law as a FET element.

In terms of its content, not only has due process taken on a meaning so broad as to include also the right to procedural fairness in administrative proceedings – as

Article 11 of the 2009 ASEAN Comprehensive Investment Agreement clearly confirms – but the very notion of denial of justice remains fairly uncertain[34]; the only aspect to appear clear-cut in arbitral practice is that the occurrence of this wrongful act may be established only where the investor has exhausted all internal remedies to challenge the allegedly unlawful decision (or has proved that such remedies would be futile).[35]

In terms of legal nature of due process, reliance by legal writers on both general principles common to domestic systems[36] and custom[37] is questionable. On the one hand, the concept here referred to may expand and contract from State to State and is tied to the idiosyncrasies of each legal system; hence the inadequacy of the above principles. On the other hand, a number of awards increasingly advance the opinion whereby a distinction must be drawn between a denial of justice claim based on customary law and one based on the FET clause: should a claim for denial of justice fail under custom, the competent arbitral tribunal would not be exonerated 'from carefully appraising the alleged facts and deciding whether they amount to a breach of the fair and equitable treatment standard'.[38]

For the whole matter to be rightly assessed, the assumption from which one must move is the following one: due process broadly understood embodies a general principle of international law which, as such, can be inferred by way of induction and generalization from a number of customary and conventional rules.[39] As a general principle of international law, due process primarily plays a 'directive' role.[40] Accordingly, its application in the field of foreign investments is not automatic, but demands a complex interpretative activity by the judge concerned. Thus, with specific regard to international investment law, due process has found (by way of deduction) concrete applications which have delineated its specific application as a principle concerning this particular area of international law. By this activity, due process has been conceived in terms of both denial of justice and of procedural fairness in administrative proceedings.

3.1. Denial of justice

The first constituent element of due process is denial of justice, viz. the traditional international wrong concerning the treatment of aliens which a State can incur for the breach of the principle. Support for this proposition may be found in a number of arbitral decisions whereby the concepts of due process and denial of justice are closely linked; accordingly, a failure to guarantee the former will often result in the occurrence of the latter.[41] Indeed, it seems that arbitrators' reasoning usually assumed the existence of a general principle providing for due process of law;[42] on the basis of this principle, and in the wake of the features peculiar to the matter of foreign investments, they have formulated the rule of denial of justice; finally, by way of a constant and uniform case law, this rule has then become 'stable' going so far as to be subsumed under FET.

In order to try to give a precise meaning to denial of justice in ISDS, it may be helpful to start from an analysis of the traditional distinction of German origin between denial of justice (Justizverweigerung) and denial of law

(Rechgsverweiverung), i.e. the different type of activities (judicial or legislative) that may result in a violation of the State obligation to protect an alien.[43] A strict interpretation of this distinction, indeed, allows two hypotheses to be identified: (i) the situation where State responsibility stems from a judicial misapplication of national law which proves manifestly unjust (*denial of justice*) and (ii) the situation where State responsibility stems from the (substantive and procedural) rules in force domestically, namely rules that the judge concerned cannot do anything but apply (*denial of law*). Now, a careful appraisal of case law sheds light on the fact that denial of justice, as a FET element, is anchored in the German model of *Justizverweigerung* only and does not include the different concept of denial of law. Whoever decides to invest part of his capital in a foreign country (especially in the case of multinational enterprises), does so in the wake of the *whole regulatory framework* existing in that country, therefore having regard not only to the rules making the investment convenient, but also to those governing the judicial system, and which may be relevant when a dispute between this investor and the host State arises.

All business transactions involve some degree of risk. When business transactions occur across international borders, they carry additional risks not present in domestic transactions. These additional risks, called country risk, typically include risks arising from a variety of national differences in economic structures, policies, socio-political institutions, geography, and currencies.[44]

Significantly enough, Andrea Giardina, serving as rapporteur of the already cited 2013 IIL Resolution in matter of investments, made the point clear that the breach of due process of law 'might be attributed to the host State judiciary', but not to the legislator.

In other words, the business risk that an investor takes on covers also the possible deficiencies of the local justice system, i.e. a system which he 'should reasonably have known at the time of the investment',[45] and the effects that this circumstance may produce in the lawsuits involving him. This idea is not new to international case law, and a significant precedent can be found in the PCIJ judicial practice first.[46] On the other hand, the two leading decisions in the matter, namely *Mondev International Ltd. v. United States* and *Loewen v. United States*, support such a conclusion: in *Mondev* the existence of a national rule conferring immunity from jurisdiction to public agencies was not regarded as contrary to FET[47]; in *Loewen* the provision of a *cautio iudicatum solvi* did not frustrate – in terms of the decision – the right of access to justice and so on.[48]

Contrariwise, a failure by a national judge to apply (or to correctly apply) its national law may constitute a denial of justice which is to be considered as a FET violation. A clear and recent example of the above may be found in *Dan Cake v. Hungary*.[49] The Claimant was a Portuguese company supplying biscuits in Hungary through its Hungarian subsidiary Danesita. This latter company did not pay certain debts and was consequently involved in insolvency proceedings in Hungary. During such proceedings, the insolvent entity reached certain agreements with creditors to settle its debts and therefore requested that the Metropolitan Court of Budapest convene a 'composition hearing' in which hopefully

creditors would vote in its favour (with the consequence that Danesita would not be declared bankrupt). Danesita's request for a composition hearing was filed in accordance with the applicable provisions of domestic law. As a consequence, *it was Danesita's right* to be convened by the judge in order to formally discuss with its creditors. The Court, however, discretionally established several additional requirements (which were not set forth on the law) for the filing of the request by the insolvent entity, refused to convey the composition hearing and forced the liquidator to sell the company's assets. This *de facto* impeded Danesita in exercising its right to a composition hearing and condemned the company to bankruptcy. In the opinion of the arbitral tribunal, it was of course uncertain whether the composition hearing would have led to Danesita's survival, but the decision of the Court of Budapest surely deprived the company of a chance of continuing its business. This constituted a misapplication of the law and was an evident denial of justice which involved a FET violation.

3.2. Procedural fairness in administrative proceedings (Audi Alteram Partem)

We will now turn to the second due process component, i.e. procedural fairness in administrative proceedings. Given the express reference contained in Art. 11 of the ASEAN Comprehensive Investment Agreement to the necessity of respecting due process in administrative proceedings, this element is extremely interesting for the present discussion.

That fairness in administrative proceedings, especially conceived as the right to be heard (*audi alteram partem*), falls under the due process principle is unsurprising and echoes the circumstance whereby due process (and the guarantees related thereto) has gone much further than the limits of the judicial function and has become the typical way by which to exercise the administrative function as well.[50]

Historically speaking, support for this proposition may be traced back to several domestic legal systems. In the US, the Supreme Court has traditionally interpreted the Fifth and Fourteenth Amendments of the American Constitution, requiring that neither the federal government nor the States deprive any person of life, liberty or property without *due process of law*, as a clause dealing not only with the administration of justice but also applying to administrative proceedings.[51] Similar decisions may be found in English case law in relation to the principle of natural justice, i.e. a concept that is very similar to due process and represents the basis of procedural protection in the English legal system. Starting from *Ridge v. Boldwin*, natural justice has been considered to be a principle of *universal application* equally valid with reference to any proceedings leading to a discretionary decision.[52] Although with delay, the same result has also been reached in civil law countries, like the Italian legal system. Reference has to be made to the Administrative Procedure Act, Italy which does nothing but extend to administrative procedures one of the main rules governing adjudication, namely the *audi alteram partem* principle.[53]

Finally, this rule belongs to the general principles of EU law and may be applied in any proceedings, regardless of their judicial or administrative nature. In *Transocean Marin Paint Association*, the Court of Justice of the EU (CJEU) stated that, generally speaking, 'a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known'.[54] Last, but not least, the same principle has been recognized in Art. 41 of the Charter of Fundamental Rights of the European Union ('Right to good administration'); in terms of its para. 2, indeed, every person has the right to be heard, before any individual measure which would affect him or her adversely is taken.[55]

Apparently, the above remarks seem to sustain the existence of a general principle common to domestic systems, which guarantees the *audi alteram partem* principle in the relationship between individuals and the administrative power. Such a view, however, proves unconvincing. Indeed, depending on the legal order where it is invoked, the principle here scrutinized tends to undertake a different content. One divergence, for example, concerns the fact that while in some countries (such as the United States, Sweden and Japan) administrative procedural acts 'provide for a hearing, in some civil law countries only a possibility to make written submissions is required'.[56] On the other hand, the circumstances under which the principle may be applied vary significantly from case to case; thus, where in some cases what counts is the 'nature' of the activities performed by the administration, in other cases one has to establish whether a person has a reasonable expectation to be heard in a given proceeding. Unsurprisingly, also within the context of the EU legal order (i.e. a context where the *audi alteram partem* rule belongs to the category of general principles of law), the way this rule is applied by the Court of Justice is shrouded in ambiguity: despite the fact it is regarded as a general principle, it only applies 'to certain categories of procedure (particularly those producing adverse effects) but not all of them (even if an unfavourable effect was indeed produced)'.[57]

Similarly, the existence of a customary international law provision in the matter should be excluded; beyond some specific treaty regimes[58] and a narrow number of judgements,[59] the rule in question has been broadly and consistently applied precisely within the area of foreign investments; needless to say, its features have to be determined with reference to this area only.

Once again, the reasoning followed by arbitral tribunals turns out to be the same. The *audi alteram partem* rule has been inferred, by way of induction, from due process, regarded as a general principle, and adapted to the features peculiar to the international law of foreign investments; subsequently, thanks to a constant and uniform case law, this rule has become a 'stable' FET element.

In administrative proceedings involving foreign investors, a violation of the *audi alteram partem* principle, conceived as a FET element, may be claimed under the presence of two cumulative conditions. For the first condition to occur, the host State's legal order is required to expressly or tacitly provide for the principle. Otherwise, the same argument advanced with reference to denial of justice should be relied on: it is assumed that the investor is and must be aware of the State's normative framework and takes the risks that are connected to it.

The fact that the *audi alteram partem* rule is provided for in some way in the host State's legal order, but is not guaranteed in a given administrative proceeding involving a foreign investor, does not necessarily entail a FET violation. To this end, arbitral case law requires an additional requirement: the decision passed *in absentia* must be able, at least potentially, to cause a serious economic loss to the investment. The decision in *Middle East Cement Shipping* corroborates this line of thought.[60] In this case, the investor's ship (Poseidon) was seized and auctioned without due notification; indeed, both the attachment order and notice for an auction were applied by the competent authority on board of Poseidon (having found neither the debtor nor his representative), notified to the chief of the Suez port's Police, and published in a local newspaper. Bearing in mind that such a serious sanction should have been notified to the claimant by a direct communication, the Tribunal found the auction procedure as contrary to due process of law and therefore to the FET principle.[61]

A recent example of lack of fairness in administrative proceedings leading to a violation of the fair and equitable treatment may be found in *Urbaser v. Argentina*.[62] One of the claims in this case was related to the fact that the Argentinean Province of the Greater Buenos Aires suddenly interrupted the negotiations with the Claimant for an increase of the tariffs for the supply of water services without giving a meaningful explanation for such an interruption. This amounted, in Urbaser's view, to a violation of FET. Argentina, contrariwise, contended that the negotiations failed because of the very high increase of tariffs requested by the Claimant. The Tribunal, however, agreed with Urbaser and found that such a tariff increase might not have been as extraordinary as having the effect of an immediate closing of the negotiation. It would have been more reasonable that the Province continued the negotiations by inviting the Claimant to lower its requests significantly. The Tribunals also noted that Argentina interrupted the negotiations due to a political choice, without giving to the Claimant the possibility of starting a meaningful discussion on the tariff increase with the Province:

> even if the proposals were excessive, there was no serious reason to react by an abrupt end of discussions with a Concessionaire with whom negotiations had been conducted in correct terms over more than a year and who still showed its interest in continuing the service under the Concession.[63]

It was therefore surprising for the Claimant to be suddenly confronted with the effects of this evolution in February 2005 without any earlier and appropriate warning from the Province. The Tribunal therefore considered unfair and inequitable that the Province conducted administrative proceedings first inviting the Claimant to submit proposals for a renegotiation and to entertain intensive discussions and then bringing such discussions to an end abruptly in reliance on federal policies unrelated to the concession under negotiation of which the Province should have informed the Claimant appropriately.

4. The role of arbitrators in the interpretation of treaty clauses and the necessity to safeguard coherence

This discussion demonstrates that it is not possible to look at standards of treatment encapsulated in BITs as single entities, the interpretation of which may take place completely disregarding general international law and the interpretation that other tribunals have given of the same standards. Efraim Chalamish has spoken, in this regard, of the 'multilateral dimension of bilateralism', in accordance to which arbitrators may turn to comparable BITs as interpretative tools[64] and to give coherence to the application of standards of treatment.[65]

This, in turn, lets the essential role of arbitrators emerge. Tribunals should act as more than simple judges of a single dispute and as operators of a bigger legal framework in which they cannot simply ignore each other. Despite the fact that they are not obliged to follow precedents and that their authority descends from a manifestation of party autonomy only in relation to the dispute at hand, they cannot avoid confronting themselves with the outside world.

It is indeed undeniable that, in lack of detailed treaty provisions setting forth clear-cut substantive standards of treatment of foreign investments, arbitrators are the real balancing factor between the necessity to issue an award that is the appropriate one for the case at hand and the need to grant that such an award is integrated within the legal framework in which it operates. The recourse to general principles of international law and existing arbitral case law 'make it possible to avoid fragmentation, to bring diversity back to a certain degree of unity and, in other words, to erect arbitration and international investment law in a system'.[66]

Arbitrators' role, therefore, should be that of *guarantors* of the issuance of a fair award in relation to the dispute at hand and the expectations of the parties on the one hand and of *intermediaries* between the single dispute and the surrounding legal framework on the other hand.[67]

It seems therefore possible to say that arbitrators are responsible for finding a point of optimality between commitment and flexibility, by way of satisfying the needs of the parties according to the wording of the relevant treaty or contract (flexibility) without disregarding the necessity of ensuring coherence (commitment), which is considered to be a form of safeguard for the stakeholders and the respect of which is, finally, essential in order to grant the legitimacy of the method of dispute settlement.

In the ACIA framework, therefore, arbitrators shall respect the treaty wording and the will of Member States to reduce the spectrum of obligations included in concept of FET to the sole principle of due process. Yet they are also required to avoid disregarding general international law and the existing investment case law relating to the principle of due process.

5. Conclusion

In a nutshell, this chapter argues that due process (which encapsulates both denial of justice and fairness in administrative proceedings) is a general principle

of international law, with its own foundations in the international legal order itself. As a FET element, on the other hand, this principle has been shaped by arbitral tribunals according to the features typical of international investment law: due process is 'contextual' and, as such, its content depends on the normative field, rather than on the national legal order, where it is supposed to operate (which is even more so, considering that due process does not include, for example, the figure of denial of law).

From this angle, an Asian approach to due process may not actually exist nor is it desirable as a matter of principle: Article 11 of the ASEAN Comprehensive Investment Agreement, despite its ground-breaking wording limiting the FET obligation of ASEAN States only to the prohibition of violating due process, does not embody a self-standing treaty clause and its application requires that both general international law and the relevant case law in matter of due process to be taken into account. As a result, arbitrators end up representing the real balancing factor between the will of ASEAN States as expressed in the ACIA and the necessity to ensure the coherence of international investment law.

Notes

** This chapter is the result of the joint work of the two Authors. However, in detail, Prof. Palombino wrote Sections III and V and Dr. Zarra wrote Sections I, II and IV.

1 Reisman, 2017: 6 ff.

2 See, in general terms, Schaufelberger, 1993.

3 Savarese, 2012: 19 ff.

4 Palombino, 2018: 20 ff.

5 This has been already sustained in *Suez and AWG v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010, para 181, where the Tribunal said: 'Indeed, to borrow the terminology of Hans Kelsen, it is no exaggeration to say that the obligation of a host State to accord fair and equitable treatment to foreign investors is the *Grundnorm* or basic norm of international investment law'.

6 The FET standard and its interpretations in the case law are analysed in depth, inter alia, by Paparinskis, 2013; and Tudor, 2008.

7 Giardina, 2008: 337–9. Tanzi, 2012: 48–52.

8 Henke, 2017; Zarra, 2018. See in this regard to European Commission *Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes*, COM(2017) 493 final, adopted on 13 September 2017.

9 Hanessian and Duggal, 2017: 220 ff.

10 See Bottini, 2016, and Smith, 2013.

11 Schreuer, 2008.

12 See, inter alia, Bernardini, 2017; Jansen Calamita, 2017; and Henke, 2017. Moreover, it is to be noted that investment arbitration tribunals are putting in place certain self-adjustments aimed at balancing both parties' interests and offering a perception of acceptability of the adjudication mechanism. See Alvarez, 2011, and Schreuer and Kriebaum, 2011. For an analysis of the deferential approach of tribunals towards regulatory powers of host States see Schill, 2012.

13 Para. 1 of such Article states that:

> The Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.

14 See Reisman, 2017, 12 ff., who puts this phenomenon in relation with the circumstance that those countries which were traditionally only capital exporting are now becoming also capital importing. Such countries (e.g. the US) are therefore using their bargaining power in order to negotiate treaty clauses which highly safeguard their regulatory power.

15 The ASEAN approach to standards of treatment of foreign investment, aimed at preserving a large regulatory power to host States, has been analysed in Wongkaew, 2014: 3 ff.; Schill, 2016a; Schill, 2016b; Desierto, 2015; Cho and Kurtz, 2016; Nottage and Thanitcul, 2016; Chaisse, 2013; Magiera, 2017. For a general analysis of Chinese practice, see Shan and Gallagher, 2009: 126 ff.; Cappiello and Vanino, 2015; see also: Berger, A. (2008). China's new bilateral investment treaty programme: Substance, rational and implications for international investment law making. Paper prepared for the American Society of International Law International Economic Law Interest Group 2008 Biennal Conference \"The Politics of International Economic Law: The Next Four Years\", Washington D. C., November 14–15, 2008, www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf, last accessed 16 September 2017, 1–18.

16 For an analysis of this provision see Chaisse and Jusoh, 2016: 116 ff.

17 Similarly, with regard to the sole due process clause, Art. 3 of the 2015 Model Text for the Indian Bilateral Investment Treaty without even mentioning the label 'fair and equitable treatment' stipulates that investors shall not be subject to denials of justice under customary international law and un-remedied and egregious violations of due process. In this regard see also Art. 5 of the 2009 Agreement on Investment Among ASEAN and the Republic of Korea and Art. 6 of the 2009 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area.

18 Palombino, 2018: 57 ff.

19 Desierto, 2015: 1031–2.

20 On the difference between contracts and treaty claims see Zarra, 2017 b: 3 ff.

21 Gaillard and Banifatemi, 2003.

22 See e.g. Art. 30 of the US Model BIT. See also, inter alia, Art. 10, para 6, of the 2001 BIT between Denmark and Uganda.

23 Ascensio, 2016: 119 ff.

24 Characterized by the two elements of *diuturnitas* and *opinio juris sive necessitatis*. See Conforti, 2015: 40 ff.

25 For a meaningful analysis of these principles and their differences with other sources of general international law see Magnani, 1997: 71 ff.

26 Palombino, 2012: 56–58; Zarra, 2017 b: 115; Iovane, 2008: 103 ff. A meaningful analysis of this source is also carried out by Strozzi, 1992: 164 ff.

27 Ascensio, 2016: 125 (own translation). See also Iovane, 2018: 2. In this regard, it is to be noted that various authors talked about international investment tribunals as a network (Savarese, 2012: 26 and 231 ff.) or as *ad hoc* tribunals, which in any case behave as if they are a system (Palombino, 2012: 195). The orderliness of international investment law and arbitration is analysed in depth in Zarra, 2017 a; and Zarra, 2017 b: 25 ff.

28 Palombino, 2018: 154 ff. Zarra, 2017 a: 669–672.

29 Rigo Sureda, 2009: 832–833.

30 Cheng, 2006: 1031.

31 The same conclusion seems to have been reached by Chaisse and Jusoh, 2016: 121–122.

32 Para. 130 states as follows:

> The violation of [due process] determines an international wrongful act of denial of justice. The denial of justice can be interpreted on the basis of customary international law. . . . This requirement is considered to be so fundamental that in the practice of US BIT and FTA is specifically indicated.

33 This Article, quoted at fn. 17 above, clearly speaks of denial of justice under customary international law.

34 Paulsson, 2005: 13 ff.

35 Sattorova, 2012: 226 ff. Goldhaber, 2013: 383 ff.

36 This opinion has been sustained inter alia by Borchard, 1940: 445 ff.

37 See Diehl, 2012: 455 ff.

38 *See*, for instance, *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, para. 423 et seq. In same vein, one may mention *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Venezuela*, ICSID Case No. ARB/10/19, Award of 18 November 2014, para. 378: 'Y aunque la denegación de justicia no estuviera contenida en el estándar de TJE [fair and equitable treatment], adicionalmente, la denegación de justicia representa en todo caso un ilícito sancionado por el Derecho internacional consuetudinario'.

39 The existence of a notion of international due process has been advanced, for example, by Kotuby 2013: 411 ff.

40 In effect due process in international law does not involve only denial of justice and may be classified under three major groups. A first set of provisions, which are provided for in most human rights treaties (both universal and regional), seeks to ensure the individual's right to a fair trial and embody, in the view of some authors, a veritable custom in criminal matters. Further relevant norms of general international law refer to some fundamental canons of international adjudication, like that protecting the juridical equality between parties in their capacity as litigants as well as that of *audi alteram partem*. Last but not least, international norms reflecting concerns of due process are those providing for the right to fairness in administrative/law-making proceedings, the scope of which extends to both individuals (at national and international levels), and States insofar as they are part of international organizations (of which both the EU and the WTO are good examples) acting as law-makers.

41 *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009, para. 452. In the same vein, Article 5, para. 2 (a), of the 2012 US Model BIT should be considered: '"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world'.

42 This way of reasoning may be generalized, considering that it is commonly applied by international judges. See Iovane, 2018: 8–21.

43 See Hatshek, 1923: 397; Strupp, 1925. In the past, this distinction had been drawn, with the view to claiming that denial of justice always entails State responsibility, whereas denial of law does so under exceptional circumstances only. For a critique of this distinction see Quadri, 1936: 220 ff., in the footnotes.

44 Meldrum, 2000: 33.

45 *Electrabel S.A. v. Hungary*, ICSID No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 7.78.

46 Reference has to be made to the case *Oscar Chinn* (*United Kingdom v. Belgium*), Judgment of 12 December 1934, p. 84:

> Mr. Chinn, a British subject, when, in 1929, he entered the river transport business, could not have been ignorant of the existence of the competition which he would encounter on the part of Unatra, which had been established since 1925, of the magnitude of the capital invested in that Company, of the connection it had with the Colonial and Belgian Governments, and of the predominant role reserved to the latter with regard to the fixing and application for transport rates.

47 *Mondev International Ltd. v. United States*, ICSID Case No. ARB (AF)/99/2, Award of 11 October 2002, para. 101 ff.
48 *Loewen v. United States*, ICSID Case No. ARB/98/3, Award of 26 June 2003, paras. 168–169.
49 *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability of 24 August 2015, para. 100 ff.
50 Buffoni, 2009: 297.
51 Evidence of such a broad application of the rule is reflected in a number of decisions whereby actions requiring some right to be heard include, *inter alia*, deprivation of welfare benefits and dismissal of a government employee. 397 U.S. 254 (1970). In this case, in particular, the Supreme Court held that the Fourteenth Amendment due process clause required a state agency to provide an evidentiary hearing before terminating a person's welfare benefits after the agency determined that the individual was no longer eligible for such benefits.
52 *Ridge v. Boldwin* [1964] AC 40.
53 *See* Law No. 241, 7 August 1990 and subsequent amendments. A number of national decisions further support such a conclusion. One may mention Italian Court of Cassation, first civil section, 20 May 2002, No. 7341.
54 Judgment of 23 October 1974, para. 15. Likewise, one may mention the decision passed by the Court of First Instance in *Lisrestal*:

> it is settled law that respect for the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceedings in question.
>
> (Judgment of 6 December 1994, para. 42)

55 Bifulco, 2001.
56 Della Cananea, 2010: 71.
57 Della Cananea, 2011: 100.
58 One example in this regard lies in Articles 6 et seq. of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. These Articles actually state that the public concerned shall be adequately informed in an environmental decision-making procedure and benefits from a number of guarantees, such as that guaranteeing the participation in the procedure and the submission of comments and questions. The Agreement on Implementation of Article VI of 1994 GATT is equally revealing. Art. 6, par. 1, of this agreement ('Evidence') states as follows: 'All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question'.

59 Reference can be made to the judgment passed by the International Tribunal for the Law of the Sea in *Juno Trader* (*San Vincent and the Grenadines v. Guinea-Bissau*), Judgment of 18 December 2004. Its para. 77 states as follows:

> The obligation of prompt release of vessels and crews includes elementary considerations of humanity and *due process of law*. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision.
>
> (emphasis added).

The separate opinion of judge Treves confirms the impression that due process, in this case, was understood in terms of fairness in administrative proceedings:

> In the present case, the essential fact seems to me to be that between the time of the arrest of the ship and the time of the application to the Tribunal (and also up to the hearing before the Tribunal) all domestic procedures held in the case (whatever other possibilities might have been open under the local law) have been *inaudita altera parte* (namely, without giving the accused party the possibility of being heard)'.
>
> In this regard see Cassese, 2006: 120 ff.

60 *Middle East Cement Shipping and Handling Co.S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award of 12 April 2002, para. 143.
61 'The Tribunal has found . . . the auction procedure applied here to have not been "under due process of law" (Art. 4a of the BIT) and specifically the notification procedure to have not been sufficient': idem, para. 147.
62 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 818 ff.
63 See para. 840.
64 Chalamish, 2009: 317.
65 *Id.*, 342.
66 Ascensio, 2016: 118 (own translation).
67 Zarra, 2017 a: 676–677.

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