



The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105

Patrick Dumberry

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Since the entry into force of the North American Free Trade Agreement (NAFTA) in 1994, several arbitral tribunals have rendered awards dealing with claims of breach of Article 1105. Some of these awards have been very controversial and have had a tremendous impact on the development of the concept of fair and equitable treatment (FET) and the evolution of international investment law. Yet, in spite of the fundamental importance of these awards, no comprehensive study had been undertaken to determine the meaning and the content of the FET standard under NAFTA Article 1105.

This book's systematic analysis of the provision and its case law fills this analytical gap. Because Article 1105 is in many ways different from typical FET clauses contained within most investment treaties, the author examines the particular parameters under which it must be interpreted. He also analyzes how these specific features have influenced NAFTA tribunals' interpretation of the provision, and how their assessments differ from awards rendered by other tribunals outside NAFTA. Among the issues treated in the course of the analysis are the following:

- the origin, development, nature and content of the concept of the "minimum standard of treatment" and its interaction with the FET standard;
- the specific parameters under which Article 1105 must be interpreted, including contextual elements such as subsequent agreement and practice between the NAFTA Parties on matters of interpretation;
- the context in which the Free Trade Commission issued its Note of Interpretation in 2001 and how NAFTA tribunals have applied it;
- whether or not the concepts of legitimate expectations, transparency, arbitrary conduct, discriminatory conduct, good faith, denial of justice, and due process have been considered by NAFTA tribunals as specific elements of protection to be accorded to investors under Article 1105;
- the many facets of these elements and the threshold of severity that NAFTA tribunals have required for finding a breach of Article 1105;
- the interaction between Article 1105 and other NAFTA provisions on national treatment, Most-Favored-Nation treatment, and expropriation; and
- how NAFTA tribunals have assessed damages for breach of Article 1105.

This comprehensive guide to NAFTA case law on Article 1105 is an important contribution to the on-going controversial debate about the scope and content of the FET standard under international law. It will be of great interest to counsel for investors and States as well as to arbitrators, academics and anyone interested in investor-State arbitration.

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