

Thomas W Wälde and Fair and Equitable Treatment

By Rachel A Hird*

The fair and equitable standard of treatment in international investment law has been the focus of recent arbitral awards and commentary. Professor Thomas Wälde offered one of the most expansive interpretations of the content and scope of the fair and equitable treatment standard in his Separate Opinion in the Thunderbird arbitration. A review of Wälde's opinions on fair and equitable treatment from his first writings on the subject through to Thunderbird reveals his increasingly expansive understanding of the standard. This article suggests that Professor Wälde's opinions on fair and equitable treatment coincide with an increasingly teleological approach to interpreting the fair and equitable treatment standard in international investment agreements.

Fair and equitable treatment (FET) has become one of the more dynamic standards of treatment in international investment law. In one of his published comments, Wälde argued that it had become a popular standard for tribunals 'willing to decide in favour of claimants'.¹ Sornarajah has suggested that the standard gained popularity with claimants looking to allege a wrongdoing on the part of a state that falls short of breaching another standard of protection such as the duty not to expropriate except

* Rachel A Hird is an LLM candidate at the University of Calgary and a student of Law at Fraser Milner Casgrain LLP. She would like to thank Nigel Bankes for his helpful comments on reviewing previous versions of this article. The author can be contacted by e-mail at rachel.hird@fmc-law.com.

1 Thomas W Wälde, 'Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues based on Recent Litigation Experience', in Norbert Horn (ed), *Arbitrating Foreign Investment Disputes* (The Hague: Kluwer Law International, 2004), pp 193–235 at 206. This article also appears in a relatively similar format as Thomas W Wälde, 'Energy Charter Treaty-based Investment Arbitration: Controversial Issues' (2004) 5 *Journal of World Investment & Trade* 373.