



APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION

Presentations

Kuala Lumpur, Malaysia
15-19 June 2009

Produced for:
Asia Pacific Economic Cooperation Secretariat
35 Heng Mui Keng Terrace
Singapore 119616
Tel: (65) 68919 600 Fax: (65) 68919 690
Email: info@apec.org
Website: www.apec.org

©2009 APEC Secretariat

APEC#209-CT-01.5

Expropriation: A comment

Vilawan Mangklatanakul
17 June 2009

Current Practice

- No real distinction between “direct” and “indirect” expropriation
- No clear definition of “indirect” expropriation
- An “equivalent effect” test
 - transfer of property/deprivation of control of investment/total damage
- Assessment on a case by case basis

General BIT’s provisions

- “shall not be expropriated, nationalised or subjected to any other measures having effect equivalent to nationalisation or expropriation”
- Public purposes related to internal needs
- Due process of law
- Non-discriminatory basis
- Prompt, effective and adequate compensation

Problems

- Vague language creates uncertainty
- Difference in interpretation
- What is “customary international law”?
- Lawyers and government often do think the same way

Practices in FTA negotiations

- US Model: Attempt to specify the criteria/factors in determining an expropriation
- Prefer to decide between the Parties to a treaty than to leave it to decision of arbitrators
- Increasingly adopted in recent FTA negotiations in ASEAN, ie ACIA, ANZFTA

Rules for interpretation

- **Annex 1 Expropriation and Compensation**
 1. An action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.
 2. Article 9(1) addresses two situations:
 - (a) the first situation is direct expropriation, where a covered investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
 - (b) the second situation is where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 3. The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an expropriation of the type referred to in Paragraph 2(b) requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (a) the economic impact of the government action, although the fact that an action or series of related actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;
 - (b) whether the government action breaches the government’s prior binding written commitment to the investor whether by contract, licence or other legal document; and
 - (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose.^[1]
 4. Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment do not constitute expropriation of the type referred to in Paragraph 2(b). (ANZFTA)

[1]“Public purpose” shall be read with reference to Article 9(1)(a) and Article 9(6).

Taxation measures

- “If there is a dispute described in article 18.1 (Scope and Definitions) of Chapter 11 (Investment) that may relate to a taxation measure, the relevant Parties, including representatives of their tax administrations, shall hold consultations. Any tribunal established pursuant to section B (Investment Disputes between a Party and an investor) of Chapter 11 (Investment) **shall accord serious consideration to a joint decision** of the relevant Parties as to whether the measure in question is a taxation measure. For this purpose, Article 25.7 (Conduct of the Arbitration) of Chapter 11 (Investment) shall apply *mutatis mutandis*.” (ANZFTA Ch. 15 art 3.4)

Exception 1

- **To protect welfare objectives such as public health, safety and the environment**
 - “Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in paragraph 2(b).” (ACIA Annex 2 para 4)

Exception 2

- **Issuance of Compulsory licences**
 - “This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement.” (ACIA art. 14.5)

Exception 3

- **Special treatment in case of expropriation relating to land**
 - “For the avoidance of doubt, any measure of expropriation relating to land shall be as defined in the Member States’ respective existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations.” (ACIA art. 14.1 fn 2)

(cont.)

- “Notwithstanding Paragraphs 1, 2, 3 and 4, in the case where Singapore or Viet Nam is the expropriating Party, any measure of expropriation relating to land, which shall be as defined in the existing domestic legislation of the expropriating Party on the date of entry into force of this Agreement, shall be for a purpose and upon payment of compensation made in accordance with the aforesaid legislation. Such compensation shall be subject to any subsequent amendments to the aforesaid legislation relating to the amount of compensation where such amendments follow the general trends in the market value of the land.” (ANZFTA ch.11 art. 9.6)

Future...

- Be precise when drafting an expropriation clause
- Indicate policies of State Parties to the treaty
- It is a matter for negotiation
- Do not leave too much room for interpretation when a dispute arise
- Create a mechanism for binding interpretation of State Parties