



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

Presentations

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UNCTAD-APEC REGIONAL TRAINING COURSE

Fair and Equitable Treatment

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- II. Regional practice and prospect



I. Chinese Practice and Proposed Change



1. Chinese practice
2. Proposed change



1.Chinese Practice

- A. **No FET Clause**
- B. **Location**
- C. **Criteria of reference**
- D. **Exception**



A. No FET clause

- Rare: eg. BITs with Japan, Korea, Turkey, former Czechoslovakia, Romania (both 1983 & 1994 versions) and Belarus
- Reasons: ?
- Implications: Can FET be presumed?



B. Location

- Preamble:
 - Rare: Sweden, Denmark BITs
 - Legal effect?
 - Repeated in following substantive articles
- Substantive provisions:
 - Promotion and protection of investment
 - Standard of treatment
 - Both: implications: application to both admission and operation phases?



C. Criteria of reference

- *Domestic Law of the Host State*
 - “Each Contracting party shall, subject to its laws and regulations, at all times ensure equitable treatment to the investments of the investors of the other Contracting Party.”---Finland BIT 1984, Article 3.
 - IL relevant?
- *Present treaty*
 - “2 . Investments approved under Article 2 shall be accorded fair and equitable treatment and protection in accordance with this Agreement.”---Singapore BIT 1985, Article 3(2).
 - Repetition of protection, or additional obligation?
 - IL relevant?



C. Criteria of reference

- *Principles of International Law*
 - Party-Accepted PILs: “The treatment and protection referred to in Paragraphs 1 and 2 of the Article 3 in the Agreement (FET) shall not be less favourable than that contained in *generally recognised principles and rules of international law* accepted by both contracting Parties.” 1984 BLEU BIT
 - Common PILs: Article 143 Fair and Equitable Treatment
 1. Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy the full protection and security in the territory of the other Party in accordance with commonly accepted rules of international law.

---New Zealand FTA Ch11



C. Criteria of reference

- *Principles of International Law*

- IMS:

1. Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment in accordance with *international law, including fair and equitable treatment* and full protection and security.
2. *For greater certainty, this Article prescribes the international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Contracting Party.* The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens *as evidence of State practice and opinio juris*. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. --Mexico BIT 2008



C. Criteria of reference

- *Other BIT standards: MFN or/and NT*
 - 1. Investments and activities associated with investments of investors of either Contracting Party shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting Party.
 - 2. The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with investments of investors of *any third State*. ---Poland BIT, Article 3.

Exceptions



- Express exceptions:
 - Rare: “all or nothing” approach
 - Public order exception: “for the maintenance of public order and in defence of the State law.”---BLEU BIT 1984, Article 3 (2).
- Implied exceptions?



2. Proposed change

Article 3 Fair and Equitable Treatment

1. Each Contracting Party shall accord to investments of investors of the other Contracting Party in its territory fair and equitable treatment and full protection and security.
2. “Fair and equitable treatment” requires, in particular, that investors and their investment are not denied equitable treatment in relevant judicial or administrative procedures, or are subject to unfair or inequitable obligations, *in according with the law of the host state and general principles of law.*
3. “full protection and security” requires that the contracting parties, when performing the duties of investment protection and security, adopt reasonable necessary measures, which *under any circumstances shall not means that investors be treated more favourably than nationals* of the Contracting party in which the investment is made.
4. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Calove in Chinese BIT?

- Domestic law standard
- National treatment maximum
- Relevance of IL?





II. Regional practice and prospect

1. APEC practice

- No mentioning in APEC Non-Binding Principles
- APEC 2007 study conclusion:
 - Included in all by three APEC IIAs
 - Largely undefined
 - Five approaches: similar to Chinese practice
 - No reference to IL (India-Indonesia BIT)
 - FET, and no less than MFN (Lebanon-Malaysia BIT)
 - NAFTA (FET by IL +interpretative note; Japan BITs with Mexico and Philippines)
 - North American Model BITs (FET=IMS)
 - No FET/IMS: eg Australia-Singapore FTA

APEC prospect on FET



- Emerging APEC consensus on FET=IMS;
 - Recent APEC BIT practice including notably Sino-Mexico BIT
- Continuous tension between domestic and international standards in defining FET?



Conclusion

- Chinese practice:
 - Diversity in acceptance, location, criteria and exceptions
 - Growing acceptance of international
- Proposed change: FET=NT?
- APEC practice: diversity and growing acceptance
- APEC prospect: consensus or controversy?

Thank you!



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