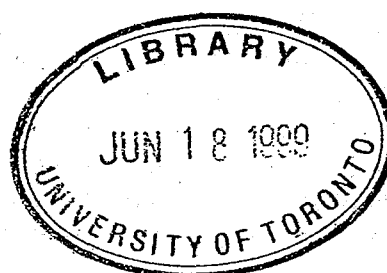


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Bilateral Investment Treaties in the Mid-1990s



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argument, it could point to similar differentiation in treatment prevailing in many countries around the world. At the same time, the host country might also argue that such "reasonable" differentiation was not discrimination.

(d) *Duty to observe commitments concerning investment*

Another clause in use requires each contracting party to observe any obligations that it may have incurred with regard to investment, although this type of clause is less frequently used than the previously discussed absolute standards. A typical example of this clause is to be found in the BIT between Denmark and Lithuania (article 3 (1)), which provides that "[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party" (table III.6).⁶⁴

This clause is directed in particular at investment agreements that host countries frequently conclude with individual foreign investors.⁶⁵ It would appear, however, that, unless otherwise stated, this provision could also apply to undertakings by the two contracting parties concerning investment. Indeed, the language of the provision is so broad that it could be interpreted to cover all kinds of obligations, explicit or implied, contractual or non-contractual, undertaken with respect to investment generally. It may be for this reason that the BIT between the Netherlands and the Philippines departed from the Netherlands prototype and adopted more specific language on this point (table III.6). Another example of a more specific formulation of this matter is the BIT between Malaysia and the United Arab Emirates (table III.6).⁶⁶

Investment agreements between host countries and foreign investors are often subject to the local laws of the host country, depending upon their precise formulation (see below under "settlement of disputes"). A provision of the kind discussed here might possibly alter the legal regime and make the agreement subject to the rules of international law. In any event, as a result of this provision, violations of commitments regarding investment by the host country would be redressible through the dispute-settlement procedures of a BIT.

(e) *Treatment consistent with international law*

Some BITs have a provision that requires the host country to provide the investments covered by the treaty with treatment no less favourable than that required by international law. These include, for example, BITs concluded by the Belgium-Luxembourg Economic Union, France and the United States. Thus, the treaty between Belgium-Luxembourg and Malaysia (article 3) specifies that fair and equitable treatment "may in no case be less favourable than that recognized under international law". The provision also appears in some BITs signed between Latin American countries, such as the BIT between Brazil and Chile (table III.6).⁶⁷

This provision ensures that the BIT is interpreted so as to provide at least the minimum standard of protection required by international law. It is analogous to the one discussed in the preceding section in that it has the effect of incorporating another separate set of norms into the BIT

⁶⁴ The clause often appears, for example, in BITs concluded by Germany, the Netherlands, the United Kingdom and the United States.

⁶⁵ On the use of such clauses generally, see Waelde and Ndi (1996).

⁶⁶ Through this type of provision it is sought to bring together, as a single category, both formal contractual arrangements between State and investor (e.g., concessions, State contracts) and obligations the State has undertaken by virtue of the instrument of approval of the investment (as to which it is usually said that they have a contractual element, although they are normally administrative acts).

⁶⁷ Other examples of BITs involving Latin American countries that contain such a provision are the BITs between Barbados and Venezuela (article 2 (2)) and between Ecuador and Venezuela (article III (1)).