Standards of Investment Protection

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Preface

As a result of the increased use of dispute settlement, primarily in the form of mixed investor-State arbitration, international investment law is developing rapidly. The protection afforded to foreign investors is based on treaties, on customary international law standards, largely derived from the classical law on the 'treatment of aliens', as well as on the national law of host States.

The growing number of investment arbitration awards has helped to provide more specific meaning to the general standards of investment protection found in the majority of international investment instruments, in particular in the currently more than 2500 bilateral investment treaties (BITs). Such standards are regularly contained and fairly similarly formulated in these numerous international agreements. Almost all of them include certain rules on the admission of investments, the two non-discrimination standards of most-favoured-nation as well as national treatment, absolute treaty standards, such as fair and equitable treatment, full protection and security, as well as protection against arbitrary and unreasonable measures, guarantees against uncompensated expropriations, and provisions on the transfer of funds.

In the currently prevailing treaty-arbitration, ie direct investor-State arbitration mostly based upon BITs or other investment treaties and dealing with alleged violations of these investment standards, it is crucial to give more precise significance to the rather vague and generally worded standards of treatment. Such deeper understanding of the present law on the treatment of foreign investment may be derived from a close analysis of the developing jurisprudence of investment tribunals.

The contributors to this book have agreed to focus on the identification of a possibly emerging consensus on how these substantive treatment standards are to be interpreted. They closely examine the origin and variations of the wording used in investment agreements and their analysis focuses on the actual application of the treatment standards in the practice of investment tribunals. The resulting book is intended to provide a first-hand road-map to substantive investment law.

The authors, renowned experts in the field of investment law from academia and practice, are all members of the International Law Association's Committee on International Law of Foreign Investment. Their contributions to this book are based on papers they have presented at the Conference on Standards of Investment Protection at the Law School of the University of Vienna on 21 September 2007.

This conference was made possible through the support of the Austrian Science Fund (FWF) which is funding a research project of the editor of this book on international investment law in the practice of arbitral tribunals. Of course,

Canada was justified in limiting the availability of the subsidy to Canada Post.[103]

Again the dissenting arbitrator took issue with this conclusion. He concluded that both UPS and Canada Post deliver materials of the sort for which delivery payments are made under the PAP, both do so as a routine part of their business, and both make money for so doing.[104] Given this *prima facie* showing that the two were in like circumstances, the burden shifted to Canada to explain the difference in treatment. While he would have found Canada's reasoning persuasive had it been the only consideration, he was persuaded by UPS's argument that Canada's justification that only Canada Post could deliver to all addresses was merely a post-hoc rationalization designed to protect the programme from attack during dispute resolution proceedings.[105]

Depending on the analytical approach of the tribunal, the like-circumstances determination is a fact-specific inquiry that often dictates the outcome of the case. An entity not like the allegedly more favourably treated entity can sustain no claim. Identifying the entity in like circumstances requires a flexible analysis that takes into account the type of treatment accorded. In most cases the differently treated entities will have a competitive relationship, and the measure in question will give the domestic entity some kind of competitive advantage. Yet the existence of a competitive relationship is not necessary if it appears the State is taking advantage of sectoral dominance by foreign entities to impose a burden on them. Moreover, a competitive relationship is not sufficient if similarly situated domestic entities bear the same burden placed on the allegedly less-favourably-treated foreign entity.

Less Favourable Treatment

In addition to identifying the appropriate comparator, a claimant alleging a national treatment obligation must demonstrate that the allegedly violative treatment is less favourable than that accorded to the domestic comparator. In most instances this will not be difficult as the alleged difference in treatment will be relatively clear. Again, it is important to note the interplay of this aspect of the obligation with the like-circumstances determination; determining that the investor is not in like circumstances with the more favourably treated entity will negate any claim, notwithstanding a clear difference in treatment. Thus, in *Methanex* the conclusion that Methanex was not in like circumstances with the

[103] Given its conclusion with respect to the cultural industries exception, the majority did not consider whether the programme also fell within the purview of the subsidies exception. The dissenting arbitrator concluded that it did not.

[104] *UPS v Canada*, above n. 56, para. 94.

[105] Ibid., paras 124–125.

more favourably treated producers of ethanol eliminated any possible national treatment violation.

National treatment obligations preclude *de jure* or *de facto* discrimination on the basis of nationality. Some claimants have argued that any treatment that differentially affects a foreign investor, even if the difference is not attributable to considerations of nationality, can be sufficient to sustain a national treatment claim. The effect of this argument is to import the whole of the discrimination element in the 'arbitrary or discriminatory' treatment standard into the national treatment obligation. It has not generally been successful. First, it is inconsistent with the understanding that most have formed of the national treatment obligation over the years. Secondly, such an interpretation is also inconsistent with the existence in most treaties of non-contingent obligations. Unreasonable treatment accorded a foreign-owned investment is likely a violation of the fair and equitable treatment standard; there is no need to import such an obligation into the national treatment obligation, and doing so would render one of the two provisions redundant.

One of the strongest statements of the nationality-based discrimination approach can be found in the *GAMI* decision. The *GAMI* tribunal disposed of any suggestion that mere differential treatment could result in a successful national treatment claim. There was no question in *GAMI* that some sugar mills had not been expropriated, but that the US investor's mills had been. They thus received less favourable treatment than had some Mexican-owned mills. According to the tribunal, however,

> [...] [i]t is not conceivable that a Mexican corporation becomes entitled to the anti-discrimination protections of international law by virtue of the sole fact that a foreigner buys a share of it.[106]

Prevailing on a nationality-based discrimination claim does not require actual proof of protectionist intent. As the tribunal in *S.D. Myers* said, 'Intent is important, but protectionist intent is not necessarily decisive on its own'.[107] There must also be some negative impact on the claimant.[108] One reason not to impose an intent requirement is the difficulty of demonstrating that a government entity, which might comprise many different actors with different motivations, actually had an 'intent' to discriminate. The *Feldman* tribunal said that requiring proof of intent would effectively limit a national treatment claim to *de jure* violations, and would severely limit the effectiveness of the obligation.[109]

The majority of the case law accords with the suggestion that the less favourable treatment must have been predicated on nationality considerations. For the

[106] *GAMI v Mexico*, above n. 83, para. 115.
[107] *S.D. Myers v Canada*, above n. 60, para. 254.
[108] Ibid.
[109] *Feldman v United Mexican States*, above n. 75, para. 183.