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Presentations

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Fair and Equitable Treatment

APEC-UNCTAD Regional Training Course on International Investment Agreements

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FET – Topics To Be Covered

- Overview – Competing FET Interpretations
- FET Formulations among APEC Economies
- History of the NAFTA Parties' Interpretation
- NAFTA Decisions & the Free Trade Commission
- US View of The FET Standard
- Interpretations by Non-NAFTA Tribunals
- Clarification of Standards In Recent Treaties

Overview – Competing FET Interpretations

- Customary int'l law minimum standard of treatment
- Autonomous Standard (embracing CIL MST components)
- Textual Analysis

APEC Economies – Formulations of the FET Standard

No reference to international law

India-Indonesia BIT, art. 3(2)

"Investments . . . of each Contracting Party shall at all times be accorded *fair and equitable treatment* in the territory of the other Contracting Party."

APEC Economies – Formulations of the FET Standard

Addressing relationship between FET and international law

- NAFTA 1105(1) & FTC Interpretation

  (1) Each Party shall accord to investments of investors of another Party treatment *in accordance with international law, including fair and equitable treatment* and full protection and security.

- Chile-Peru ALC (signed 2006)

APEC Economies – Formulations of the FET Standard

Addressing relationship between FET and international law *(cont'd)*

- Japan's IIAs with Mexico and the Philippines

"Note: This Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other 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 customary international law minimum standard of treatment of aliens* [...]."

APEC Economies – Formulations of the FET Standard

Omit any reference to FET and the minimum standard

- Australia-Singapore FTA (2003)
- New Zealand-Singapore FTA (2001)
- New Zealand-Thailand CEP (2005)

For Further Information

- U.S. Department of State
  - www.state.gov/s/l/c3439.htm
- Mexico's Ministry of Economy
  - http://www.economia.gob.mx/?P=5500
- Foreign Affairs & International Trade Canada
  - http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp

NAFTA Article 1105: Minimum Standard of Treatment

(1) Each Party shall accord to investments of investors of another Party treatment *in accordance with international law, including fair and equitable treatment* and full protection and security.

Scope of NAFTA Article 1105(1)

- Customary International Law Obligations – Yes!
- All International Law Obligations – No!

Basis for U.S. Interpretation

- OECD Draft Convention on the Protection of Foreign Property, 1963 and 1967
- OECD Committee on International Investment and Multinational Enterprises Survey, 1984
- U.S. Bilateral Investment Treaties
- Canadian Statement of Implementation of the NAFTA, 1994

Basis for Claimants' Interpretations

- Writings of publicists
  - F.A. Mann's 1981 British Yearbook of International Law article

NAFTA Decisions

- *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB (AF)/97/1 (Award) (Aug. 30, 2000)
- *S.D. Myers v. Canada* (Partial Award) (Nov. 13, 2000)
- *Pope & Talbot, Inc. v. Canada* (Award) (Apr. 10, 2001)
- *United Mexican States v. Metalclad Corp.*, Supreme Court of British Columbia, 2001 BSCS 664 (May 2, 2001)

NAFTA Free Trade Commission

- The trade ministers of the three NAFTA countries
- Article 2001(2): The FTC shall "resolve disputes that may arise regarding [the Agreement's] interpretation or application."
- Article 1131(2): "An interpretation by the Commission of a provision of this Agreement *shall be binding* on a Tribunal established under [Section B of Chapter Eleven]."

FTC Interpretation July 2001

B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. 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 customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

FTC Interpretation July 2001

"Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."

- FTC Interpretation of July 31, 2001 ¶ B(1)

FTC Interpretation July 2001

"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 customary international law minimum standard of treatment of aliens."

- FTC Interpretation of July 31, 2001 ¶ B(2)

FTC Interpretation July 2001

"A breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

- FTC Interpretation of July 31, 2001 ¶ B(3)

NAFTA Decisions after the FTC Interpretation of Article 1105(1)

Mondev Int'l v. USA, ICSID AF, Award, Oct. 11, 2002

"Article 1105(1) did not give a NAFTA Tribunal unfettered discretion to decide for itself, on a subjective basis, what was 'fair' or 'equitable' in the circumstances of each particular case . . . the Tribunal is bound by the minimum standard as established in State practice and in the jurisprudence of arbitral tribunals. It may not simply adopt its own idiosyncratic standard of what is 'fair' or 'equitable' without reference to established sources of law."

NAFTA Decisions after the FTC Interpretation of Article 1105(1)

United Parcel Service ("UPS") v. Canada, Award on Jurisdiction, Nov. 22, 2002

- No customary international law minimum standard of treatment implicated by anticompetitive practices

NAFTA Decisions after the FTC Interpretation of Article 1105(1)

ADF v. USA, ICSID AF, Award, Jan. 9, 2003

"We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments. . . .

[W]e ask: are the U.S. measures here involved inconsistent with a general customary international law standard of treatment requiring a host State to accord "fair and equitable treatment" . . . to foreign investments in its territory? . . .

NAFTA Decisions after the FTC Interpretation of Article 1105(1)

Loewen v. USA, ICSID AF, Award, June 26, 2003

"'[F]air and equitable treatment' and 'full protection and security' . . . constitute obligations only to the extent that they are recognized by customary international law. . . . . To the extent, if at all, that NAFTA Tribunals in *Metalclad Corp v. United Mexican States*, *S.D. Myers, Inc. v. Government of Canada* and *Pope & Talbot, Inc. v. Canada* may have expressed contrary views, those views must be disregarded."

NAFTA Decisions after the FTC Interpretation of Article 1105(1)

Waste Management II v. Mexico, ICSID AF, April 30, 2004, ¶ 98

"[T]he minimum standard of treatment of [F&ET] is infringed by conduct attributable to the State and harmful to the claimant if . . . arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process . . . .

NAFTA Decisions after the FTC Interpretation of Article 1105(1)

Waste Management II v. Mexico, ICSID AF, April 30, 2004, ¶ 98 *(cont'd)*

". . . . In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."

NAFTA Decisions after the FTC Interpretation of Article 1105(1)

International Thunderbird Gaming Corp. v. Mexico, (UNCITRAL) Final Award, Jan. 26, 2006

"a gross denial of justice or manifest arbitrariness falling below acceptable international standards"

And also holding that . . .

"the administrative process requirement is lower than that of judicial process."

US View of NAFTA FET Standard

US Counter-Memorial in *Glamis Gold v. USA*, dated Sept. 19, 2006

- addressing the absence of "any relevant State practice to support its contention that States are obligated under international law to provide a transparent and predictable framework for foreign investment." pp. 226-27
- addressing the absence of "of any customary international law rule requiring States to regulate in such a manner – or refrain from regulating – so as to avoid upsetting foreign investors' settled expectations with respect to their investments." pp. 230-33

US View of NAFTA FET Standard

US Counter-Memorial in *Glamis Gold v. USA*, dated Sept. 19, 2006 *(cont'd)*

- rejecting attempts to "lift one factor to be considered in an indirect expropriation claim [i.e., legitimate expectations] and adopting that factor as the sole test for a violation of the minimum standard of treatment." pp. 233-34

Competing Interpretations Recap

- Customary int'l law minimum standard of treatment
  - 2004 US Model BIT & Recent Treaties
- Autonomous Standard
- Textual Analysis

Autonomous Standard - Components

"(i) refraining from discriminatory conduct;

(ii) providing security for reasonable, investment-backed expectations;

(iii) refraining from arbitrary conduct; and

(iv) providing transparency and due process."

TECMED v. Mexico, ICSID AF, Award, May 29, 2003, ¶ 154 excerpts

[I]n light of the good faith principle established by international law, [the provision] requires the Contracting Parties to provide to international investments *treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.* The foreign investor expects the host State to act in a consistent manner, *free from ambiguity and totally transparently* in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. . . .

TECMED v. Mexico, ICSID AF, Award, May 29, 2003, ¶ 154 excerpts

"The foreign investor also *expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State* that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. . . . The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. [. . .]"

Saluka v. Czech Republic, UNCITRAL, Partial Award, March 17, 2006

Dutch-Czech BIT, art. 3(1)

"Each Contracting Party shall ensure *fair and equitable treatment* to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors."

- No reference to international law

Saluka v. Czech Republic, UNCITRAL, Partial Award, March 17, 2006, pp. 60-61

- General standards cannot be reduced to a precise statement of rules
- Not a decision *ex aequo et bono*
- Not an open-ended mandate to second-guess government decision-making
- Specification through judicial practice

Saluka v. Czech Republic, UNCITRAL, Partial Award, March 17, 2006, ¶ 309

- "[FET] is an *autonomous* Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct [ ] that clearly provides disincentives to foreign investors. [W]ithout undermining its legitimate right to take measures for the protection of the public interest, [the State] has therefore assumed an obligation to treat a foreign investor's investment in a way that *does not frustrate the investor's underlying legitimate and reasonable expectations*. A foreign investor whose interests are protected under the Treaty is entitled to expect that the [State] will *not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions).*"

Evolution of Treaty Practice

- Clarification of Standards, *e.g.*:
  - U.S.-Australia
  - U.S.-Singapore FTA
  - U.S.-Morocco FTA
  - U.S.-Chile FTA
  - 2004 US Model BIT
  - US-Colombia TPA
  - Canada's new model

U.S.-Australia FTA

Article 11.5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

[11-1]Article 11.5 shall be interpreted in accordance with Annex 11-A.

U.S.-Australia FTA

Article 11.5: Minimum Standard of Treatment[11-1] *(Cont'd)*

2. For greater certainty, . . . "fair and equitable treatment" . . . do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; . . . .

[11-1]Article 11.5 shall be interpreted in accordance with Annex 11-A.

U.S.-Australia FTA

Article 11.5: Minimum Standard of Treatment[11-1] *(Cont'd)*

3. 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.

[11-1]Article 11.5 shall be interpreted in accordance with Annex 11-A.

U.S.-Australia FTA

Annex 11-A
Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 11.5 and Annex 11-B *results from a general and consistent practice of States that they follow from a sense of legal obligation*. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

V. Conclusion

- Various APEC Economies' FET formulations
- NAFTA Parties' interpretation
- Non-NAFTA Tribunal interpretations of FET standards
  - Defensive & offensive reliance on IIAs
  - Attracting FDI
  - Future Negotiations - Learning from Other States' Experiences

Thank you

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