Key Concepts in International Investment Arbitration

Second Edition – January 2022

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This Presentation gives only an indication of certain concepts and the corresponding case laws involved in Investment Treaty Arbitration. It is not intended to be either complete or an exhaustive narration of the subject.

Concepts discussed

A. Investment & Investor

B. Fair and Equitable Treatment (FET)

C. Most Favoured Nation (MFN)

D. Expropriation

Preface

Bilateral Investment Protection Treaties between different countries provide global investors protection from arbitrary, unfair, unreasonable actions of government of the investee state. Generally, the treaties provide for recourse to arbitration in a third country. International Investment Arbitration has emerged as a highly specialized branch of international law. Tribunals across the world have pronounced awards that have helped clear up key essential concepts in the field.

In recent years the tribunals and international investment treaties have come under strong criticism. Developing countries often take the view that the treaties and tribunals favour the capital-rich investing countries at the expense of poor investee countries. India has taken the lead in trying to modify the treaty protection regime. Brazil-India Investment Cooperation and Facilitation Treaty (25th January 2020) marks a significant difference from the old treaties which were modeled on the India-UK Agreement for Promotion and Protection of Investments (came into force on 6th January 1995).

This Presentation discusses four key concepts critical to International Investment Arbitration. The concepts are discussed with reference to the old model of investment treaties and also as per India-Brazil Treaty. As investment protection regime evolves, the meanings assigned to various concepts are bound to also change. Hence, this presentation may be seen as a work-in-progress.

The presentation is aimed at giving a well-read advanced reader an overview of the concepts as elucidated by awards of different arbitration tribunals and also as provided in the new treaty. The Presentation refers only to cases under UNCITRAL Arbitration Rules.

While attempt has been made to be accurate as well as concise and precise, there may be inadvertent errors both in content as well as presentation. We shall be most obliged if the learned readers could kindly point out such errors and also give suggestions for improvement.

Anil Chawla, Senior Partner

A. Investment & Investor

- Broad and open ended definition
- Inclusive for wider interpretation
- Definition of assets expansive
- Guidance from local laws

A0. Investment – Different definitions

- Investment treaties define investments in diverse ways. Some adopt an extremely broad view while others limit the scope considerably.

a formal incorporation test). In the case of investments, narrowing techniques include:

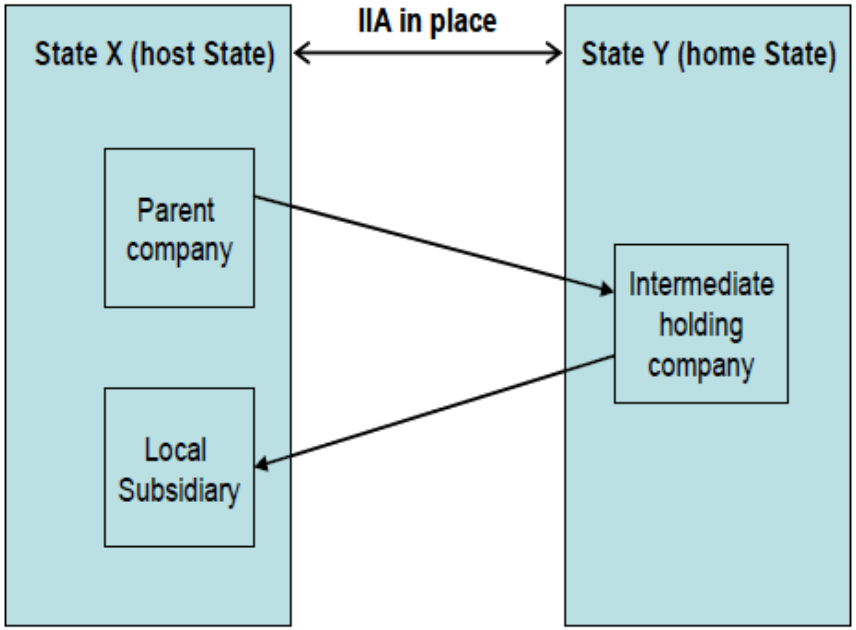
- Applying the protection of the treaty only to investments made in accordance with host country law;
- Using a closed-list definition instead of an open-ended one;
- Excluding of portfolio shares by restricting the asset-based approach to direct investment only;
- Introducing investment risk and other objective factors to determine when an asset should be protected under the treaty;
- Excluding certain types of assets such as certain commercial contracts, certain loans and debt securities and assets used for non-business purposes;
- A more selective approach to intellectual property rights as protected assets; and
- Dealing with the special problems of defining the investment in the case of complex group enterprises as investors.

Source: Scope and Definition, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2011

A00. Investors – Types and exclusions

- **Natural persons** – nationality / residence / permanent residence / domicile – different treaties take different approaches.
- **Legal Entities** – included or excluded based on form, purpose, ownership, real and effective commercial link with the country.

Treaties often attempt to exclude or deny benefits to "shell" or "letterbox" companies.



Some treaties exclude on the basis of ownership or on the basis of absence of substantial business operations. For example, India Singapore Agreement has a Denial of Benefits clause which will exclude the type of structure shown in the diagram from benefits.

Source: Scope and Definition, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2011

A000. Investment & Investor – Key concepts

- Definition to be interpreted with object of treaty
- Choice of rules does not change definition
- Shareholder of shareholder company is investor
- Claims to money may be investment
- Claims through third state are investment

A1. Definition to be interpreted with object of treaty

- Literal meaning is sometimes not acceptable.
- Categories given in definition may be illustrative and not exhaustive
- Interpretation must take into account object and purpose of the treaty

(Romak S.A. (Switzerland) v. The Republic of Uzbekistan; Award - Date – November 26, 2009; Seat –Paris; The Agreement between the Swiss Confederation and the Republic of Usbekistan on the Promotion and Reciprocal Protection)

188. Based on the above considerations, Romak's proposed literal construction of Article 1(2) of the BIT is untenable as a matter of international law. The Arbitral Tribunal must therefore explore the meaning of the word "investments" contained in the introductory paragraph of that Article. As stated above at paragraph 180, the categories enumerated in Article 1(2) are not exhaustive and are clearly intended as *illustrations*. Thus, for example, while many "claims to money" will qualify as "investments," it does not follow that *all* such assets necessarily so qualify. The term "investments" has an intrinsic meaning, independent of the categories enumerated in Article 1(2). This meaning cannot be ignored.

189. In construing the term "investments," the Arbitral Tribunal will have due regard to the object and purpose of the BIT which, by referring to "*economic cooperation to the mutual benefit of both States*" and to the "*aim to foster the economic prosperity of both States*," suggests an intent to protect a particular kind of assets, distinguishing them from mere ordinary commercial transactions. However, it is also plain that the BIT's stated object and purpose sheds little light on the meaning of the term "investments," and "*leaves* [it] *ambiguous or obscure*."

A2. Choice of rules does not change definition

- Choice of dispute resolution mechanism (ICSID or UNCITRAL) does not alter the definition of “investment”.

(Romak S.A. (Switzerland) v. The Republic of Uzbekistan; Award - Date – November 26, 2009; Seat –Paris; The Agreement between the Swiss Confederation and the Republic of Usbekistan on the Promotion and Reciprocal Protection)

193. However, the Arbitral Tribunal cannot ignore the fact that Article 9(3) of the BIT provides for the possibility to resort to ICSID Arbitration.[161] Romak has suggested that the definition of the term “investment” may vary depending on the investor’s choice between UNCITRAL or ICSID Arbitration, and has suggested that the definition of “investment” in UNCITRAL proceedings (i.e., under the BIT alone) is wider than in ICSID Arbitration.[162]

194. The Arbitral Tribunal does not share this view, which could lead to “*unreasonable*” results. This view would imply that the substantive protection offered by the BIT would be narrowed or widened, as the case may be, merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the Treaty. This would be both absurd and unreasonable. Naturally, there are specific jurisdictional restrictions imposed by the ICSID Convention (for example, the limitation with respect to physical persons who are dual nationals, or to the existence of a “legal dispute”). However, said restrictions do not bear on the definition of “investment”. There is no dispute that the

A3. Shareholder of shareholder company is investor

- A company P holds shares in a company named Q. An individual, say X, holds shares in P. Claim filed by X. Held that X is investor and can file claim even if P has not filed a claim.

(Yury Bogdanov v. Republic of Moldova; Award - Date – March 30, 2010; Seat –Stockholm; The Agreement between the Government of the Russian Federation and the Government of the Republic of Moldova on the Promotion and Mutual Protection of Investments)

67 It is generally accepted that "*shareholding in a company is a form of investment that enjoys protection. Even if the affected company does not fulfil the nationality requirements under the relevant treaty, there will be a remedy if the shareholder does*"[1]. Thus, damage inflicted on such company, which indirectly concerns the investor, entitles the investor to seek treaty protection. "*The shareholder may then pursue claims for adverse action by the host State against the local company that affects its value and profitability*"[2]. If not, the protection offered by bilateral and multilateral investment treaties would become rather illusory.

A4. Claims to money may be investment

- Based on definition of investment in Basic Treaty, claims to money directly related to specific investment may also be investment.

(BG Group Plc. v. The Republic of Argentina; Award - Date – December 24, 2007; Seat –Washington D.C.; The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments)

139. The Tribunal also finds that "*claims to money which are directly related to a specific investment or to any performance under contract having a financial value*" squarely fall within the definition of "Investment" of the BIT.

A5. Claims through third state are investment

- Claims through an investor of a third State investor are also investment.
- Most treaties have a broad definition of "investment", which is not exhaustive and does not form a "restrictive genus".

(EnCana Corporation v. The Republic of Ecuador; Award - Date – February 3, 2006; Seat –London; The Agreement between The Government of Canada and The Government of The Republic of Ecuador for The Promotion And Reciprocal Protection of Investments)

182. But this is not an end of the matter. An investment is widely defined to include "claims to money" (Article I(g)(iii)), and extends to assets owned or controlled "either directly, or indirectly through an investor of a third State". Thus claims to money held through a third State investor can constitute an investment. Moreover the protection of Article VIII also extends to "returns" which are widely defined as…

> "all amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties, fees or other current income." (Article I(j))

It is hard to imagine a broader definition, and its breadth is enhanced by the words "in particular, though not exclusively, includes" which says not once but three times that the examples given are not exhaustive and clearly implies that they are not intended to form a restrictive genus.

A6. Investment & Investor

1. • **Interpretation in line with object of treaty**
2. • **Dispute Resolution Mechanism does not affect interpretation**
3. • **Indirect investment is often investment**
4. • **Claims may be investment**
5. • **Claims through third country party may be investment**

The above Overview is based on old model of bilateral investment protection treaties.

A7. Investor in India-UK and India Brazil Treaty

- India-UK Treaty (1995) – Investor includes any national or company (including firm or association) of either country
- India-Brazil Treaty (2020) – Investor definition is as follows:

"Investor" means:

a) any natural person of a Party that makes an investment in the territory of the other Party; or

b) any enterprise constituted and organized in accordance with the law of a Party, other than a branch, that has substantial business activities in the territory of that Party and that makes an investment in the territory of the other Party.

India-Brazil Treaty excludes shell companies since they do not satisfy the criterion of substantial business activities in the home country. Moreover, investors making investments through third countries may also be excluded by the expression "makes an investment in the territory".

A8. Investment in India-UK and India Brazil Treaty

- India-UK Treaty (1995) – Investment is defined as follows:

> (b) "investment" means every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes;
>
> (i) movable and immovable property as well as other rights such as mortgages, liens or pledges;
>
> (ii) shares in and stock and debentures of a company and any other similar forms of interest in a company;
>
> (iii) rightful claims to money or to any performance under contract having a financial value;
>
> (iv) intellectual property rights, goodwill, technical processes and know-how in accordance with the relevant laws of the respective Contracting Party;
>
> (v) business concessions conferred by law or under contract, including concessions to search for and extract oil and other minerals;

The above definition is very wide and includes all types of investment. The Treaty specifies no exclusions.

A8. Investment in India-UK and India Brazil Treaty (Contd.)

- India-Brazil Treaty (2020) – Investment is defined as follows:

2.4 **"Investment"** means an enterprise, including a participation therein, in the territory of a Party, that an investor of the other Party owns or controls, directly or indirectly, or over which it exerts a significant degree of influence, that has the characteristics of an investment, including the commitment of capital, the objective of establishing a lasting interest, the expectation of gain or profit and the assumption of risk. The following assets of the enterprise, among others, are covered under this Treaty:

a) shares, stocks and other forms of equity instruments of the enterprise or in another enterprise;

b) debt instruments or securities of another enterprise;

c) licenses, authorizations, permits, concessions or similar rights conferred in accordance with the law of a Party;

d) loans to another enterprise;

e) intellectual property rights as defined or referenced to in the Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (TRIPS); and

f) movable or immovable property and related rights.

A8. Investment in India-UK and India Brazil Treaty (Contd.)

- India-Brazil Treaty (2020) – Exclusions from definition of Investment are as follows:

For greater certainty, "Investment" does not include the following:

i) an order or judgment sought or entered in any judicial, administrative or arbitral proceeding;

ii) debt securities issued by a Party or loans granted from a Party to the other Party, bonds, debentures, loans or other debt instruments of a State-owned enterprise of a Party that is considered to be public debt under the law of that Party;

iii) any expenditure incurred prior to the obtainment of all necessary licenses, permissions, clearances and permits required under the law of a Party;

iv) portfolio investments of the enterprise or in another enterprise;

v) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or an enterprise in the territory of a Party to an enterprise in the territory of another Party;

vi) goodwill, brand value, market share or similar intangible rights;

vii) claims to money that arise solely from the extension of credit in connection with any commercial transaction; and

viii) any other claims to money that do not involve the kind of interests or operations as set out in the definition of investment in this Treaty.

A8. Investment in India-UK and India Brazil Treaty (Contd.)

Parameter	India-UK Treaty 06 January 1995	India-Brazil Treaty 25 January 2022
Natue of investment	Every kind of asset	An enterprise including participation in an enterprise
Key characteristics	Must be in accordance with the national laws of the host country	a) Commitment of Capital; b) Objective of establishing a lasting interest; c) expectaction of gain or profit; and d) assumption of risk
Essential pre-qualifications	Asset should be established or acquired	Investor must (a) own or control, directly or indirectly; OR (b) exert a significant degree of influence
Applicability	Investments of all type	Only investments by legal entities like companies, LLPs, branches, corporations and joint ventures.
Movable and immovable properties	All types included	Included only when owned by the enterprise
Claims to money under contract	Included	Excluded
Goodwill, brand value, market share and such other intangible rights	Included	Excluded

A8. Investment in India-UK and India Brazil Treaty (Contd.)

Parameter	India-UK Treaty 06 January 1995	India-Brazil Treaty 25 January 2022
Business concessions by law or contract	Included	Excluded except to the extent in accordance with the law of the host country
Intellectual Property Rights	Included	Only when owned by the enterprise and covered by WTO TRIPS
Debt instruments	All types included	Only owned by the enterprise included. Public Debt or instruments issued by Government or Government enterprises excluded.
Preliminary and preoperative expenses	Included	Excluded
Portfolio investments	Included	Excluded
Trade credits	Included	Excluded
Judicial / Administrative Orders / Arbitral Awards	Included	Excluded

India-UK Treaty (Agreement for Promotion and Protection of Investments) is representative of almost all investment treaties executed by India from 1995 to 2015. Investment Cooperation and Facilitation Treaty between Brazil and India indicates a new mindset and may be the format for all future investment treaties by India.

B. Fair & Equitable Treatment (FET)

Measured against:

- International minimum standard required by customary international law
- International law including all sources
- Independent self-contained treaty standard

- No precise definition to ensure a wide interpretation
- Deals with situations of unfairness
- Abusive conduct
- Discriminatory behavior

Did you know:
FET clause is absent in treaties signed by some Asian countries like: Singapore, Saudi Arabia and Pakistan

B0. FET – Key concepts

- Encourage & create investors
- On the basis of International Standards
- Recognizable components
- Reasonable expectations
- Even-handed
- Protecting contracts
- Non-discriminatory
- Not deter foreign investment
- Certain and predictable
- No to politically motivated
- Due process, propriety

B1. Encourage & create investors

- FET is in the context of an obligation to 'encourage and create' favourable conditions for investors.

(National Grid P.L.C. v. Argentine Republic; Award Date - November 3, 2008; Seat – Washington D.C.; The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments)

During an economic or social crisis, acts generally termed unfair and unequitable, will NOT be so.

times fair and equitable treatment to investors. Therefore, the obligation of fair and equitable treatment is placed squarely in the context of an obligation to "encourage and create" favorable conditions for investors. In this context, it seems a logical consequence that the Contracting Parties would choose not to use limitations to such treatment such as found in the expression "minimum treatment standard under international law."

(Paragraph 170)

B2. International standards – not national

Standard for FET:

- Assessed on the basis of international standards
- Not to be determined according to standards used for its own nationals

(CME Czech Republic B.V. (The Netherlands) v Czech Republic; Partial Award Date – September 13, 2001; Seat – Stockholm; The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic)

tions and inactions versus CME/ČNTS as being fair and equitable. The standard for actions being assessed as fair and equitable are not to be determined by the acting authority in accordance with the standard used for its own nationals. Standards acceptable under international law apply, e.g. the threshold test of Professor Vagts as cited above. The Media

(Paragraph 611)

B3. Recognizable components

Recognizable Components of FET:

- Transparency
- Consistency
- Stability
- Good faith
- Investor's legitimate expectations

(Murphy Exploration and Company - International. v. The Republic of Ecuador; Partial Award Date – May 6, 2016; Seat – The Hague.; The Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment)

206. This debate is more theoretical than substantial. It is clear from the repeated reference to "fair and equitable" treatment in investment treaties and arbitral awards that the FET treaty standard is now generally accepted as reflecting recognisable components, such as: transparency, consistency, stability, predictability, conduct in good faith and the fulfilment of an investor's legitimate expectations.[306] The precise application of these components, and the stringency of the standard applicable, may vary from case to case depending on the terms of the clause and the specific circumstances of the case. Notwithstanding, the function of the FET clause in investment treaties

B4. Reasonable expectations

Investor's expectation:

- Should not be shielded from ordinary business risk
- Expectation must be reasonable and legitimate

(National Grid P.L.C. v. Argentine Republic; Award Date - November 3, 2008; Seat – Washington D.C.; The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments)

This case put a qualification on the investor's expectation to ensure that the investor does not have unreasonable expectations. Most other cases have given benefit of doubt to the investor.

175. The protection of investor expectations has been made subject to two significant qualifications: first, that the investor should not be shielded from the ordinary business risk of the investment and, second, that the investor's expectations must have been reasonable and legitimate in the context in which the investment was made. In *LG&E*, for example, the tribunal considered that "the investor's fair

B5. Not deter foreign investment

- Should not deter foreign investment
- Avoid frustration of legitimate and reasonable expectations

(Saluka Investments B.V. (The Netherlands) v. The Czech Republic; Partial Award Date – March 17, 2006; Seat – Geneva; The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic)

301. Seen in this light, the "fair and equitable treatment" standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.

302. The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations[34] which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations. As the tribunal in *Tecmed* stated, the obligation to provide "fair and equitable treatment" means:

B6. Even-handed

FET is <u>not an absolute parameter</u>, key is:

- Even-handedness
- Facts and circumstances of the individual case

(National Grid P.L.C. v. Argentine Republic; Award Date - November 3, 2008; Seat – Washington D.C.; The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments)

Differs from the view taken in other cases, where an investor's basic expectation is a stable, predictable environment.

In their ordinary meaning, the term "fair" means "just," "even-handed," "unbiased," "legitimate,"[52] "reasonable."[53] Equitable is defined as "fair" and "just,"[54] "just, fair, and right, in consideration of the facts and circumstances of the individual case."[55] While the definition of each term uses the other and underlines their relationship, two aspects stand out: the idea of even-handedness and the need to consider all the facts and circumstances of an individual case. Paragraph 168

Breach of Treaty is determined taking into account all circumstances including an **economic crisis**.

B7. Protecting contracts

- Protects contractual relationship between the parties
- Does not undermine or interfere with the investor's investment

(CME Czech Republic B.V. (The Netherlands) v. Czech Republic; Partial Award Date – September 13, 2001; Seat – Stockholm; The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic)

611. The Media Council's intentional undermining of the Claimant's investment in ČNTS equally is a breach of the obligation of fair and equitable treatment. The Respondent's position that the Media Council also re-

proceedings. Should the Media Council have interfered with the contractual relations of other broadcasters in the same way as it did between CET 21 and ČNTS, these other actions might also be qualified as a breach of law as the case may be. These other cases, however, to the

B8. Non-discriminatory

Fair and Equitable Treatment is not reached in case of:

- Discriminatory conduct
- Violation of contract

(Eureko B.V. v. Poland; Partial Award Date – August 19, 2005; Seat – Brussels; The Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment)

242. Furthermore, the measures taken by the RoP in refusing to conduct the IPO are clearly discriminatory. As the Tribunal noted earlier, these measures have been proclaimed by successive Ministers of the State Treasury as being pursued in order to keep PZU under majority Polish control and to exclude foreign control such as that of Eureko. That discriminatory conduct by the Polish Government is blunt violation of the expectations of the Parties in concluding the SPA and the First Addendum.

B9. Certain & predictable

FET must create Certain and Predictable business environment

(Occidental Exploration and Production Company. v. The Republic of Ecuador; Award Date – July 1, 2004; Seat – London.; The Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment)

196. The Tribunal concludes on this matter that, as stated above, OEPC undertook its investments, including its participation in the pipeline arrangements, in a legal and business environment that was certain and predictable. This environment was changed as a matter of policy and legal interpretation, thus resulting in the breach of fair and equitable treatment. This breach relates to the effects of both revoking the

B10. No to politically motivated

Politically motivated and arbitrary actions of government violate FET.

(Eureko B.V. v. Republic of Poland; Partial Award Date – August 19, 2005; Seat – Brussels; The Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment)

233. The Tribunal has found that the RoP, by the conduct of organs of the State, acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.

234. The Tribunal has no hesitation in concluding that the "fair and equitable" provisions of the Treaty have clearly been violated by the Respondent. In the opinion of the Tribunal, in the present case, the conduct of the RoP could even be characterized as "outrageous"

B11. Due process, propriety

FET mandates:

- Principles of procedural propriety and due process
- Freedom from coercion or harassment

(Saluka Investments B.V. (The Netherlands) v. The Czech Republic; Partial Award Date – March 17, 2006; Seat – Geneva; The Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic)

308. Finally, it transpires from arbitral practice that, according to the "fair and equitable treatment" standard, the host State must never disregard the principles of procedural propriety and due process[41] and must grant the investor freedom from coercion or harassment by its own regulatory authorities.

B12. FET - Quick overview

1. • Transparency, Consistency, Stability & Good Faith
2. • Non-discriminatory, certain & predictable environment
3. • Legitimate, reasonable expectations to be met
4. • Contracts to be honored
5. • International standards of procedures and due processes

The above Overview is based on old model of bilateral investment protection treaties.

B13. FET in India-Brazil Treaty – Prohibited Measures

India-Brazil Treaty (2020) does not mention Fair and Equitable Treatment but specifies that either country shall NOT subject investments of other country to measures which constitute:

a) denial of justice in any judicial or administrative proceedings;

b) fundamental breach of due process;

c) targeted discrimination, such as gender, race or religious belief;

d) manifestly abusive treatment, such as coercion, duress and harassment; or

e) discrimination in matters of law enforcement, including the provision of physical security.

B14. FET in India-Brazil Treaty – National Treatment

India-Brazil Treaty (2020) does not mention FET but specifies National Treatment which is defined as follows:

5.1 Without prejudice to the measures in force under its legislation on the date of entry into force of this Treaty, each Party shall accord to investors of the other Party or to investments by investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors or to investments by its own investors, with respect to management, conduct, operation, sale or other disposition of investments in its territory.

Exceptions to National Treatment are on two grounds:

- Legitimate public welfare or regulatory objectives
- Inherent competitive disadvantages which result from the foreign character of investors and their investments

B15. FET in India-Brazil Treaty – Transparency

India-Brazil Treaty (2020) does not mention FET but specifies Transparency as follows:

8.1 Each Party shall, as per its law, ensure that its laws, regulations, procedures and administrative rulings of general application in respect of any matter covered by this Treaty are published, or otherwise made available in electronic format, in such a manner so as to enable interested persons and the other Party to become acquainted with them.

- Notably, the transparency has to be "*as per its law*" or in other words, as per the law of the country. Transparency need not be as per international standards but should be as per the standards that are applicable under the laws of the country.

B16. FET in India-Brazil Treaty – Permitted Exceptions

India-Brazil Treaty (2020) provides that restrictions could be imposed on rights of investors in some cases (in addition to the ones mentioned earlier). Instances of the situations when restrictions could be imposed are as follows:

- Affirmative action measures towards vulnerable groups.
- Balance of Payments crisis
- Exchange measures in conformity with an agreement with International Monetary Fund
- Judicial, arbitral or administrative decisions or awards
- Compliance with labour obligations
- Compliance with law on taxation
- Criminal or penal proceedings and recovery of proceeds of crime
- Social security, public retirement or compulsory savings schemes
- Requirements to lock-in initial capital investments
- Bankruptcy or insolvency protection of rights of creditors
- Public morals, public order; protection of human, animal or plant life or health; protect and conserve the environment; protect national treasures or monuments of artistic, cultural, historic or archaeological value.

C. Most Favoured Nation (MFN)

- Treaty – created obligation
- No less favourable treatment
- Equality of states
- Non- discrimination
- Relative obligation

Schematically,[3] under MFN a signatory state must extend to another party that is a beneficiary of the clause the most-favourable treatment that it would have granted to a third party. Under a BIT, this amounts to the host state extending to investors or investments from the other signatory state the most-favourable treatment that it would have granted to investors or investments from a third state to the BIT. The treaty in which an MFN clause is included is called the "basic treaty."

Source: The Most-Favored-Nation Clause in Investment Treaties, IISD Best Practices Series – February 2017; International Institute for Sustainable Development

C0. MFN – Key features

- Treaty-based obligation must be contained in a specific treaty.
- Requires comparison between treatment to two foreign investors in like circumstances. Relative standard, must be applied to similar situations.
- MFN governed by *ejusdem generis* – applies only to same subject to which the clause relates.
- Without prejudice to freedom of contract – A special privilege or incentive granted through contract to one investor; Not obliged to provide it to another investor.
- Violation of MFN treatment - less favourable treatment as compared to a third country investor, based on nationality of foreign investor.

(Source: UNCTAD Series on Issues in International Investment Agreements II – Most-Favoured-Nation Treatment, United Nations, New York and Geneva, 2010)

C00. MFN – Key issues

- Intention of the parties to Basic Treaty
- Is Dispute Settlement covered by MFN?
- Mention of specific one excludes others
- Not to be extended inappropriately
- Specific overrides general
- Necessary to be investor
- Examples of Restricted MFN Clause

C1a. Intention of basic treaty

- Intention of the parties to the Basic Treaty as evident from other provisions of the Treaty – the MFN clause should not lead to a re-write of the Treaty

(Sanum Investments Limited. v. The Government of the Lao People's Democratic Republic; Award Date – December 13, 2013; Seat – Singapore.; The Agreement between the Government of the People's Republic of China and the Government of The Lao People's Democratic Republic concerning the Encouragement and Reciprocal Protection of Investments)

and *security*, as the Claimant itself recognizes. In addition, to read into that clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties' consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses. Therefore, the Tribunal finds that it has no jurisdiction for claims

(Paragraph 358)

C1b. Intention (continued)

- Object and purpose of the treaty
- Negotiating history of the parties

(Austrian Airlines v. The Slovak Republic; Award Date – October 9, 2009; Seat –Paris; The Agreement between the Republic of Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments)

121. Therefore, the Tribunal considers that it must interpret Article 3 of the Treaty "neither restrictively nor expansively but rather objectively and in good faith".[39] It must do so in accordance with the usual rules of treaty interpretation set forth in Articles 31 and 32 of the VCLT, taking into account *inter alia* the wording of Article 3 of the Treaty, its context, the object and purpose of the Treaty, as well as the relevant supplementary means of interpretation.

provision and Article 4(4) and 4(5). In particular, it held that Article 4(4) must be read as precluding foreign investors from submitting the "legitimacy" or legality of an expropriation to arbitration. This conclusion was also buttressed by the negotiating history, which shows that the Contracting States intended to limit arbitral jurisdiction to the amount and payment of compensation for expropriation.

(Paragraph 132)

C1c. Intention (continued)

- Even clear expressions like "*all matters*" in MFN clause may have ambiguity unless the intentions of the parties to the Basic Treaty confirm the meaning sought to be inferred by either words of the treaty or by actions leading to the treaty.

(Vladimir Berschader & Moise Berschader v. The Russian Federation; Award Date – April 21, 2006; Seat –Stockholm; The Agreement between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Soviet Union on the Encouragement and Reciprocal Protection of Investment)

184. With respect to the construction of expressions such as "all matters" or "all rights" covered by a treaty, it should be noted that, for the reasons discussed above, not even seemingly clear language like this can be considered to have an unambiguous meaning in the context of an MFN clause. As emphasised by the *Maffezini* tribunal, with regard to treaties which in their MFN clauses speak of "all rights" or "all matters" subject to the treaty in question, but which do not provide *expressly* (our emphasis) that dispute settlement as such is covered by the clause, "it must be established whether the omission was intended by the parties or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors."

C2a. Is dispute settlement covered under MFN?

- Third-party treaty dispute settlement provisions more favorable than basic treaty applicable to the extent compatible with *ejusdem generis*.

(Vladimir Berschader & Moise Berschader v. The Russian Federation; Award Date – April 21, 2006; Seat – Stockholm; The Agreement between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Soviet Union on the Encouragement and Reciprocal Protection of Investment)

163. The case of *Maffezini v Kingdom of Spain* concerned the requirement, set out in the arbitration clause of the Argentina – Spain BIT, whereby domestic courts are to be given the opportunity to deal with a dispute for a period of eighteen months before such dispute could be submitted to arbitration. Maffezini sought to avoid the application of this requirement by invoking the dispute settlement provisions in the Chile – Spain BIT through operation of the MFN clause in the Argentina – Spain BIT. In finding that the MFN clause could be invoked in this manner, the arbitral tribunal purported to lay down the following general rule:

"… if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle."[45]

C2b. Dispute settlement under MFN (continued)?

- Public policy considerations envisaged as fundamental conditions to Basic Treaty – notable exception to extending of MFN benefit of third party treaties.
- Examples of policy considerations which could not be bypassed by MFN clause – (1) Exhaustion of local remedies (2) Fork-in-the-road provision (3) Parties agreed to an institutionalized system of arbitration.

(Vladimir Berschader & Moise Berschader v. The Russian Federation; Award Date – April 21, 2006; Seat – Stockholm; The Agreement between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Soviet Union on the Encouragement and Reciprocal Protection of Investment))

164. The arbitral tribunal went on, however, to note that there were "some important limits that ought to be kept in mind."[46] The tribunal stated that:

"As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight."[47]

C2c. Dispute settlement under MFN (continued)?

- If the MFN clause does not make reference to "*all matters governed by the agreement*", the clause does not extend to dispute settlement.
- Limited wording of arbitration agreement strong indicator that MFN clause does not apply to it.

(Vladimir Berschader & Moise Berschader v. The Russian Federation; Award Date – April 21, 2006; Seat – Stockholm; The Agreement between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Soviet Union on the Encouragement and Reciprocal Protection of Investment)

168. The tribunal distinguished *Maffezini* on the grounds that the MFN clause in the Italy – Jordan BIT made no reference to "all matters governed by the agreement" and hence could not be given as broad an interpretation as the MFN clause considered in *Maffezini*. The tribunal also held that the Claimants had submitted "nothing from which it might be established that the common intention of the Parties was to have the most-favoured-nation clause apply to dispute settlement."[53] On the contrary, the limited wording of the arbitration clause constituted a strong indication that the parties intended to exclude contractual disputes from ICSID arbitration.

C2d. Dispute settlement under MFN (continued)?

- Intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.
- Dispute Settlement using MFN – exceptional circumstances and not a general principle.

(Vladimir Berschader & Moise Berschader v. The Russian Federation; Award Date – April 21, 2006; Seat –Stockholm; The Agreement between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Soviet Union on the Encouragement and Reciprocal Protection of Investment)

172. The tribunal stated that the basic prerequisite for arbitration is an agreement of the parties to arbitrate and that such an agreement must be clear and unambiguous.[56] Accordingly, if such agreement to arbitrate is to be founded upon an MFN clause, the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.[57]

"The decision in Maffezini is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view. However, such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present."[59]

C2e. Dispute settlement under MFN (continued)?

- Arbitration clause from a third country treaty to be available only if the terms of the Basic Treaty clearly and unambiguously so provide or where it can be clearly inferred.

(Vladimir Berschader & Moise Berschader v. The Russian Federation; Award Date – April 21, 2006; Seat – Stockholm; The Agreement between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Soviet Union on the Encouragement and Reciprocal Protection of Investment)

181. The tribunal in the *Gas Natural* case suggested that as a matter of principle MFN provisions in BITs should be understood to be applicable to dispute settlement provisions unless it appears clearly that the parties intended otherwise.[61] For the reasons developed above, it should be evident that this Tribunal cannot accept that standpoint. Instead, the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.

C2f. Dispute settlement under MFN (continued)?

- MFN should not lead to treaty-shopping.

(Vladimir Berschader & Moise Berschader v. The Russian Federation; Award Date – April 21, 2006; Seat –Stockholm; The Agreement between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Soviet Union on the Encouragement and Reciprocal Protection of Investment)

169. Referring to the *Maffezini* case, the tribunal stated:

"In the words of the Claimants themselves in this case, the award "has given rise to some concern with regard to the possible expansive effects of the extension of a Most-Favoured nation clause to the investors' right to select different forums'"".[54]

The tribunal then went on to expressly state its own view on the *Maffezini* decision as follows:

"The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the Maffezini case. Its fear is that the precautions taken by the authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of "treaty shopping"."[55]

C3a. Mention of specific one excludes others

- If the MFN clause mentions some specific areas but does not mention dispute settlement, this obviously excludes dispute settlement.
- If exceptions to MFN clause mentions some specific areas excluded from MFN but does not mention dispute settlement, it means that dispute settlement is not excluded from MFN.

(National Grid P.L.C. v. The Argentine Republic; Decision on Jurisdiction; Date – June 20, 2006; Seat – Washington D.C.; The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments)

82. The Tribunal observes that the MFN clause does not expressly refer to dispute resolution or for that matter to any other standard of treatment provided for specifically in the Treaty. On the other hand, dispute resolution is not included among the exceptions to the application of the clause. As a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius.*[67]

C3b. Mention of specific one excludes others (contd.)

- *Expressio unius principle* is only a supplementary means of interpretation. It must be used with special care.

(Austrian Airlines v. The Slovak Republic; Award Date – October 9, 2009; Seat –Paris; The Agreement between the Republic o f Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments)

131. This is particularly so taking into account that the *expressio unius* principle is only a supplementary means of interpretation that cannot alone determine the outcome of the interpretation when a treaty contains other relevant elements. As noted by one authority in the law of treaties with reference to the *expressio unius* principle and to other supplementary means, "[a]ll these supplementary means of interpretation need to be used with special care. They are no more than aids to interpretation, and might well produce wrong results if followed slavishly".[46] What the Tribunal must examine is whether the Treaty provides for exceptions to the application of the MFN clause and, more specifically, whether the provisions governing access to arbitration under the Treaty are to be regarded as a limitation to the scope of the MFN clause.

C4. Not to be extended inappropriately

- Need for balance
- To be extended within appropriate limits.

(National Grid P.L.C. v. The Argentine Republic; Decision on Jurisdiction; Date – June 20, 2006; Seat – Washington D.C.; The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments)

92. The Tribunal concurs with *Maffezini*'s balanced considerations in its interpretation of the MFN clause and with its concern that MFN clauses not be extended inappropriately. It is evident that some claimants may have tried to extend an MFN clause beyond appropriate limits. For example, the situation in *Plama* involving an attempt to create consent to ICSID arbitration when none existed was foreseen in the possible exceptions to the operation of the MFN clause in *Maffezini*.[77] But cases like *Plama* do not justify depriving the MFN clause of its legitimate meaning or purpose in a particular case. The MFN clause is an important element to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad.

C5a. Specific overrides general

- General intent of the MFN clause cannot override specific intent expressed at any place in the Basic Treaty.

(Austrian Airlines v. The Slovak Republic; Award Date – October 9, 2009; Seat –Paris; The Agreement between the Republic o f Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments)

135. Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause. As a result of these contextual considerations, the specific intent expressed in Articles 8, 4(4) and 4(5) informs the scope of the general intent expressed in Article 3(1), with the result that the former prevails over the latter. In other words, the restrictive dispute settlement mechanism for expropriation claims set out in Articles 8, 4(4) and 4(5) constitutes an exception to the scope of Article 3(1). Hence, the MFN clause does not apply to the settlement of disputes over the legality of expropriations.

C5b. Specific overrides general (continued)

- Specific mention in clarification excludes all that is not mentioned, thus specific restricts the general.

(Vladimir Berschader & Moise Berschader v. The Russian Federation; Award Date – April 21, 2006; Seat –Stockholm; The Agreement between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Soviet Union on the Encouragement and Reciprocal Protection of Investment)

193. It would seem that the Contracting Parties were aware of the ambiguity of the expression "all matters covered by the present Treaty", since they added the clarification that the MFN clause would apply "particularly to Articles 4, 5 and 6". Those Articles embrace the classic elements of material investment protection, i.e. fair and equitable treatment, non-expropriation and free transfer of funds. Article 10, which contains the provisions concerning dispute resolution between an investor and a Contracting State Party, is not, however, included in this clarification.

194. It may, therefore, be concluded that the expression "all matters covered by the present Treaty" does not really mean that the MFN provision extends to all matters covered by the Treaty. Therefore, the "ordinary meaning" of that expression is of no assistance in the instant case, and the expression as such does not warrant the conclusion that the parties intended the MFN provision to extend to the dispute resolution clause. In fact, it would seem that the

C5c. Specific overrides general (continued)

- When separate and specific provisions cover dispute settlement, MFN clause cannot cover dispute settlement.

(ICS Inspection and Control Services (United Kingdom) v. The Argentine Republic; Award Date – February 10, 2012; Seat –The Hague; The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments)

296. On the basis of the above examination of sources contemporary to the BIT, the Tribunal's view is that the term "treatment", in the absence of any contrary stipulation in the treaty itself, was most likely meant by the two Contracting Parties to refer only to the legal regime to be respected by the host State in conformity with its international obligations, conventional or customary. The settlement of disputes meanwhile remained an entirely distinct issue, covered by a separate and specific treaty provision. Thus, when the text of the MFN clause is silent about extending its application to dispute settlement provisions and Article 8(1) of the same BIT provides a mechanism for dispute settlement between an investor and the host State in respect of all investment disputes which "arise within the terms of this Agreement", the context represented by Article 8(1) plays a determinative role in the ascertainment of the ordinary meaning of the terms of the MFN clause. Further elements confirm this conclusion.

C6. Necessary to be investor

- A claimant must be covered by the definition of “investor” as provided under the Basic Treaty. MFN benefit not available if the claimant is not an investor or if the investment is not eligible under the Treaty.

(HICEE B.V. v. The Slovak Republic; Partial Award Date – May 23, 2011; Seat –London; The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic)

cases. The clear purpose of Article 3(2), as of Article 3(5), is to broaden the scope of the substantive protection granted to the eligible investments of eligible investors; it cannot legitimately be used to broaden the definition of the investors or the investments themselves.[195] The argument thus falls of its own weight.

(Paragraph 149)

C7. Examples of restricted MFN clause

As a reaction to wide interpretation of MFN clause by Tribunals, some treaties have incorporated a MFN clause that is restricted in its scope.

Box 25. Examples of MFN clauses restricting incorporation by reference

Chile-Colombia FTA (2006)

Annex 9.3
Most-Favoured-Nation Treatment

"The Parties agree that the scope of application of Article 9.3 only covers the matters related to the establishment, acquisition, expansion, administration, conduct, operation, sale or other disposition of investments, and hence, does not apply to procedural issues, including dispute settlement mechanisms such as that contained in Section B of this Chapter."
(unofficial translation)

Box 27. Japan-Switzerland EPA (2009)

Article 88
2. It is understood that the treatment referred to in paragraph 1 does not include treatment accorded to investors of a non-Party and their investments by provisions concerning the settlement of investment disputes between a Party and the non-Party that are provided for in other international agreements.

(Source: UNCTAD Series on Issues in International Investment Agreements II – Most-Favoured-Nation Treatment, United Nations, New York and Geneva, 2010)

C8. MFN – Quick overview

1. Intent of the parties to the Basic Treaty
2. Dispute Settlement may or may not be part of MFN
3. Mention of specific one excludes others
4. Specific overrides general
5. MFN available only to investor as defined in Basic Treaty

The above Overview is based on old model of bilateral investment protection treaties. India-Brazil Treaty does not have a Most Favoured Nation (MFN) clause.

D. Expropriation

- Taking of property
- Non- discriminatory
- Legitimate purpose
- In accordance with a lawful procedure
- Appropriate compensation

It should be kept in mind that a mere non- performance or breach of a contract, by the State which results in an economic loss to the investor does not automatically amount to expropriation.

Expropriations generally refer to property-specific or enterprise-specific takings where the property rights remain with the State or are transferred by the State to other economic operators.

Source: Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2012

D0. Expropriation – Sovereign right

- Exercise of sovereign right of expropriation is lawful if it is for a public purpose, is non-discriminatory, is in accordance with due process of law and is accompanied by compensation.

States have a sovereign right under international law to take property held by nationals or aliens through nationalization or expropriation for economic, political, social or other reasons. In order to be lawful, the exercise of this sovereign right requires, under international law, that the following conditions be met:

(a) Property has to be taken for a public purpose;
(b) On a non-discriminatory basis;
(c) In accordance with due process of law;
(d) Accompanied by compensation.

Source: Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2012

D00. Expropriation – Types

- Direct Takings, Indirect Expropriations and Non-discriminatory Regulatory Measures

> The protection of foreign investors from uncompensated expropriations traditionally has been one of the main guarantees found in international investment agreements (IIAs). Direct takings involve the transfer of title and/or outright physical seizure of the property. Some measures short of physical takings may also amount to takings in that they permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way. These measures are categorized as indirect expropriations. Finally, there are also non-discriminatory regulatory measures, i.e. acts taken by States in the exercise of their right to regulate in the public interest that may lead to effects similar to indirect expropriation but at the same time are not classified as expropriation and do not give rise to the obligation to compensate those affected.

Source: Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nations, New York and Geneva, 2012

D000. Expropriation – Key issues

- Deprivation attributable to the state
- Public purpose must be legitimate
- Regulatory decisions affecting private contract
- Reality and not form of take over important
- Deprivation without any gain not expropriation
- Diminished profits not expropriation
- Taxation is expropriation only when extraordinary

D1a. Deprivation attributable to the state

Essential ingredients for deprivation to be expropriation:

- Substantial deprivation of property
- All or material part of the investment
- Attributable - Result of state's actions

(RosInvestCo UK Ltd. v. The Russian Federation; Award Date – September 12, 2010; Seat –Stockholm; The Agreement between Government of the UK and the Government of the USSR for the Promotion and Reciprocal Protection of Investments)

Respondent argued that change in taxation does not amount to expropriation. Tribunal held that accumulation of arbitrary taxation measures along with other measures taken by the respondent with the intention to seize and control the assets of Yukos, amounted to unlawful expropriation.

623. A measure constitutes an expropriation if it has the effect of a substantial deprivation of property forming all or a material part of the investment, and if the measure is attributable to Respondent. If it is an expropriation, it is lawful if the requirements set forth in Article 5 IPPA are complied with.

D1b. Deprivation (continued)

Expropriation is cause for action under Treaty if:

- Deprivation is permanent
- There is no justification of deprivation as legitimate exercise of the state
- Not covered by exception in the Treaty.

(Copper Mesa Mining Corporation v. The Republic of Ecuador; Award Date – March 15, 2016; Seat –The Hague; The Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion And Reciprocal Protection of Investments)

The Tribunal held that the measures taken by the respondent were arbitrary and done without due process.

But interestingly, while awarding damages, the court reduced them due to the claimant's contributory negligence.

6.58. As regards a measure amounting to a direct expropriation under the Treaty, the Tribunal considers that its constituent legal parts requires: (i) that the measure deprive the investor of its investment permanently; (ii) that the resulting deprivation finds no justification as the legitimate exercise of the Respondent's police or regulatory powers and (iii) the non-application of Article XVII(3) of the Treaty. The primary issues here

D2. Public purpose must be legitimate

- Public purpose must be acceptable legitimate policy objective
- Expropriation be reasonably related to fulfillment of policy objective
- Avoidance of payment is not legitimate public policy objective

(British Caribbean Bank Limited (Turks & Caicos) v. The Government of Belize; Award Date – December 19, 2014; Seat –The Hague; The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments)

241. The Tribunal considers that, for the purposes of Article 5 of the Treaty with which it is concerned, a defence that an expropriation was undertaken "for a public purpose related to the internal needs of [the] Party" requires—at least—that the Respondent set out the public purpose for which the expropriation was undertaken and offer a *prima facie* explanation of how the acquisition of the particular property was reasonably related to the fulfilment of that purpose. The Tribunal is of the view that the Respondent has not convincingly shown that the 2009 acquisition of the Loan and Security Agreements was undertaken for a public purpose.

236. In the Tribunal's view, this justification falls close to a statement that the public purpose for the acquisition of the Loan and Security Agreements was to avoid or delay the repayment to which the Claimant was contractually entitled. While the Tribunal accepts that a State is entitled to broad latitude to devise its public policy as it sees fit, it does not accept that the mere avoidance of payment, without more, can serve as a legitimate public policy objective for the expropriation

D3. Regulatory decisions affecting private contract

- Regulatory decision that renders a private contract non-operative need not amount to expropriation
- Unfair and inequitable treatment is not necessarily expropriation
- Denial of justice may also not amount to expropriation

(European Media Ventures S.A. v. The Czech Republic; Partial Award on Liability); Date – July 8, 2009; Seat – London; The Agreement between the Czechoslovak Socialist Republic and the Belgian-Luxembourg Economic Union for Reciprocal Promotion and Protection of Investments)

76. Secondly, an investor who contracts with a private party, as the Claimant did here, and who depends for the achievement of the full benefit of those contracts upon the host State's exercise of its regulatory powers is not entitled to compensation for expropriation merely because regulatory decisions go against him, even if the consequence is that his business is ruined. Certainly, he is entitled to fair and equitable treatment and not to be subjected to a denial of justice but these are entitlements quite separate and distinct from the right not to be subjected to expropriation; unfair and inequitable treatment by a regulatory agency is not necessarily expropriation.

D4. Reality and not form of take over important

- Assumption of control even when there is no take over of property may amount to expropriation based on the reality of impact of state actions.

(European Media Ventures S.A. v. The Czech Republic; Partial Award on Liability); Date – July 8, 2009; Seat – London; The Agreement between the Czechoslovak Socialist Republic and the Belgian-Luxembourg Economic Union for Reciprocal Promotion and Protection of Investments)

74. Moreover, the approach of the Iran-US Claims Tribunal in these cases is more cautious than the brief quotations in the pleadings would suggest. Thus, the full text of the paragraph in the *Tippetts* award from which the two clauses quoted in paragraphs 25-26 of the Claimant's Post-Hearing Submissions were taken is as follows (the part not quoted in the Submissions being shown in italics):

> "*While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted* whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, *and the form of the measures of control or interference is less important than the reality of their impact.*"[33]

D5. Deprivation without any gain not expropriation

- An action that does not benefit the state and serves no public purpose is not expropriation merely because it deprives the claimant of his property or harms in some other way.
- Deprivation is not expropriation if the state does not gain from it.

(Ronald S. Lauder v. The Czech Republic; Award - Date – September 3, 2001; Seat –London; The Treaty with the USA and The Czech And Slovak Federal Republic concerning the Reciprocal Encouragement And Protection of Investment)

203. In addition, even assuming that the actions taken by the Media Council in the period from 1996 trough 1999 had the effect of depriving the Claimant of his property rights, such actions would not amount to an appropriation - or the equivalent - by the State, since it did not benefit the Czech Republic or any person or entity related thereto, and was not taken for any public purpose. It only benefited CET 21, a independent private entity owned by private individuals.

D6. Diminished profits not expropriation

- Profits must disappear as a result of the action alleged to be expropriation
- Diminishing of profits, when investment continues to be beneficial, does not amount to expropriation

(BG Group Plc. v. The Republic of Argentina; Award - Date – December 24, 2007; Seat –Washington D.C.; The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments)

268. The Tribunal notes that a State may exercise its sovereign power in issuing regulatory measures affecting private property for the benefit of the public welfare. Compensation for expropriation is required if the measure adopted by the State is *"irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that ". . . any form of exploitation thereof. . ." has disappeared. . . ."*[225] Conversely, a measure does not qualify as equivalent to expropriation if the *"investment continues to operate, even if profits are diminished"*.[226]

D7. Taxation is expropriation only when extraordinary

Taxation is expropriation only if it is:

- Extraordinary; or
- Punitive in amount; or
- Arbitrary in its incidence.

(EnCana Corporation v. The Republic of Ecuador; Award - Date – February 3, 2006; Seat –London; The Agreement between The Government of Canada and The Government of The Republic of Ecuador for The Promotion And Reciprocal Protection of Investments)

> From the perspective of expropriation, taxation is in a special category. In principle a tax law creates a new legal liability on a class of persons to pay money to the State in respect of some defined class of transactions, the money to be used for public purposes. In itself such a law is not a taking of property; if it were, a universal State prerogative would be denied by a guarantee against expropriation, which cannot be the case. Only if a tax law is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised. In the present case, in any event, the denial of VAT refunds in the amount of 10% of transactions associated with oil production and export did not deny EnCana "in whole or significant part" the benefits of its investment.

(Paragraph 177)

D9. Expropriation – Quick Overview

1. • Substantial deprivation of property by the state
2. • Lawful if public purpose, non-discriminatory, due process of law and adequate compensation
3. • Harm to investment without gain to state not expropriation
4. • Profits must disappear and not merely diminish
5. • Taxation is normally not expropriation

The above Overview is based on old model of bilateral investment protection treaties.

D10. Expropriation in India-Brazil Treaty

India-Brazil Treaty (2020) specifies Expropriation as follows:

6.1 Neither Party may nationalize or expropriate an investment of an investor (hereinafter "**expropriate**") of the other Party, except:

a) for reasons of public purpose;[1]

b) in a non-discriminatory manner;

c) on payment of effective and adequate[2] compensation, according to paragraph 6.2; and

d) in accordance with the due process of law.

D10. Expropriation in India-Brazil Treaty (Contd.)

The Treaty provides the following cases when Expropriation is not prohibited:

- Indirect expropriation is permitted. Only direct expropriation through formal transfer of title or outright seizure is prohibited.
- Expropriation by measures or awards that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment is permitted.

6.3 For greater certainty, this Treaty only covers direct expropriation, which occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

6.4 Non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article.

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