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Chapter 1 : The Shifting Landscape for American Not-for-Profit Organizations - IJNL Vol. 10, Iss. 1

A fair and equitable treatment (FET) standard, which requires each contracting party to ensure fair and equitable treatment of the investments by investors of the other contracting party (Article).

The question of how states will meet their environmental targets while ensuring energy security for growing populations will have to be answered in the coming years. Will increasing numbers of states seek to attract investment in renewables through measures such as those introduced by Spain and Italy in the early s? Measures which, having been subsequently altered, led to a raft of investment treaty claims against those states. Two further awards involving claims against Spain have now been made publicly available, but was Charanne the sun setting on Spanish solar arbitrations, or merely an eclipse? This, coupled with the effect of the global financial crisis on the Spanish economy, led Spain to initially enact two further pieces of legislation in , both of which had a substantial impact upon the Special Regime. In spite of these measures, the Spanish government became increasingly concerned by the growing tariff deficit â€" ie, the difference between the costs of the subsidies paid to the renewable energy producers and the incoming revenue from energy sales. This led to a number of legislative measures, the most significant of which were as follows: This was adopted without prior notice to solar power producers. As detailed in our previous contribution to the edition of this review, in Charanne Spain was successful in defeating the first ECT arbitration to be determined in relation to certain of the legislative actions detailed above. In that arbitration, the claimants pursued their claims under articles 10 1 and 10 12 Fair and Equitable Treatment and article 13 1 Expropriation of the ECT. First, they considered that the claimants had not submitted enough evidence to support their contentions in relation to the life of the plants and, in fact, considered the lifetime to be more akin to years. The majority considered that it was not, given that no specific promise to this end was provided by the state, either directly to the investors in this case, or in respect of the promotional materials provided to all investors in These are summarised below. As a result they had leveraged their investments with substantial non-recourse loans. For its part, Spain put forward a number of jurisdictional objections, as it had done in Charanne. All but one of these objections were dismissed by the tribunal, with only the objection to a claim posited by the claimants based on a tax measure being upheld on the basis that such a measure was carved out of the ECT. In respect of the Fair and Equitable Treatment claim under article 10 1 , Spain adduced three high-level defences. Spain was entitled to alter its regulatory system to meet the economic challenges it faced in respect of the growing tariff deficit. It did so in a manner that was fair and guaranteed investors a reasonable return. Investors including the claimants were only ever entitled to a reasonable return and, by contrast, the previous Special Regime had over-compensated the photovoltaic plants. The claimants had chosen to invest in overpriced and overleveraged solar plants and, in the event that the new regulatory environment did not provide them with a satisfactory return on their investment, this was a result of their own mistakes in respect of structuring and financing. On the basis of judicial economy, the tribunal elected to address the breach of the duty to provide fair and equitable treatment only, on the basis that it was the most appropriate legal context for assessing the complex factual situation. The measures adopted by Spain implemented an entirely new regime based upon assumptions different to those provided for in the legislation. That new regime had retroactive effect and was intended to significantly reduce subsidies paid to existing plant owners. The basis of that application includes a failure to state reasons and a manifest excess of power, based upon the finding of a breach of article 10 1 in circumstances where the tribunal held that Spain had a sovereign right to amend its legislation and had made no commitments as to a stable regulatory environment. No doubt the success or otherwise of this application will be addressed in the edition of this review. However, it is of course not that straightforward in the field of investment treaty arbitration. In the edition of this review we noted that reports had indicated that Spain had succeeded in defeating another ECT claim, Isolux. During the course of the last 12 months the Spanish-language version of the award has been made public. Of particular interest for those monitoring the Spanish solar arbitrations is the fact that the claims made by the claimant in Isolux were similar to those made in Eiser, specifically a claim of breach of article 10 1 on the basis of the measures. However, as summarised below, the tribunal determined that those same measures that constituted a breach in Eiser did not amount to a breach in this case. However, like the Eiser tribunal it accepted that it did not have jurisdiction to consider the tax measures. Such due diligence need not be exhaustive, but the expectations put forward in such a claim ought to be measured against the information the investor ought reasonably to have known prior to investing. While the claimant asserted they should be determined by reference to the decision to invest â€” that being June when the Spanish and Canadian parent companies decided to relocate the Spanish solar assets with the Dutch entity which eventually became the claimant. Spain contented the appropriate time was the date upon which the restructuring took place â€" that being October Critically, the tribunal agreed with the State. It then followed that the claimant could not have possessed legitimate expectations that the regulatory environment initiated in would not be subject to substantial change; indeed, by October the environment had already experienced a number of changes detrimental to investors. It was held by the majority of the tribunal that this was the only legitimate expectation attributable to the claimant at the time of investing. The majority further stated that, as at October , all investors in the Spanish solar energy industry knew or ought to have known that the abolition of the Special Regime was a real possibility. At the time of writing, the authors are aware of nine ECT claims against Italy and seven such claims against the Czech Republic. A final award has now been made public in respect of one such claim against Italy, summarised below. Under similar circumstances to Spain, the promotion of renewable energy in Italy led to an influx of investors in the solar sector. This caused Italian central and local authorities to implement various pieces of legislation, leading to several cases being brought against Italy under the ECT. The claimants alleged that as a result of these failures, their investment in a megawatt solar energy project in Puglia, Italy ,was undermined. Italy denied these allegations on both merits and jurisdictional grounds. Specifically, they submitted that the tribunal should decline jurisdiction on the basis that: Italy further submitted that the tribunal should decline jurisdiction on the basis that the claimants were barred from seeking relief due to their unlawful conduct when constituting what Italy claimed was an illegal investment. The tribunal, however, found that the claimants had never misrepresented the nature of the project, and had repeatedly listed it with the relevant agencies without any attempt at deception. These focused on four events which they asserted created damaging legal instability which undermined the success of the project. Notably, the tribunal moved away from the tripartite criteria proposed in Charanne of public interest, unreasonableness and disproportionality, in favour of a single test based on disproportionality alone: Except perhaps in very clear cases, it is not for an investment tribunal to decide, contrary to the considered view of those authorities, the content of the public interest of their state, nor to weigh against it the largely incommensurable public interest of the capital-exporting state. By contrast, disproportionality carries in-built limitations and is more determinate. It is a criterion which administrative law courts, and human rights courts, have become accustomed to apply to governmental action. This claim focused on the fact that the claimants had purchased land at a premium on the mistaken basis that they could subsequently use that land for the project. The tribunal noted that this argument rested on the assumption that the failure of the project was properly attributable to the State â€" an assumption which the tribunal had already dismissed. On that basis, a majority of the tribunal found in favour of the Italy. While Blusun has no binding effect on other tribunals constituted under the ECT, the merits decision is potentially significant for both Italy and investors seeking to bring claims under the ECT. Another interesting aspect of Blusun was that, as in Charanne and other intra-EU investment treaty cases, [25] the European Commission submitted an amicus curiae brief in respect of jurisdictional challenges based on EU law. As in previous cases, the EC submitted that intra-EU investments fall within the exclusive jurisdiction of EU law and its institutions, and not to investment-treaty arbitration.

Chapter 2 : International Law Reporter: 12/4/11 - 12/11/11

The 'Fair and Equitable Treatment' Standard and the Circumstances of the Host State Chester Brown and Kate Miles (eds), Evolution in Investment Treaty Law and Arbitration, Cambridge University.

Such critical statement is of course not without basis. International Investment Agreements IIAs , which can be interpreted as concrete products of the contemporary investment treaty regime in general do not specifically distil the responsibilities of investors within their provisions. In addition, based on a number of awards that have been arbitrated throughout the past twenty years, some tribunals maintain that the object and purpose of investment treaties are indeed to essentially provide protection for investors. In Occidental v Ecuador, a new tax regulation made the Claimant, i. Occidental, an American oil company, stopped receiving VAT refunds. The Respondent argued that the Claimant was not treated differently, as other Ecuadorian national oil companies, such as Petroecuador, were also denied VAT refunds. However, the Tribunal, instead of comparing the Claimant with other Ecuadorian companies within the oil and gas sector, the Tribunal took a very wide approach and compared the Claimant with other exporting companies in general, such as mining, flowers, bananas, and seafood. Although the Tribunal agreed that the intent of the new tax regulation was not for discriminating, but the result of the policy had indeed created a less favourable treatment to the Claimant. The Tribunal considered the characteristic of investment based on the Salini case Salini test and the Joy Mining case which involved regularity of profit, contribution, duration of the contract, assumption of risk, contribution to economic development of host states. This case also shows that there is no responsibility for the investors to contribute to economic development of the host state. Similar to the open definition of investment, criticism can also be directed on the same lines to the definition of investors. Within investment treaty practice, investors can either be in the form of individuals or companies. For instance, it is possible for individual investors to enjoy more than one protection under different IIAs because of their nationality. In addition, the concept of the nationality of the companies is very wide which is based on at least one of several conditions such as incorporation, main seat of effective management, or the existence of foreign controlled19 but the most common is incorporation and main seat of the business. Indirect expropriation affects the investment, even though there is no transfer of title and physical property. However, in several models of BITs, the effect is emphasized, for instance: Several cases consistently show that the effect of the measure is more important than the intention of the government which can be in the form of substantial deprivation from the enjoyment of the property 34 and significant effect to economic value of the investment. Finally, insignificant effect to the investment was a main consideration for the Tribunal to establish that it was not expropriation. In Pope and Talbot v Canada, the regulatory taking was considered as creeping expropriation and the Tribunal rejected the argument that regulatory taking is not under the definition of Article NAFTA. In Tecmed v Mexico 44, the transportation of waste by Cytrar might risk the environment and public health, 45 thus pressures from the society arose towards the operation of Cytrar. In addition, it describes that the Tribunal merely only focused at the case from the economic point of view of the investment without considering the social impacts. On the other hand, some hold strong arguments that general regulatory action will neither cause expropriation nor bring compensation for investors. It is often related to the doctrine of police power. Thus, it was not considered expropriation and was non-compensable. They argue that the act in order to benefit public interest is unlikely to be successful when any business requests for compensation. However, this responsibility only can be seen from the interpretation made by the tribunal and not in the textual provision in IIAs. Investors Rights and Responsibilities to Recourse to Domestic Court in the Context of Umbrella Clause A breach of contractual undertaking is also considered a breach of investment treaty under the provision of umbrella clause. This clause requires host states to observe their obligations to investors from other contracting states that have been concluded in investment treaty56 and any breach incurs international state responsibility. The Tribunal in SGS v Pakistan argued that the context umbrella clause cannot automatically elevate a breach of contract to be a breach of treaty law. In addition, BIT between USA and Romania stipulates that the contracting party shall observe any obligation it may have entered into which relates to investments. The Tribunal concluded that the intention of umbrella clause in the BIT clearly provides to accommodate other obligations such as contractual obligation. In addition, the inconsistency of the Tribunal in determining whether the definition of any obligation or any dispute often tends to be a loophole for investors to claim protection over contractual obligation. Firstly, it is deemed to be equal to international minimum standard. FET comprises of several obligations for host states to assure transparency, non arbitrary, due process, judicial property, good faith, protection of legitimate expectation, and provide a stable legal framework. From the interpretation of several tribunals, legitimate expectation has different forms in every country, and it really depends on the circumstances in the country. The idea is simply to make the regulations of the host state remain the same as the first time the investment was made. Investors obviously will expect that this condition will remain stable as these aspects undoubtedly have significant impact to the circumstance of their investment. In Metalclad v Mexico84, the Claimant had a federal permit to build a hazardous waste landfill as well as to operate the facility. However, municipality of Guadalcazar refused to grant permit on the ongoing project and shortly after that there was a new governmental regulation concerning the protection of the environment including the area of the project. The Tribunal emphasized transparency and free ambiguity, as a key element. Requirement of relevant legal permits should be far from ambiguity and the state is responsible to clarify such misunderstanding and confirm the correct understanding. Nevertheless, ideally it should be also the responsibility of the investor to possess adequate knowledge of the legal framework and to acquire professional advice about the prospect of their investment. In several cases this legitimate expectation and transparency are the responsibility of the investors to possess sufficient knowledge of the risks of their investment. In Genin v Estonia91, claimant is a US national. The fact that claimant have conducted unlawful action regarding the ownership of the company without acquiring prior consent to the authority made tribunal found that the action to revoke the EIB license was neither discriminatory nor arbitrary. The model requires host states to maintain transparency by publishing laws, regulations, and administrative ruling of general application as well as adjudicatory decision. In addition, host states are also obliged to publish any new proposed regulation 94 which is a relatively new formula in current BIT practice. The wording within Article 11 is clearly to emphasize that the government not only has to be transparent to any new regulation, but also to comply with minimum standard such as due process and prevent the government from any arbitrary conduct. A similar provision appears in Norway BIT Model that employs the obligation to maintain transparency. Moreover, this provision is merely to clarify the obligation of host state to protect the legitimate expectation of the investor by providing transparency. Conclusion In general, no one can deny that investors benefit greatly from the contemporary investment treaty regime. As seen from a number of provisions within IIAs, there have been many options for investors to invoke protection against government conducts, but nothing in current IIAs that clearly state the responsibilities of the investors toward the host states. A number of treaty claims show that host states lose their power to regulate policy objectives, even though it was intended for public interest. This is because it was often claimed as a breach of protection under IIAs. Furthermore, there are several solutions to overcome this major drawback. First, it is by formulating an equal position both for host state and investors. It clearly states the standard treatments, rights and obligations of investors, host state, and also host state. In addition, this model provides guidance to determine a breach of BIT. Moreover, it gives considerable new approach to investor - state dispute settlement where currently the right to 94 Article 11 US Model BIT available at http: Therefore, it can effectively limit the broad interpretation from investment tribunal.

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Chapter 3 : Fair and Equitable Treatment (FET) | Herbert Smith Freehills â€“ Arbitration notes

11 The 'fair and equitable treatment' standard and the circumstances of the host State nick gallus The case of Section B of Chapter 11 of NAFTA

This section broadly explains these eight provisions. Before examining these provisions, it is important to note three general points. Furthermore, the precise wording of the core provisions often differs. Differently worded provisions could create different protections to those described in this section. Second, many provisions only impose obligations on the state in regard to investments. Consequently, a state may interfere with a not-for-profit organization but if it does not interfere with a protected investment then the state may not breach the treaty. Finally, it is important to note that even tribunals considering exactly the same provision do not always agree on its meaning. Different arbitrators hear different BIT disputes and often take advantage of the fact that there is no binding doctrine of precedent which would oblige them to hew to an interpretation adopted in an earlier case. Moreover, there is no appellate body to ensure consistency of reasoning in investment treaty awards. While consensus sometimes emerges after a few decisions addressing the meaning of a particular provision, the area of law is new and consensus is yet to emerge over all aspects of the protections BITs offer foreign investors. As a consequence, both would-be claimants and respondents may be faced with uncertainty when it comes to the concrete meaning of investment treaty commitments and the implications flowing from these obligations. Some tribunals have said that foreign investors expect a stable legal and business environment. For example, one tribunal found that Argentina breached the standard by reneging on a commitment to allow US investors to charge local Argentine customers in US dollars for the transport and distribution of gas. The International Court of Justice, for example, found that failing to prevent local workers from occupying a factory was not sufficient to amount to a failure to provide full protection and security, where there was no evidence the workers damaged the plant and some level of production was maintained. That tribunal found that Ecuador failed to provide national treatment by refunding value-added tax to a local flower exporting company and not to the foreign investor exporting oil. Expropriation Almost every BIT requires states to pay compensation when they expropriate foreign investments. This definition will invariably include tangible property, such as land and buildings, thereby protecting such property against expropriations. In addition to defining investments so as to include tangible property, almost every BIT also defines investment to include intangible property, such as contractual rights and intellectual property. BIT tribunals have found states breached BITs by failing to pay compensation for expropriating intangible property rights. States can directly take tangible property rights. There is no test for what amounts to an indirect expropriation. There is not even consensus as to whether tribunals hearing a claim for an indirect expropriation should only focus on the effect of the measures on the investment or whether they should also look at the legitimacy of the purpose behind the measures for example, a legitimate public health purpose. While some tribunals focus on the effect of the measures on the investment, 82 one NAFTA tribunal found that a Californian law proscribing the use of an ingredient in gasoline was not an indirect expropriation because the law pursued a legitimate purpose. A NAFTA tribunal said that a measure is more likely to be an indirect expropriation if the measure is inconsistent with specific commitments given to the foreign investor. While debate continues to rage as to what amounts to an expropriation, 86 some governments have moved to provide more detailed written guidance in more recent treaties. In particular, tribunals disagree over the precise obligations a state must observe. One tribunal found Argentina breached the provision when it failed to fulfill a specific legislative commitment to maintain gas distribution tariffs in US dollars. Precisely which contractual obligations fall within the umbrella is unclear. Some tribunals say the provision protects all contractual obligations. The obligations protected is not the only aspect of the provision that is unclear. Which breaches of contract breach the provision is also unclear. Some tribunals say the provision protects all breaches. Some tribunals have suggested that the provision only protects contracts to which the foreign investor and the state, themselves, are parties. Free transfers Many BITs contain a provision requiring the host state to allow investors to freely transfer money into and out of the country. While the meaning of the provision appears plain on its face, future tribunals may read in restrictions. Establishing investments The above provisions all protect investments once they are established in the host state; they do not confer rights to establish investments. Before explaining which actions might breach which obligations, it is important to note two general points. First, some of the state actions could be mandated by domestic law existing before the not-for-profit-organization begins operating in the country. At least one tribunal has said that government actions mandated by laws existing before an investment will not breach BIT obligations. The tribunal said that BIT tribunals can only evaluate new laws and how existing laws are applied to specific investors. The second general point is that states sometimes justify those actions that interfere with investments on the grounds that they are necessary to protect such interests as national security or public order. We described above how such purposes can be considered within some individual BIT obligations. Tribunals may be asked to review a wide range of circumstances where a state invokes a national security, public morals or other similar defense. It may fall to tribunals, in the absence of detailed treaty language, to develop tests which pass judgment on the legitimacy of such actions. With these general points in mind, we will now identify which state actions against not-for-profit-organizations, described in Section II above, could breach BIT obligations. Interfering with the formation of not-for-profit organizations As a general matter, host governments have the discretion to admit investments including not-for-profit ones. However, as was discussed above, some small proportion of treaties, such as the Canada-Russia BIT, will oblige states to provide national treatment regarding the establishment of investments. Thus, if a host state were to prevent a not-for-profit-organization from establishing a presence in its territory, it will be relevant to determine whether nationals of that host state have, in similar situations, been granted the right to establish not-for-profit activities. Where similarly-situated locals receive more favorable treatment there may be grounds that the foreign entity has been denied national treatment as required by the treaty. Where a host state has gone so far as to represent that it would allow a foreign organization to establish a presence in its territory, that state could breach its obligation to provide fair and equitable treatment if the state were to renege on those representations. Denying and restricting foreign funding A state prohibiting foreign funding of a foreign-owned not-for-profit-organization for no legitimate reason could breach various investment treaty obligations. First, a state may breach its treaty obligation to permit free investment-related transfers both into and out of the territory. The organization may have problems if there are no local not-for-profit-organizations with which it can be compared or if those not-for-profit-organizations can also not obtain foreign funding. Tribunals adopting a broader interpretation might compare the treatment of the foreign owned not-for-profit-organization with any local organization, regardless of whether it is not-for-profit. Indeed, there may be no need to argue that an expropriation has taken place, if the relevant investment treaty also obliges host governments to permit investment-related transfers without delay. The Open Society Institute has complained of restrictions introduced in Uzbekistan, whereby a government committee would review all financial grant-making activity. It bears reminding, however, that because of the architecture of investment protection treaties, such agreements provide no recourse for domestic not-for-profit organizations that is, those not established or owned by a foreign entity in cases where their own governments deny or delay the access of such groups to foreign funding. In this respect, it warrants repeating that investment protection treaties are no substitute for more broadly-cast human rights treaties, which squarely address the treatment of domestic actors at the hands of their own government. Dissolving not-for-profit-organizations and seizing assets States failing to renew the licenses of not-for-profit-organizations already operating in the country may, in some circumstances, breach BIT obligations. A state denying a not-for-profit-organization a license could breach its obligation to provide fair and equitable treatment if the state represented that it would renew the license. A not-for-profit organization, whose license to operate is a protected investment, is more likely to succeed in such a claim than an organization whose license is not. Even states imposing particularly onerous reporting requirements could breach BIT obligations. Indeed, it is easy to conceive that organizations whose activities are hobbled might bring claims for indirect expropriation of their investment in Russia â€" without speculating as to the merits of such claims. State officials attending and monitoring meetings of not-for-profit organizations and other forms of harassment or intimidation It is unclear whether a law forcing a not-for-profit-organization to allow state officials to attend meetings, of itself, breaches any BIT obligations. The authors are unaware of any decisions or literature addressing these sorts of expectations and such a claim would, therefore, need to overcome the hurdle of not having any real authority from which to draw. States could even face claims for failing to prevent private parties from harassing not-for-profit organizations. Even if the not-for-profit organization does not have a contract or agreement with the state, the state may breach a BIT by failing to fulfill obligations contained in legislation. A not-for-profit organization would have a potential claim that a given country breached its BIT obligations to observe its obligations and provide fair and equitable treatment if that country failed to fulfill specific obligations in the state law applicable to not-for-profit organizations. BIT remedies for not-for-profit organizations i. Remedies A tribunal finding a state breached its BIT obligations can, generally, order the state to: Claimants overwhelmingly claim only monetary damages. In some instances, this will be straightforward. For example, a state: Identifying the damages of a not-for-profit organization arising simply from the inability to continue to operate is not so straight forward. The organization could likely claim for the amount it has invested in the country minus the proceeds from the sale of any assets. While BIT tribunals sometimes award future profits to foreign investors crippled by state interference, most not-for-profit organizations will, by definition, not earn any future profits. Such a claim would need to demonstrate that future profits are not speculative. Enforcement Even if a not-for-profit organization successfully claims a state breached a BIT, a state may refuse to provide the remedies ordered by the tribunal. The state may refuse to cease its act breaching the treaty or may refuse to undertake the actions necessary to comply with its BIT obligations. The authors are unaware of a BIT tribunal ordering a state to cease or undertake action, let alone a state refusing to comply with such an order and, therefore, we can only speculate on the consequences of such a refusal. It is difficult to identify the recourse of a not-for-profit-organization in those circumstances. It seems unlikely that a state would refuse to comply with a BIT in this way. Indeed, the authors are only aware of one instance of a state refusing to pay compensation ordered in a BIT award. ICSID awards are easier to enforce than others. The New York Convention allows local courts to refuse to enforce arbitral awards on a number of grounds. It is difficult to precisely identify the size of this obstacle. Some treaties specifically provide that all claims under the treaty are commercial, for the purposes of the Convention, and claimants under these treaties will not face this problem. Conclusion Not-for-profit organizations appear to enjoy protection under the some BITs which have been concluded over the last half century. While these instruments were often developed with for-profit investment in mind, some of these agreements expressly contemplate commitments of capital made on a not-for-profit basis. Furthermore, many other investment treaties are silent on such questions, and therefore susceptible to interpretations which would place not-for-profit investments under the protective canopy of the treaty. Claims under the ICSID dispute resolution system might encounter some tribunals supplementing the definition of investment found in a given investment treaty with that believed to be implicit in the ICSID Convention. Nevertheless, there are strong arguments for holding not-for-profit investments to meet this heightened jurisdictional test imposed by some ICSID tribunals. Where claims can clear the jurisdictional hurdles set forth in the treaties and relevant arbitration rules, the substantive protections of BITs may be relevant to a range of different scenarios faced by not-for-profit organizations engaged in foreign activities. Perhaps most obvious, where not-for-profit organizations are subject to the outright seizure of their assets, they may bring a claim for direct expropriation of their property. However, other treaty obligations such as those on the free transfer of capital, fair and equitable treatment, full protection and security and national treatment could prove valuable where organizations encounter interference with their right to transfer funds into and out of the host state; where they are discriminated against when seeking to establish a presence in a new territory; where they are denied re-registration on arbitrary grounds or contrary to prior representations from state officials; or where organizations and their principals suffer harassment, abuse or other forms of intimidation at the hands of state or non-state actors. At the same time, certain treaty protections are not always ideally suited to the problems commonly faced by not-for-profit organizations. For example, provisions requiring the free transfer of funds protect not-for-profit organizations bringing capital into and out of the host state but do not protect the free disbursement of funds within a targeted host country. Investment treaties give little guidance as to which exercises of government authority are legitimate non-compensable measures, and which would trigger liability for expropriation of an investment. Further, the quantification of damages may be vexing in some cases where certain activities of not-for-profit organizations are at issue.

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Chapter 4 : The European Arbitration Review - Energy Arbitrations : Clyde & Co (en)

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The tribunal also discussed the role of EU law within the context of investment treaty disputes. The award is of interest as it discusses in detail the FET standard and even proffers a test in respect of the stability aspect often considered to fall within the scope of FET. The award also concludes departing from other cases that unilateral declarations made by a state would fall within the scope of an umbrella clause. Finally, the discussion in the award of EU issues is topical, given the number of ongoing disputes where the inter-relation between EU law and investment treaty arbitration is in issue. A fair and equitable treatment FET standard, which requires each contracting party to ensure fair and equitable treatment of the investments by investors of the other contracting party Article 3. This legislation made available to investors tax incentives, including custom duty exemptions. They argued that these investments were made in reliance on the expectation that the Incentives would be maintained for a ten year period. Within the context of its efforts to become an EU member state, Romania revoked the Incentives in February In the merits phase of the arbitration, the parties disagreed on issues of applicable law and, in particular, the role of EU law within the context of the dispute. Specifically, it argued that: The tribunal should take into account the wider juridical context in which the BIT between Romania and Sweden was negotiated and concluded. Sweden and the other EU member states expected Romania to take all measures needed to comply with EU law, which entailed the removal of the Incentives. As such, the BIT should not be construed as signifying that Romania was in breach of it by implementing measures mandated by EU law. As an alternative argument, Romania maintained that, if the BIT were to be found incompatible with EU law, the latter should prevail on the basis of the principle lex specialis derogat legi generali: In particular, the European Commission argued that the tribunal should take into account EU law on state aid when making a decision. If there was a conflict between these treaties, then the BIT would prevail: Because the preservation of rights provision in Article 9 2 of the BIT would apply, ring-fencing the rights granted to investors under the BIT. As lex specialis, given that it is a treaty with a more delimited scope of application than the Accession Treaty and the EC Treaty. According to the claimants, pursuant to Article 12 of the ILC Articles on State Responsibility, the origin or character of a breach is irrelevant in determining the existence of a breach of an international obligation. Furthermore, the revocation of the Incentives was unfair and unlawful, and, in particular, that the Incentives were compatible with EU law. Specifically, the claimants argued that the revocation of the Incentives: Breached the umbrella clause in the BIT. Amounted to an expropriation without compensation. In essence, Romania argued that the claimants bore the risk of regulatory change. In any event, it had exercised its powers in a non-discriminatory fashion and to advance public welfare, so it could not be concluded that it breached the BIT. More specifically, Romania argued that the claimants did not establish in the arbitration that Romania had promised not to change the incentive regime in issue. Even if it had made such a promise, Romania argued that the claimants did not rely on it to make their investments or, if they did, that reliance was unreasonable. Romania also contended that the changes in the incentive regime did not violate the BIT as its actions were reasonably related to a rational policy, namely EU accession. A different majority dismissed the claim based on the umbrella clause, due to lack of evidence. The tribunal further considered that the relevant issue in this case was whether EU law plays a role in the interpretation of the BIT. In this regard, the tribunal considered the following: There was no reason to assume that Sweden and Romania had any intent to defeat their obligations under any of the applicable treaties when they entered into each of them, and the tribunal must interpret each treaty in particular, the BIT according to the intent of the parties. It noted that this was especially relevant in relation to the issue of whether Romania acted fairly and equitably. It seems that this would have helped Romania persuade the tribunal that it did not breach the FET standard. The majority concluded that the claimants had not provided enough evidence and legal argument on the content of Romanian law for the tribunal to find the existence of an obligation protected by the umbrella clause. Accordingly, the majority dismissed this claim. Stanimir Alexandrov, dissenting, considered that it was not necessary for the claimants to establish that there was a vested or actionable obligation under Romanian law. In his view, it would suffice to show that Romania undertook a firm commitment towards the claimants. The tribunal pointed out that the determination of the content of the FET standard does not depend on idiosyncratic views. It should be based on state practice and judicial or arbitral case law or other sources of international law. The tribunal added that the conduct in question does not need to be egregious to amount to a violation of the FET standard. It was common ground between the parties that the FET standard should be interpreted considering the object and purpose of the BIT, as reflected in its Preamble. Bearing that in mind, the tribunal stated that it favoured a balanced view of the goals of the BIT similar to that adopted by the tribunal in Saluka Investments BV Netherlands v Czech Republic. The tribunal discussed a number of types of conduct that would violate the FET standard, namely conduct that is substantially improper for example, conduct that is arbitrary, manifestly unreasonable, discriminatory or in bad faith. It then analysed the protection granted by the BIT in respect of regulatory changes. The tribunal indicated that the FET standard in the BIT could not be interpreted as the equivalent to a stabilisation clause. It observed that a state may always change its legislation, taking into consideration that: If a change in legislation fails to meet these requirements, while the legislation may be validly amended as a matter of domestic law, the state may incur international liability. The tribunal then discussed the transparency and consistency duties that would arise out of the FET standard. The majority found that Romania made specific promises to the claimants in respect of the Incentives and their duration in particular. The majority concluded that it was reasonable for the claimants to believe that the Incentives were legal under Romanian law and would be maintained for the full ten year period. The majority also concluded that Romania failed to act transparently by failing to inform the claimants in a timely manner that the regime would be terminated before its stated date of expiration. The tribunal did not find evidence on the record that Romania had acted in bad faith and therefore dismissed this allegation. In light of its finding on the FET standard, the tribunal considered it unnecessary to rule on the unreasonable impairment and expropriation arguments advanced by the claimants. The claimants sought RON2, The majority of the amounts were sought in respect of lost profits. Comment The award touches on a number of issues that are not settled in the field of international investment treaty arbitration. One such issue concerns the umbrella clause. Mr Alexandrov advanced a more expansive construction of the umbrella clause in the BIT: Given the breadth of the terms used by most investment treaties containing umbrella clauses, it is unclear whether the debate as to the meaning of these clauses has a foreseeable end. Indeed, there is inconsistent jurisprudence as to whether umbrella clauses cover all contractual obligations concluded by a host state see, for example, Noble Venture v Romania ICSID Case No. The role of EU law in respect of intra-EU investment treaty disputes is another issue as to which arbitral tribunals have held different views. The tribunal suggested that EU law would be part of the factual background to the case. There are a number of pending cases in which this is an issue in dispute. The tribunal discussed in some detail the scope and application of the FET standard. In so doing, it attempted to find a middle-ground in relation to some of the aspects of the FET standard.

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accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. " 7 "OECD Draft Convention on the Protection of Foreign Property," 7 ILM () at page

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