
Non-discrimination

Dolzer & Schreuer pp. 191-212

General background

- Non-discrimination: “borrowed” from international trade law? Relevance of WTO caselaw?
 - ↗ National treatment of traders – an old concept!
- The three elements of non-discrimination
 - ↗ The link to general fair and equitable treatment provisions – arbitrariness; national treatment (NT) and most favoured nation (MFN)
- The need to think differently about non-discrimination in investment law as compared to trade law!
 - ↗ Bilateral character of IIL
 - ↗ The focus on investors and / or investment

Energy Charter Treaty

- Art. 10.1: “no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.”
- 10.2: “Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph 3.”
- 10.3: “"Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.”

NAFTA – art. 1102 (NT)

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. [same for investment in para. 2]
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

NAFTA – NT cont.

4. For greater certainty, no Party may:
 - (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
 - (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

NAFTA – art. 1103 (MFN)

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a nonParty with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

NT vs. MFN?

- Do NT and MFN share the same characteristics?
 - ↗ Similarity of wording!
- MFN and the link between BITs!
 - ↗ What is the scope of MFN clause? The importance of the wording!
 - ↗ What is the presumption? Substantive vs. procedural vs. scope vs. jurisdiction
 - ↗ The dilemma when negotiating new treaties!
 - ↗ Legal clarity and predictability!
 - ↗ Currently a "hot topic"!

What / who to compare?

- Investors / investments
- Degree of flexibility: Case-by-case?
 - ↗ One extreme: identical investor / investment
 - ↗ Other extreme: all other investors / investments
 - ↗ Same sector or activity? Related to the nature of differential treatment (effect or intent)?
 - ↗ Characteristics of the contested measure
 - ↗ "in like circumstances"
- How broad? All? The best treated investor?
- Is it possible to take a "short-cut"?
 - ↗ Is there a reasonable justification for the differential treatment?

The character of different treatment

- Based on nationality? The purpose?
 - ↗ "de facto" / "de jure"
- If differential treatment: who has the burden of proof?
 - ↗ Does it shift to the defendant: "prima facie case"?
Differs from WTO!
 - ↗ Must there also be evidence of effect and / or intent?
- Which proofs can the defendant invoke?
 - ↗ De minimis argument?
 - ↗ Effects test?
 - ↗ Legitimate intent

Questions for discussion

- Have we seen an increase in cases?
- In which context: Prove that there is a «discriminatory purpose»?
- In which context: Prove that the measure pursues a legitimate purpose?
- Does non-discrimination clauses extend beyond investment protection?