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State Recalibration of Investment Treaties: Causes, Embodiments and Implications

- (Contingent) reasons for creation of investment treaty protections from late 1960s to early 1970s:
  - Developing state hostility to foreign investment rooted in both political (decolonization) and economic/developmental (import substitution) strategies.
- Late 1980s:
  - Expansion despite erosion of (some of) these constitutive factors.
  - Paradoxically perhaps, no real assessment of the shape and utility of the regime.

Recalibration (late 1990s): Causes

- Activation of investor-state arbitration:
  - Outcomes (inconsistency/incoherence)
  - Methodologies (hermeneutics)
  - E.g. *CMS, Enron* and *Sempra* awards
- Feedback loop:
  - Especially for awards rendered under NAFTA Chapter 11: e.g. *SD Myers* and *Pope & Talbot*
- Shift in direction of investment flows:
  - Including growth in “South-South” BITs
- Institutional factors:
  - Co-mingling of “trade” and “investment” issues/negotiators in FTA processes.

Recalibration: Strategies and Embodiments

- General strategy - Analogies with:
  - Domestic (constitutional) law:
    - U.S. takings jurisprudence (U.S. Sup. Ct, *Penn Central v State of New York*): Annex on Expropriation, 2004 U.S. Model BIT
    - Replication in non-U.S. BITs/FTAs: Annex 2, 2009 ASEAN Comprehensive Investment Agreement
  - WTO: (i) Conflict with TRIPs (on compulsory licensing); (ii) Exceptions (GATT Art. XX/GATS Art. XIV)
- Specific embodiments - Episodic (often driven by case-law):
  - National Treatment
    - *SD Myers* (2000): Pt. B(3), 2001 NAFTA FTC Interpretation
  - Most-Favoured-Nation Treatment
    - *Maffezini* (2000): Art. 5(4), 2009 ASEAN-China Investment Agreement
  - Fair and Equitable Treatment
    - *Pope & Talbot* (2001): Pt. B(2), 2001 NAFTA FTC Interpretation
    - Custom as anchor for fair and equitable treatment
  - Expropriation:
    - Use of domestic constitutional analogies *plus* specific exception for non-discriminatory regulatory actions: Annex 4, ASEAN-Aus-NZ FTA
  - Exceptions:
    - General: GATT Art. XX/GATS Art. XIV (eg. Canada)
    - Security: Auto-interpretation (eg. fn 2, art. 22.2, 2006 Peru-U.S. FTA)

Recalibration (cont.)

- Specific (continued):
  - Procedural:
    - Time-lines
    - Consolidation
    - Transparency
  - Systemic:
    - Tightening of qualifications *and* independence of arbitrators (e.g., Art. 23, 2009 ASEAN-Aus NZ FTA)
    - Contemplation of appellate mechanism: (e.g, Annex D, 2004 U.S. Model BIT)

Problems

- Pendulum shift:
  - "Under-protection" of foreign investment?
  - 12 April 2012: Australia's rejection of ISDS in future trade agreements
- Uncertainty by other means:
  - Custom as the anchor for fair and equitable treatment?
- Burden of proof implications
- Inappropriate match: objective evidence of a "risk" and choice of "recalibration" method
- Redundancy

Alternate Approaches

- Methodological:
  - What are the specific risks facing foreign investors and how should these be addressed by different treaty disciplines?
  - Inter-disciplinary insights, especially political economy
  - Cost-benefit calculations involving individual treaty partners (offensive versus defensive interests)
- Obligations:
  - Care with choice of domestic and other analogies
  - Role of fair and equitable treatment?
- Exceptions:
  - General (flexibility)
  - Specific (financial crisis)
    - Prudential: Paras. 2-3, GATS Annex on Financial Services
    - But check for disguised protectionism (as in *Fireman's Fund v Mexico* (2006) and *Saluka v Czech Republic* (2006))
    - Adjudicatory expertise: NAFTA Financial Services Committee's assessment of state party's invocation of the prudential exception (NAFTA Article 1415).

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