

Investor Beware - Significance of Investor Conduct under the Fair and Equitable Treatment Standard

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Abstract : The Fair and Equitable Treatment standard has emerged as a core tenet of a formulated legal structure aimed at encouraging investment through the granting of a secure and stable environment for the investor in the Host State. As an absolute, non-contingent standard, it constitutes an independent and reliable system for the protection of the investor and is frequently invoked and applied in investor-state dispute settlement under bilateral and multilateral investment treaties. Thus far, the standard has been examined principally as a measure for determining the responsibility of host countries towards investors and investments. The conduct of investor in applying the Fair and Equitable Treatment Standard is relatively unexplored. Such an assessment may be necessary in light of the development of new defenses to demands of host governments to confine the application of the standard in order to ensure a proper balance between the protection of investors and the inherent right of a State to regulate economic conduct within its borders. This paper explores the implications of including considerations of investor conduct in the determination of whether an act of the host country's administrative and/or judicial authorities has breached the fair and equitable treatment principle. The need for such defenses are of special concern for governments of developing countries, whose limited resources can affect their ability to provide an effective evaluation of the nature of the proposed investment, and, subsequently, to ensure that the expected benefits are realized. On the basis of conceptual analysis, and emerging international judicial and arbitral case law, this paper suggests that investor duties such as, the avoidance of unconscionable conduct, the reasonable assessment of investment risk in the host country, and a duty to operate an investment reasonably are leading to a new limit upon the fair and equitable treatment standard- one that can be succinctly captured in the phrase "Caveat Investor".

Keywords : BITs, FET Standard, investor behavior, arbitral case law

Conference Title : ICTBEL 2015 : International Conference on Trade, Business and Economic Law

Conference Location : Paris, France

Conference Dates : August 27-28, 2015