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insight 1

Expansion of the Energy Charter to Africa and Asia: Undoing Reform in International Investment Law?

Nathalie Bernasconi-Osterwalder

On March 20, 2017 Kenya was the latest country to join the 2015 International Energy Charter, becoming its 83rd signatory. This most recent development reflects the successful outreach strategy of the Energy Charter Secretariat initiated in 2012. The Secretariat is recruiting actively throughout Africa and recently established new Energy Charter Liaison Embassies in Iran and Pakistan.

But what are states signing on to in the hope of mobilizing investment for energy generation to meet national demand? What are the Energy Charter Treaty, the International Energy Charter and the Energy Charter Secretariat, how do they inter-relate and what is their significance for adhering states, developing countries in particular? This note provides insight into a somewhat confusing set of declarations, agreements, processes and related implications.

1. Background

The 1994 Energy Charter Treaty (1994 ECT)[1] is an instrument for the promotion of international cooperation in the energy sector. Significantly, it includes the first sectoral investment chapter concluded after the end of the Cold War: it was signed in December 1994 and entered into force in April 1998. The process leading to the adoption of the 1994 ECT began with a political declaration, the European Energy Charter, adopted in The Hague in December 1991, designed to integrate the former non-market economies of Eastern Europe and Central Asia in a framework of energy cooperation with Western Europe. The Energy Charter Process put in motion in 1991 is managed by the Energy Charter Secretariat, created by the 1994 ECT. In May 2015 the so-called Ministerial (The Hague II) Conference adopted the 2015 International Energy Charter (2015 IEC)[2] as an update of the European Energy Charter. In July 2016 the Energy Charter Conference (the governing body set up under the 1994 ECT) approved the use of "International Energy Charter" as an informal working name referring collectively to the Energy Charter Conference itself, its subsidiary bodies and the Energy Charter Secretariat.[3]

As of April 2017, the 1994 ECT has been signed or acceded to by 52 states plus the European Union and Euratom, bringing the total number of its signatories to 54.[4] Membership now spans beyond Europe to include members such as Australia, Japan and Mongolia. At the same time, its coverage does not include major economies, such as Canada and the United States. Italy recently withdrew from the 1994 ECT.[5] Russia, which had signed but not ratified the treaty, informed the depository in 2009 that it did not intend to become a contracting party,[6] thus terminating the provisional application of the treaty. Russia's move came after it was sued by investors under the 1994 ECT's dispute settlement provisions by the operation of its provisional application (1994 ECT, Art 45).

The 1994 ECT includes investor–state dispute settlement (ISDS) provisions that allow foreign investors to initiate international arbitration to challenge state measures taken in the energy sector in alleged violation of the treaty's investment provisions. As of April 2017, the Energy Charter Secretariat listed on its website 101 known investor–state arbitration cases initiated under the 1994 ECT.[7] These cases covered a wide spectrum of sectors such as mining, oil and gas, electricity, fossil fuels, nuclear and renewable energy, and represented approximately 13 per cent of all known treaty-based investor–state arbitration cases initiated to date.[8] The largest investment treaty award in history was rendered under the 1994 ECT when an arbitral tribunal found Russia liable for over €50 billion. Although the award was set aside by a Dutch court in April 2016, the investors are still trying to overturn the court's decision and pursuing enforcement proceedings of the set-aside award against Russia across the globe.[9]

2. The 1994 ECT: An investment protection treaty for the energy sector based on a BIT model from the early 1960s

The stated purpose behind the 1994 ECT is to establish "a legal framework in order to promote long-term cooperation in the energy field" (Art. 2). Although the framework covers multilateral cooperation over transit, trade, and energy efficiency, the primary focus has been on investment protection and dispute resolution. The 1994 ECT's investment provisions are the only legally significant rules and bear much resemblance to the traditional

bilateral investment treaties (BITs) that have been the subject of wide criticism over the past years. Like traditional BITs, the 1994 ECT's investment provisions focus exclusively on investor rights and investment protection. For example, they cover direct and indirect expropriation, unqualified fair and equitable treatment (FET), non-discrimination commitments and a far-reaching umbrella clause, to name but a few. Even though the 1994 ECT drafters have managed to squeeze all of these obligations into a single paragraph (see Box 1), the legal consequences and risks for host states remain significant. In addition, as mentioned earlier, the 1994 ECT contains ISDS (Art. 26). As noted by Energy Charter Secretariat on its website, the top priority of the 1994 ECT is to "[offer] binding protection for foreign energy investors against key non-commercial risks, such as discriminatory treatment, direct or indirect expropriation, or breach of individual investment contracts."[10]

Box 1: An example of ECT's provisions on investment protection

Article 10

Promotion, protection and treatment of investments

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment *to accord at all times* to Investments of Investors of other Contracting Parties *fair and equitable treatment*. Such Investments shall also enjoy the *most constant protection and security* and no Contracting Party shall *in any way impair by unreasonable or discriminatory measures* their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. *Each Contracting Party shall observe any obligations it has entered into* with an Investor or an Investment of an Investor of any other Contracting Party.

[…]

(3) For purpose of this Article, "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.

[…]

Source: Energy Charter Treaty (Emphasis added)

3. The 2015 IEC: A first step to acceding to the 1994 ECT

On May 21, 2015, members of the 1994 ECT and over a dozen other states and international organizations signed the International Energy Charter (2015 IEC). The 2015 IEC is open for accession by all countries and regional economic integration organizations, and the Energy Charter Secretariat is putting great efforts into geographic expansion.

The 1994 ECT and 2015 IEC are fundamentally different types of international instruments. While the 1994 ECT includes an investment promotion and protection chapter with investment treaty–style provisions, which allows both states and investors of a state party to bring a claim against the state party hosting the investment, the 2015 IEC is a non-binding political declaration aimed at strengthening the energy cooperation between the signatories.

However, the implications of the 2015 IEC should not be underestimated. Importantly, the declaration is "seen as a first step towards accession to the legally binding Energy Charter Treaty."[12] Indeed, the current 1994 ECT members, many of which are looking to access energy markets in Africa and Asia, are hoping that "the signing of the International Energy Charter will encourage non-members to consider acceding to the Energy Charter Treaty."[11] This is also supported by the Industry Advisory Panel set up by the Energy Charter Conference in 2004. Serving as a consultative board to the Energy Charter Conference, this Panel is interested in securing access to energy markets and resources and reducing risks through strong investment protection provisions and ISDS.

4. Risks of acceding to the 1994 ECT

Acceding to the 1994 ECT (as opposed to only signing the 2015 IEC) would be problematic for countries who are currently reviewing and reforming their approach to investment treaties. Countries wishing to join the 1994 ECT would have no opportunity to negotiate the content of the treaty when acceding. This would mean that the widely-recognized flaws of the early investment treaties (including the 1994 ECT), such as broadly-defined legal standards and lack of transparency and independence in dispute settlement, could not be redressed. Many developing and developed countries in the Americas, Africa and Asia, as well as the European Union, are no longer using traditional-type language on investment protection such as that included in the 1994 ECT.

African countries have been particularly active in reviewing their investment treaty models and are

in process of negotiating progressive regional and bilateral investment agreements. Models developed within the Eastern African Community (EAC) and the Southern African Development Community (SADC) and at the Pan-African level have all included more precise definitions of investment protection standards, set out responsibilities for investors and integrated innovations with respect to dispute settlement to ensure transparency and independence. Some have stated their preference for state–state dispute settlement over ISDS, and have subjected access to ISDS, where applicable, to a requirement to exhaust local remedies first.

> “Many developing and developed countries in the Americas, Africa and Asia, as well as the European Union, are no longer using traditional-type language on investment protection such as that included in the 1994 ECT.”

Therefore, acceding to the 1994 ECT would reintroduce rules developed in an era when ISDS cases and the inherent risk of investment arbitration were virtually non-existent and certainly unknown. It would run counter all the innovation and development on the continent and beyond over the past years.

5. Expanding the reach of the International Energy Charter to Africa and Asia to gain market access and investment protection with ISDS

In 2012 the ECT members adopted a program for consolidation, expansion and outreach (CONEXO policy). Since then, the Energy Charter Secretariat has been targeting African and Asian countries to join the 1994 ECT, organizing a series of events and promotion activities. These activities have led a number of countries to sign the 2015 IEC. As of April 2017, the International Energy Charter has 83 signatories, Kenya being the most recent one.[13] Other countries that recently signed it include Bosnia and Herzegovina (2016), Burkina Faso (2017), the Republic of Korea (2016), Nigeria (2017), Rwanda (2016), Senegal (2016) and Swaziland (2016). While only a few have expressed their wish to also accede to the 1994 ECT, the signing of the 2015 IEC, as highlighted above, could be the first step towards accession to the 1994 ECT.

It is a common practice for countries to designate their energy ministries as the competent agencies to decide

Box 2: Timeline of the Energy Charter Process

December 1991: The Energy Charter (also known as the European Energy Charter):

“provides the political foundation for the Energy Charter Process. The Charter is a concise expression of the principles that should underpin international energy cooperation, based on a shared interest in secure energy supply and sustainable economic development…. All Charter signatories are Observers to the Energy Charter Conference, and signing is a first and necessary step towards accession to the 1994 Energy Charter Treaty.”

December 1994: Energy Charter Treaty (ECT):

establishes the Energy Charter Conference at which each Contracting Party has one representative. It also sets up a Secretariat.

December 1994: Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA)

April 1998: Amendment to the Trade Provisions of the Energy Charter Treaty:

brings trade provisions in line with the WTO rules.

August 2012: Energy Charter policy on consolidation, expansion and outreach (2012 CONEXO Policy):

“aims at the consolidation of countries yet to ratify the Energy Charter Treaty and the relations with more than 30 observer countries involved in the Energy Charter Process at different stages of accession to the Treaty.”

May 2015: The International Energy Charter:

“is a declaration of political intention aiming at strengthening energy cooperation between the signatory states and which does not bear any legally binding obligation or financial commitment.”

Source: Consolidated Version of the Energy Charter Treaty and Related Documents, p. 10, available at http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty; The Energy Charter Process, available at http://www.energycharter.org/process/overview.

whether or not to join the Energy Charter. Since these ministries are typically not involved in the negotiation of investment treaties, the legal implications of the 1994 ECT may not always be adequately understood. This does not put into question the key roles energy ministries should play in the decision-making process, as both the 1994 ECT and the 2015 IEC cover a host of issues of the energy sector, such as transit, trade and energy efficiency. However, these issues remain largely non-binding, while the investment protection provisions are legally binding and enforceable through ISDS. Therefore, it is highly recommended that agencies familiar with investment treaty negotiations also be involved when countries evaluate whether to accede to the 1994 ECT or whether to sign the 2015 IEC.

6. Conclusion

The Energy Charter Secretariat is in expansion mode, wanting to gain access to energy resources in Africa and Asia for its current—mostly developed country—members, and extending a far-reaching (and outdated) investment protection system to investments in resource-rich countries.

> “Acceding to the 1994 ECT would run counter all the innovation and development on the African continent and beyond over the past years.”

The objectives of the International Energy Charter are reiterated in the 2015 IEC: “to support the Charter’s policy of Consolidation, Expansion and Outreach *with the aim to facilitate the expansion of the geographical scope of the Energy Charter Treaty* and Process,” and “to support active observership in the Energy Charter Conference, *aiming at … early accession of observer countries to the Energy Charter Treaty*” [emphasis added].[14]

States who have joined the 2015 IEC should be careful about the slippery slope of acceding to the high-risk 1994 ECT’s investment protection framework.

States who have not yet joined the 2015 IEC should assess the risks and benefits of doing so, taking into account the danger of being pulled into accession to the 1994 ECT.

Given their importance, decisions on acceding to the 1994 ECT or signing the 2015 IEC require an assessment through an inter-ministerial group including the agencies responsible for not only energy policy but also trade and investment.

Author

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insight 2

Another Conflict of Norms: How BEPS and International Taxation Relate to Investment Treaties

Julien Chaisse and Flavia Marisi

1. Emergence of international tax law

The ever-increasing level of international trade and investment transactions has rendered reform of international taxation necessary and inevitable, in both law and practice.[1] Tax policy is no longer predominantly within the scope of the individual state, and the number of tax questions that are governed by international agreements has grown dramatically.

The exchange of information and the cooperation among states in taxation matters are not new: as early as the 1920s, countries found the need to consult on pressing matters of international tax, especially the question of double taxation. Countries pursued these interactions in different forums—first the International Chamber of Commerce (ICC), and later the League of Nations.

International tax law is now governed mainly by international tax treaties—agreements between states that serve several purposes and "play a key role in the context of international cooperation in tax matters."[2] They reduce or eliminate international double taxation over cross-border income, prevent excessive taxation and consequently tax evasion, and thus encourage both international investment and global economic growth. Moreover, they enhance exchange of information and cooperation among tax administrations, especially in tackling the key issue of international tax evasion.[2]

2. International tax law reform and the OECD-led BEPS project

The wish to pay as little tax as possible led some wealthy individuals and enterprises to participate in shell corporations, some of which were used for illegal purposes, such as evasion of tax and international sanctions.[3] The measures taken by certain companies aimed at shifting profits to low- or no-tax destinations or intended to make profits vanish are known as Base Erosion and Profit Shifting (BEPS). This practice has a strong impact on the loss of revenues, amounting to US$100–240 billion every year.

The BEPS project launched in 2013 by the Organisation on Economic Co-operation and Development (OECD), and later approved by the G20,[4] presents 15 actions intended to make sure that profits are taxed where the activities that produced them are carried out and where value is generated. According to the OECD, BEPS "harms governments because it reduces their tax revenues and raises the cost of ensuring compliance, [and] it harms people because, when some MNEs [multinational enterprises] pay low or no tax, individual taxpayers must shoulder a greater share of the tax burden."[5]

> "The measures taken by certain companies aimed at shifting profits to low- or no-tax destinations or intended to make profits vanish are known as Base Erosion and Profit Shifting (BEPS)."

To eliminate arrangements that allow income to go untaxed by exploiting differences in domestic tax laws, and to eliminate or modify preferential regimes that are potentially harmful to a fair allocation of the tax burden, specific rules have been issued or upgraded as a result of the OECD-led BEPS project.

3. Transfer pricing and profit shifting

The matters of profit calculation and tax jurisdiction are closely inter-related. After determining whether a part of a company's profits is generated in a certain country, it is important to set the norms for the identification of the share of profits that will be taxed in that jurisdiction.

One BEPS issue is transfer pricing, which is the determination of the price for goods and services exchanged between controlled or related legal entities that are part of the same corporate group. An example of transfer price is the cost of the goods paid by the parent to the subsidiary when the latter sells goods to the former. The arm's length principle governing international transfer pricing requires related entities to assign revenues in the same way as they would if they were independent parties in the same or similar situation.

To provide guidance on policy and administrative aspects of applying transfer pricing analysis to MNEs, the United Nations and Deloitte have published

manuals on transfer pricing in different countries. Per the United Nations manual, when the applied pricing does not respect the international arm's length principle, it could be deemed as "incorrect pricing" with the potential emergence of tax evasion concerns. In practice, reaching a suitable transfer price may not be a simple task, especially taking into consideration the hitches connected to attributing a value to intangible assets and services. Transfer prices are useful to calculate the revenues of both entities engaged in the transnational exchanges, and hence affect the tax base of both countries part of the cross-border transactions.

Many MNEs are involved in practices aiming to decrease the amount of taxes they must pay, including profit shifting if the arm's length principle is not applied. Profits are shifted from entities based in countries with heavier taxes to related entities based in countries with lower taxation, through either underpricing or overpricing the intra-group transaction. And since intra-group transactions constitute 60 per cent of global trade,[6] the numbers implicated are considerable. An example of underpricing is when goods produced by the parent company, based in a heavy-taxation country, are allegedly sold to its subsidiary company, based in a low-taxation country, and then placed on the market by the latter. In turn, overpricing takes place when goods produced by the subsidiary, based in a low-taxation country, are sold to the parent company, based in a heavy-taxation country, and then from the latter placed on the market.

The intricacy of domestic taxation systems on transfer pricing has inspired a study that lists nearly all national norms on taxation.[7] Even in intra-EU transfer pricing, a careful analysis of the relevant issues has been undertaken by the European Commission since 2001.[8]

4. BEPS and international investment law

The significant increase of global foreign direct investment (FDI) flows between 1998 and 2000, between 2005 and 2007, and in 2015[9] has come together with the signing of an increasing number of double taxation treaties (DTTs). DTTs and bilateral investment treaties (BITs) have complementary aims: while the purpose of BITs is to protect and foster FDI, DTTs tackle the issues of where profits originated by these cross-border investments should be taxed and how to distribute the tax revenues of MNEs.

When taxation is included in the scope of a BIT that provides for investor–state arbitration, foreign investors can resort to investment arbitration to challenge their host states for changes in the relevant domestic legislation that could harm their investments. Here is where the BEPS project comes into play: with its 15 actions aimed at avoiding profit shifting, and with the purpose of ensuring that economic activities are taxed where their value is originated, it has already inspired and most probably will continue to inspire national reforms in taxation systems. Consequently, since these reforms may imply a change of national rules governing foreign investments, a clash could emerge between the implementation of BEPS and the application of BITs that include taxation within their scope.

New national measures on taxation, voluntarily implementing the BEPS, could impose new obligations on investors and potentially collide with the respective rights and obligations provided for by BITs and other international investment agreements. More precisely, changes in tax rules that would affect either the profits or the assets of foreign investors could lead to claims for breaches of investment treaty clauses such as free transfer of funds, fair and equitable treatment (FET), national treatment (NT), most-favoured-nation (MFN) treatment and expropriation. In these situations, conflicts arise between the taxation and the investment fields.

"When taxation is included in the scope of a BIT that provides for investor–state arbitration, foreign investors can resort to investment arbitration to challenge their host states for changes in the relevant domestic legislation that could harm their investments."

Several investment arbitration cases have been filed alleging indirect expropriation derived from state measures on taxation. Some scholars maintain that this has become more frequent with the growth in the number of regulatory measures taken by states in the area of taxation.[10] Worth mentioning are the cases *Link-Trading v. Moldova*, *EnCana v. Ecuador*, and *Occidental v. Ecuador*: all of them challenged changes in taxation rules as allegedly expropriatory measures.

With the aim of avoiding investor–state disputes on tax measures, some of the newest BITs and model BITs—such as the 2015 Indian model BIT—carve out taxation from the scope of the treaty. The carve-out clause that Article 2.6(iv) of the Indian model BIT recommends may be a point of contention in the India–European Union talks for the proposed Broad-based Trade and Investment Agreement (BTIA).[11] The China–European Union negotiations for a Comprehensive Agreement on Investment (CAI) crystalize the same issue, which denotes the growing problem posed by the inclusion of tax measures in investment agreements.

Tax systems may affect cross-border investment in at least four ways. First, where the same profits are

taxed both in the residence state and in the source state, a company will pay taxes twice. This double taxation—along with other factors, such as the presence and accessibility of raw materials, low-cost labour, solid and capillary infrastructure, and favourable tax legislation—can affect MNEs' choices as to the destination of their investments. In the short term, the BEPS project would incite national taxation reforms around the globe, and there would be, consequently, an escalation in the risk of collision of domestic reforms with provisions on international trade or investment agreements, such as DTTs or BITs. In fact, although BEPS measures are not compulsory, already before their formal endorsement by the G20 in October 2015, more than 30 countries had already implemented them in their respective legislation.[12]

Second, the application of transfer pricing rules in transnational exchanges between related entities avoids persisting discrepancies between the cost of goods declared by the exporting company and the value of goods declared by the importing company, in the application of custom duties, value-added tax (VAT) and direct tax. This could potentially result in increased costs for compliance on behalf of MNEs.[13]

Third, there is a risk of creating a climate of tax incertitude. Factors such as the rise of companies with cross-border activities, the speedy technological evolution, the increased attention MNEs dedicate to tax planning and the absence of a global policy towards international tax laws bring additional uncertainty. A comprehensive implementation of the BEPS agenda would require comprehensive reform of the international taxation framework. However, agreement on such reform seems unlikely, since the views of Brazil, China, Russia and South Africa, in line with OECD countries, significantly differ from the views of other developing countries. In fact, the original BEPS project of 2013 provided the states where companies are established (usually developed countries) with broader possibility to impose heavier taxes, and the states where companies operate (mostly developing countries) with fewer taxing rights. Consequently, when MNEs engaged in intra-group transactions, developing countries had less room for manoeuvre to impose taxes, while the largest share of taxes was imposed by developed countries. Although limited adjustments have been made to the BEPS project in 2015, the original divergence of opinions suggests that a comprehensive reform of the international taxation framework seems unlikely.

The absence of a shared view may be aggravated by the augmented access tax authorities have to information on MNEs' cross-border operations. While some national tax authorities could use this information to design a global approach to transfer pricing,[13] other tax authorities will have to manage larger volume of information than before without necessarily being able to cooperate on these matters. As a result, they may even be prone to adopting a stricter policy (which they perceive to be in their sole interest). Finally, the "exit taxes" certain states are imposing on the income of individuals or corporations will probably negatively impact the movement of both capital and labour.[13]

5. Conclusion

The recent OECD-led BEPS reform project is of prime importance, not just for the tax community but also to prevent a limited number of economic entities from becoming the only beneficiaries of gains resulting from cross-border trade and investment and to ensure that those gains are more widely redistributed. In this respect, it is important to revisit international investment law and policy to ensure that they do not hinder the proper implementation of the BEPS and national tax reforms.

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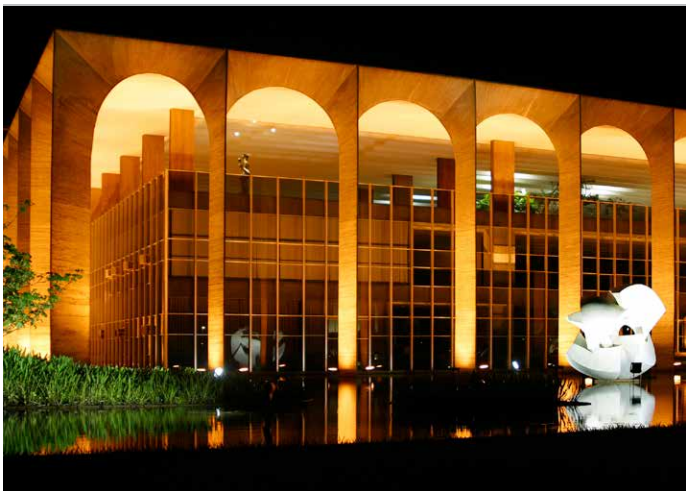
insight 3

Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments

José Henrique Vieira Martins



1. Introduction

None of the 2.369 bilateral investment treaties (BITs) in force involves Brazil.[1] Although Brazil signed 14 traditional BITs between 1994 and 1999,[2] they were never approved by the country's National Congress, which saw the investor–state arbitration regime as limiting states' right to regulate and as granting extraordinary benefits to foreign investors, hence discriminating against domestic investors. For the same reasons, Brazil did not sign the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Even so, it continued to receive significant amounts of foreign direct investment (FDI), consolidating its position as one of the world's top recipients of FDI[3] and reinforcing the understanding that having BITs in force is not decisive for attracting investments.

The increasing internationalization of Brazilian enterprises,[4] the interest of partner countries in negotiating investment agreements, the several problems perceived in traditional BITs and the growing number of investor–state arbitration cases raised the debate of investment agreements again in Brazil. This consisted in an opportunity to develop an innovative model that did not focus only on protection of investors and investments, but which aimed at promoting and facilitating productive investment of high quality. The Brazilian government thus adopted a new approach: the Cooperation and Facilitation Investment Agreement (CFIA).[5] This article discusses the problems of traditional investment treaties, the main features of the CFIAs and recent developments in negotiations.

2. Problems of the traditional model of investment agreements

The traditional model of investment agreement, establishing strong protection clauses for foreign investors and allowing them to initiate international arbitration against the host state without prior recourse to the local judiciary, has had negative effects on host countries. Among several other criticisms, their provisions were excessively burdensome for capital-importing states, particularly when the specific needs of developing countries are considered. Many clauses have been interpreted in a way that limits or prevents states' right to regulate, restricting the implementation of legitimate public policies.

Indirect expropriation clauses, for example, have allowed foreign investors to challenge legitimate public policies aimed at protecting the environment or human health before arbitral tribunals. This happened, for instance, in the cases initiated by Philip Morris against Uruguay and Australia,[6] in which the tobacco company challenged the labelling regulations established by these countries to reduce the attractiveness of cigarette packs and thus limit the consumption of the product.

Many of the 767 investor–state arbitration cases known to date[7] have had major political repercussions in the countries involved. Investment tribunals have awarded large amounts of compensation and are often perceived as favouring individual business interests over social and public considerations of the host state.

With a focus on the dispute settlement mechanism and with a structure that stimulates challenges to domestic regulations that somehow affect investments, BITs have created an adversarial dynamic, which does not contribute to create a good business environment nor long-term investor–state relations. Despite often having the name "Agreements for the *Promotion* and Protection of Investments," these traditional texts do not have an actual promotion concern,[8] but almost exclusively the protection one, and their effectiveness in promoting investments has not been confirmed, after all these years, by any available data.[9]

Developing and developed countries alike have started to think of reforming the international investment agreements regime and to promote changes in their investment treaty models, including clauses aimed at clarifying and delimiting states' obligations toward investors and limiting the possibilities of initiating arbitration. Even so, many concepts used for that purpose maintain large room for interpretation by arbitrators and do not solve the problem.

Different countries have adopted various strategies. Bolivia and Ecuador have terminated many of their BITs. India is currently renegotiating or withdrawing from its BITs. Australia has moved away from investor–state arbitration in its agreements. South Africa has turned to domestic mediation for the settlement of investor–state disputes. The United States has made some changes to its model BIT. In the European Union, the opposition of the European Parliament and civil society to the classic investor–state arbitration mechanism led the European Commission to propose the creation of a reformed system with a standing first-instance tribunal and an appellate mechanism.

3. The Cooperation and Facilitation Investment Agreement model

Brazil's response to the criticisms of the current regime was to move away from the adversarial approach and to adopt a cooperative approach, focusing on the elements of mutual benefit to investors and states. It sought to avoid the problems of traditional agreements and look for a model that really aimed at promoting investment, and not just protecting it.

With that in mind, a governmental team led by the Ministries of Finance (MF), Foreign Relations (MRE) and Industry and Foreign Trade (MDIC), in consultations with other institutions and private sector coalitions, developed the CFIA model. The creation of this model also took into account debates and studies of international organizations and economic forums such as the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), the International Institute for Sustainable Development (IISD) and the G20, besides valuable benchmarks on the theme and country examples.

The premise of the CFIAs is the long-term perspective that states need to cooperate and maintain fluent and organized dialogue with investors to foster sustained investments. It is a new concept of agreement focused on stimulating and supporting mutual investments (adopting the concept of investment facilitation), aiming at boosting reciprocal investment flows and opening new and sustainable integration activities between the states. The model is therefore in line with the development agendas at the G20 and other international forums, especially with the more recent discussions on investment facilitation—which have benefited a lot from the Brazilian model agreement as an example—as it fosters the improvement of investment conditions to amplify business opportunities and stimulate private sector investments.

The CFIA model is composed of four main substantive parts, discussed in detail as follows.

a. Scope of the agreement and definitions

The definition of investment plays an essential role, since the CFIAs cover only FDI, which is the kind of investment seen as able to play a more decisive role in the development of the states. Portfolio investments are explicitly excluded from the scope of the CFIAs, since they encompass essentially short-term and speculative investment.

b. Regulatory measures and risk mitigation

The national treatment and most-favoured-nation (MFN) treatment clauses establish that foreign investors must be treated no less favourably than domestic investors or investors from third parties. A few existing exceptions are preserved, such as the prohibition of investments in border regions. The model does not limit new public policy measures, if they are not discriminatory. There also are articles on transparency, on the freedom of investment-related transfers, and an article about expropriation, which determines that direct expropriations are not allowed, unless they are made in the public interest, in a non-discriminatory way, in accordance with due process of law and on payment of effective compensation. The expropriation article does not cover indirect expropriation.

An important innovation in relation to other investment agreement models is the introduction of clauses on corporate social responsibility based on the OECD Guidelines for Multinational Enterprises,[10] provisions against corruption and, in the most recent negotiations, specific exceptions for the protection of human, animal and plant life. This is in line with Brazil's wish that investments be socially responsible and contribute to sustainable development.

c. Institutional governance and dispute prevention and settlement

Under the CFIAs, each partner state must create a centralized mechanism (Ombudsman or Focal Point) to receive investors' queries and demands. The Ombudsman analyzes the demands and questions posed and, coordinating with the governmental entities related to the issue through expedited proceedings, provides the investor with an answer or solution. The objective is that foreign investors have at their disposal effective means to overcome hardships and challenges faced to make and maintain the investment and to foster a good business environment. Brazil's Ombudsman was established within the Chamber of Foreign Trade (CAMEX), an inter-ministerial body responsible for formulating, adopting and coordinating trade and investment policies.

The CFIAs also innovate through the constitution of a Joint Committee for state–state cooperation and dispute prevention. The dispute prevention component works through a mechanism in which representatives of the investors and governments involved can share their views on the issue raised by the investors and look for a solution on a common ground.

If the parties fail to find a common ground, the states involved can initiate international arbitration as a last resort. The CFIAs do not provide for investor–state arbitration. The main purpose of the state–state arbitration is to determine whether the host state violated any of the disciplines of the agreement and, if so, recommend that the state adjust or eliminate its nonconforming measure.

d. Agenda for Further Investment Cooperation and Facilitation

The cooperation aspect of the Joint Committee's attributions is exercised especially through the development of the Agenda for Further Cooperation and Facilitation, which can include themes such as business visa facilitation, exchange of legislation

information and logistics. These topics move forward depending on the common interest of the partner states. Therefore, the agenda is intended to be a living document, which can be adapted to each case, including topics of mutual interest.

4. Recent developments

In 2013 CAMEX issued a mandate for the negotiation of agreements with African countries, based on the guidelines of the newly developed CFIA model. This mandate was expanded in 2015, right after the conclusion of the first agreements with Angola, Malawi and Mozambique, to include all countries interested in negotiating agreements under the CFIA model with Brazil.

Brazil has also signed CFIAs with Chile, Colombia, Mexico and Peru, and has concluded negotiations with India and Jordan. Negotiations based on a 2015 proposal by Brazil have recently been concluded by the MERCOSUR Working Subgroup on Investments (SGT 12), with the signing of the Cooperation and Facilitation Investment Protocol to the Treaty of Asunción on April 7, 2017.

At the time of writing, the CFIAs with Mexico and Peru have just been approved by the Brazilian Senate, becoming the first investment agreements to obtain congressional approval in Brazil. The other CFIAs signed by Brazil are still undergoing the approval process. The Ombudsman for Direct Investment and a National Committee on Investment were established in September 2016 within the structure of CAMEX, including regulations for both institutional frameworks.[11]

Even if the name or the structure of the agreements may vary slightly, their main features are the same and based on the CFIA model. The small changes indicate adjustments to the specific needs of each partner and the possibility to continually improve the model without losing its essence.

The investment cooperation and facilitation frameworks of the CFIAs (including the Ombudsmen, the Joint Committees and the flexible Agendas for Further Investment Cooperation and Facilitation) have drawn the attention of relevant international organizations. Almost all the action lines included in UNCTAD's Global Action Menu for Investment Facilitation[12] are also present in the Brazilian model. Furthermore, the IISD-led draft South–South Principles on International Investment for Sustainable Development[13]—still undergoing a drafting process with states—and the OECD Secretariat paper on investment facilitation are in line with many of the ideas included in the Brazilian model. The CFIA model was also echoed in G20 debates on the need to foster investments, which gained force with the Seoul Summit (2010), the creation of the Trade and Investment Working Group (TIWG) and the approval of the G20 Guiding Principles for Global Investment Policymaking.[14]

5. Conclusion

The problems perceived in the traditional model of agreements led to Brazil's decision to remain outside the logic of simply creating extraordinary conditions for foreign investors through an adversarial approach. Ultimately, they led Brazil to develop the CFIA model to redefine, on a more balanced basis, what it is expected of an investment agreement. The CFIA model fosters a cooperative approach, focusing on investments facilitation and dispute prevention for a more productive business environment.

While the success of the CFIA model in terms of generating more investments and fewer disputes cannot yet be tested, the new institutional framework—established due to the CFIA—has already improved and organized the investment policy decision-making process and provided Brazil with a better system for diagnosis and analysis of the domestic regulatory scenario. The approval of the agreements with Mexico and Peru and the positive repercussion of the model among relevant economic agents and partners, as well as in the international academic and cooperation circles, show that the model seems to be heading in the right way.

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insight 4

Intra-EU Investment Protection: Up the Creek Without a Paddle

Andrej Arpas

The roiling waters of European BITs

European Union (EU) member states currently have dozens of intra-EU bilateral investment treaties (BITs) still in place. Once regarded as necessary assurances for investors—mostly from Western Europe—that their investments would be sheltered from the whims of the new post-communist regimes, intra-EU BITs have lost their rationale. Many countries formerly east of the Iron Curtain have, over the years, joined the European Union and adopted EU laws and regulations.

Yet, despite a recent ruling as to the incompatibility of intra-EU BITs with EU law, only Ireland and Italy (having terminated their intra-EU BITs in 2012 and 2013, respectively) rely purely on rules of the EU single market—such as freedom of establishment, free movement of capital, non-discrimination on grounds of nationality—for the protection of intra-EU cross-border investors and investments.[1] To complicate matters further, although the European Commission has requested member states to terminate their intra-EU BITs, the precise contours of investor protection within the Union remain unclear as they continue to be fleshed out.

Meanwhile, the bloc's investment environment finds itself in uncharted waters as evidenced by a new Polish–Slovak spat over water exports: the case of *Muszynianka v. Slovak Republic.* This paper elucidates some of the intricacies of the case, including the factual and legal background and its position within the context of intra-EU investment protection.

Background to the Muszynianka case

Muszynianka cooperative is a Polish mineral water purveyor with a bottling plant in Muszyna, a town on the border with Slovakia. In a bid to expand, in 2012, it ventured south of the Slovak–Polish border across the delimiting Poprad river, registering a legal entity in Slovakia's regional capital of the same name. The company had built a 2-km-long pipeline over the border river and was ready to start pumping the water. The investment amounted to about CZK100 million (€3.7 million).

In January 2015, it applied with the Slovak health ministry for a permit to exploit the water source. The health ministry informed the company on January 26, 2015 that the concession application had been rejected based on Article 4(2) of the Slovak constitution, a provision which had entered into force on December 1, 2014 through constitutional amendment.[1] The amendment proscribes exports of drinking, geothermal and mineral water via pipelines or trucks.[2]

Muszynianka, with an annual turnover of about €1 billion, turned to the European Commission with a complaint that received limelight in the Polish media and support from both the then-outgoing Polish Prime Minister Ewa Kopacz and the current Beata Szydlo cabinet.[3]

Peeling the onion of investment arbitrations

Information is limited at this point, but it appears as though, seeing that other measures to resolve the dispute failed, the Polish investor initiated a €75 million investment arbitration claim against Slovakia under the Polish–Slovak BIT.[4] Among the provisions that may have been invoked by Muszynianka cooperative is Article 3(2) of the BIT:[5]

> Each party shall guarantee in its territory fair and equitable treatment with respect to investment of the other party's investors. This treatment will be no less favorable than that afforded to each party's own investors in its territory or to investors of third countries if this treatment is more favorable.

The first sentence of Article 3(2) sets out the typical fair and equitable treatment (FET) obligation. The second sentence then explains that FET involves national and most-favoured-nation (MFN) treatment. The precise relationship between FET, on the one hand, and national and MFN treatment, on the other hand, is left a bit vague by the text. However, the investor could argue that both sets of obligations apply.

Progress on the arbitration is slow as Slovakia immediately challenged the nomination of a Bulgarian arbitrator, Stanimir Alexandrov.[6] Nominated by the Polish investor, Mr. Alexandrov decided to step aside before the matter could be resolved, citing the "hostile manner in which he perceived the challenge to have been prosecuted by the Slovak Republic" as the reason for his departure.[7]

The challenge was rooted in another controversial BIT arbitration under the 1991 Netherlands–Slovakia BIT: the *HICEE v. Slovakia* case. The challenge to Mr. Alexandrov in the Muszynianka case was based on his behaviour in his roles as counsel to the claimant and witness in the *HICEE* case. (As witness, he gave written testimony when HICEE B.V., a Dutch company, sought to disqualify an arbitrator.) Slovak Prime Minister Robert Fico had introduced a ban on distribution of profits that involved HICEE's local subsidiary, a health insurance provider.[8] HICEE claimed that Slovakia thus breached its FET, expropriation and free transfer obligations under the BIT. It sought damages of over €1 billion, but lost.[9]

Peeling the proverbial onion further, Achmea, another Dutch investor in Slovak healthcare, initiated arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL), also falling back on the Netherlands–Slovakia BIT's FET safety peg. Slovakia contested the applicability of the BIT, given the intra-EU nature of the dispute. It also submitted a jurisdictional objection to the local court of Frankfurt, Germany, the seat of the arbitration. Article 344 of the Treaty on the Functioning of the European Union (TFEU) sets forth that disputes concerning the interpretation or application of the EU Treaties must be submitted to dispute settlement methods provided for in the EU Treaties themselves. Slovakia argued that this excluded the jurisdiction of domestic courts such as the German federal courts. The Frankfurt court decided against Slovakia in an interim ruling in 2010 and again in its final ruling in December 2012. Slovakia appealed to a higher-instance court, which affirmed that Slovakia's objections were moot, interpreting that Art. 344 TFEU does not speak of private investor–state disputes and, as such, arbitral tribunals did not constitute a TFEU violation. Slovakia then turned to Germany's highest court in the ordinary jurisdiction—the Federal Court of Justice (BGH).

This leads us to the innermost crust in our onion metaphor. In trying to ensure a uniform and consistent application of EU law, the BGH proceeded to forward preliminary questions to the Court of Justice of the European Union (CJEU), pursuant to Art. 267 TFEU. Arguably, the most important question concerns the use of arbitral tribunals under intra-EU BITs in the face of Art. 344 TFEU, which would seem to have all disputes brought before the CJEU instead.[10] The BGH also enquired as to whether Art. 18 TFEU (non-discrimination) is being infringed by granting special rights to certain EU nationals and not others through intra-EU BITs. Answers to these important questions will presumably deliver a watershed moment for this and indeed numerous other EU arbitrations. Seeing that the outcome of the case currently hangs in an interpretative limbo, the BGH decided to stay the proceedings while it awaits the CJEU's ruling.[11]

Back to Muszynianka's complaint to the European Commission

Based on publicly available information, the case seems to be ongoing, with a focus on the rules governing the internal market.[11] However, insofar as intra-EU BITs are concerned, the European Commission has recently struck them down as contravening EU law.[12]

Investor protection smashed to BITs and pieces?

On September 29, 2016, the Commission ruled that intra-EU investment "reassurances" were excessive and incompatible with EU law, and that Austria, the Netherlands, Romania, Slovakia and Sweden were all to terminate their respective intra-EU BITs.[12] The Commission pointed out that most of these treaties were concluded in the 1990s between then-existing EU member states and countries that were to join the European Union later, in 2004 and 2007. Most of these were ex-communist countries where the rule of law and private property were terms undergoing fledgling and fragile rediscovery. Consequently, the Commission reasoned that it may have been prudent to hammer out additional measures to protect foreign investment. However, it argued that years of transformation rigours and mandatory adaptation to the strictures of EU legislation preceding their membership rendered such protection obsolete and, legally speaking, null and void. Indeed, according to the Slovak finance ministry, Slovakia had, even before the ruling, considered intra-EU BITs, of which there were 20 in Slovakia alone, to be "inapplicable, to say the least"[13] due to their overlap with EU law.

Conclusion

Where does this leave us in terms of EU single-market investment protection? Sailing in uncertain waters, to abuse the Muszynianka theme. In theory, the common European market works based on principles that should pre-empt undue anguish on the part of foreign investors. But reality is a little messier. In the case of one Polish investor, at least, the spaghetti bowl of overlapping national and supranational interests and authority may come as a reminder that *lex specialis* is sometimes especially pricey.

Author

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insight 5

The Recent Argentina–Qatar BIT and the Challenges of Investment Negotiations

Facundo Pérez-Aznar

After a 15-year halt, Argentina has come back to the bilateral investment treaty (BIT) negotiation arena, with the signing of a BIT with Qatar on November 6, 2016 and the ongoing negotiations of a BIT with Japan.[1] In this article I analyze the scope of the Argentina–Qatar treaty and the characteristics of the negotiations undertaken by Argentina.[2]

1. Background on Argentine BITs and disputes

Between 1990 and 2001, Argentina signed 58 BITs, of which 55 entered into force. In general terms, their content did not vary much, and they had the features of traditional BITs. The end of Argentina's BIT program in 2001 coincided with the peak of the country's worst-ever economic crisis, and the proliferation of investment arbitration claims against Argentina.[3]

Since the 1990s Argentina has experienced the effects of BITs. Already in 1995 foreign investors, based on various BITs, were granted access to the Argentine media sector on a national treatment basis.[4] Also the concerns about BITs can be detected at a very early stage. After the first three cases against Argentina were registered with the International Centre for Settlement for Investment Disputes (ICSID) in 1998, the Chief of Cabinet before the National Congress expressed concerns and indicated that the Ministry of Foreign Affairs had been requested to use diplomatic channels to limit the scope of BITs.[5] In 2003 the executive informed the Congress that there were more than 50 claims involving BITs. Half of these became cases under the arbitration rules of ICSID or the United Nations Commission on International Trade Law (UNCITRAL), while the other half never materialized in arbitral proceedings, which suggests that there were settlement agreements.[6] The post-2003 events are better known, with a total number of 59 cases against the country, most of them involving government measures to face the economic crisis.

2. Between traditional and innovative provisions

The Argentina–Qatar BIT resembles in structure and wording the 2012 Moldova–Qatar BIT.[7] In fact, 15 out of 20 provisions of the Argentine treaty have the same or similar wording as those of the Moldovan treaty. Many provisions do not differ much from those of traditional BITs, including the provisions on expropriation, compensation for losses, transfers, subrogation, denial of benefits, entry and sojourn of personnel and state–state dispute settlement. Other provisions, even if they follow in general terms the Moldovan treaty, show significant variations.

The preamble refers to "sustainable development," a novelty in Argentine treaties. The definition of "investor" follows the Moldovan treaty, except for the requirements that judicial persons be constituted or organized and have their principal place of business in the territory of the home state (Art. 1, para. 1(b)). It also provides that a company shall not be deemed an "investor" under the treaty "where it is controlled by nationals of a third State or of the host State" or where it does not conduct "substantial business activities within the territory" of the home state (Art. 1, para. 1(d)). On the other hand, the provision provides that juridical persons include official agencies, sovereign funds and trusts, entities that were generally not included in previous Argentine BITs. The definition of "investment" also uses the open-ended asset-based definition of the Moldovan treaty, but includes the requirement that an investment "involves commitment of resources into the territory" of the host state (Art. 1, para. 2).

The treaty follows the Moldovan treaty in that it "shall not apply to any dispute raised before the entry into force" of the agreement, but with an additional limitation providing that it shall not apply to disputes that are "directly related to events or actions taking place prior to [the date of entry into force], even if their effects are experienced on a date on which the Agreement is already effective" (Art. 2, paras. 1 and 2). The provision on the promotion and protection of investments links both the fair and equitable treatment (FET) and the full protection and security standards to customary international law (Art. 3, paras. 4 and 5).

The investor–state dispute settlement (ISDS) provision also follows the traditional approach of the Moldovan treaty. ISDS covers "[a]ny juridical dispute under the provisions of this Treaty, arising directly from an investment" (Art. 14, para. 1). The period of amicable settlement of three months shorter than the negotiation periods of previous Argentine BITs. If a dispute cannot be settled amicably it may be submitted to a) the competent court of the host state, b) the mechanisms provided for in the ICSID

Convention or c) "an ad hoc tribunal administered by the Permanent Court of Arbitration" (PCA) (Art. 14, para. 2). Despite Argentina's various criticisms to ICSID in different arbitrations, the treaty keeps ICSID arbitration as an option. However, the reference to the PCA is new to Argentine BITs and suggests that Argentina is starting to think about the PCA as an alternative to ICSID.

A number of provisions may have been included at the request of Argentina since they are absent from the Moldovan treaty, such as the articles on the right to regulate (Art. 10), compliance with the laws of the host state (Art. 11), corporate social responsibility (CSR) (Art. 12), security measures (Art. 13) and challenge of arbitrators (Art. 16). The provisions on the right to regulate and security measures reflect essential aspects of most litigations involving Argentina and show an improvement compared to previous Argentine BITs.

The article on compliance with the laws of the host state is among the main innovations of the BIT. It provides that "[t]he Contracting Parties acknowledge that investors and their investments shall comply with the laws of the host Contracting Party with respect to the management and operation of an investment" (Art. 11). The ISDS provision, in turn, does not state that only "the investor concerned" may submit the dispute to the different options appearing in the provision (a requirement that appears in the Moldovan treaty); rather, it provides that "the dispute may be submitted," without indicating the investor as the necessary claimant. The interaction of the two provisions suggests that the host state could initiate arbitration against foreign investors who do not comply with its laws.

Improvements are more limited in other clauses, such as the ones on the challenge to arbitrators, CSR, and "more favourable" provisions.[8] The latter is a variation of a clause of the same type included in the 12 treaty. The most-favoured-nation (MFN) treatment clause cannot be used to invoke ISDS provisions included in treaties signed before the entry into force of the BIT. However, it could have provided instead that MFN cannot be used to invoke ISDS contained in *any* other treaty, which has been the consistent position of Argentina before arbitral tribunals.

3. Looking ahead

Argentina's stock of 52 BITs in force providing for ISDS and its history of 59 arbitrations as respondent state, coupled with the crucial importance of foreign investments to Argentina nowadays, certainly have an effect on the negotiations of the new BITs and distinguishes the situation of Argentina from that of other developing countries. Another aspect that has characterized the recent negotiations with Japan and Qatar is that the counterparts have conditioned new investments in Argentina to the conclusion of BITs.[9]

It has to be seen now how the National Congress will react to the new BIT. At the time of writing, it had not been sent to the Congress for approval, a condition necessary for its entry into force. Many members of Congress expressed concerns about ICSID arbitration when discussing the Law on Public–Private Partnerships (PPP) in November 2016.[10]

Following the example of various developing and developed countries, it would be useful to undertake in Argentina a public debate on the national policy on the promotion and protection of foreign investments involving the different stakeholders. It would also be useful to count on a model BIT that codifies Argentina's long-standing litigation position. Interestingly, Argentina had its own model BIT in the early 1990s and by 2010 it was working on a model BIT.[11] In order to move towards more advanced and efficient mechanisms for the promotion and protection of foreign investments, in addition to highly-qualified and experienced negotiators, it is also necessary to count on the political will of both negating parties.

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guest column

Sustainability Toolkit for Trade Negotiators: Tapping the Potential of Trade and Investment Agreements for Achieving Environmental Goals

Aaron Cosbey

Regional and bilateral trade and investment agreements have great untapped potential for helping to facilitate the transition to a green economy and achieving the 2030 Sustainable Development Agenda. Negotiators are recognizing this potential to contribute to the achievement of national and international environmental objectives. In recent years, several notable pacts have pushed boundaries in such diverse areas as fisheries subsidies,[1] trade in green goods,[2] and the conservation of endangered species.[3] These innovative deals have not only influenced subsequent regional agreements, but are also driving progress at the multilateral level, such as when the **work on green goods at the Asia–Pacific Economic Cooperation** (APEC) sparked World Trade Organization–based negotiations on a green goods agreement.[4]

There is also the potential for significant negative impacts, particularly when we look beyond strictly environmental provisions to those elements that *affect* the environment: the "behind the border" trade rules which restrict how states regulate in areas such as investment, intellectual property rights, services, government procurement and subsidies. Trade and investment—and the agreements that govern them—have a powerful economy-wide potential for change. The structural changes wrought by trade and investment can help move economies towards greater efficiency and wider dissemination of environmentally friendly technologies. But they can also perpetuate and intensify investment in polluting and resource-intensive economic activities, and discourage beneficial regulations. We argue that trade and investment rules must go beyond positive efforts such as liberalization of green goods to also provide national governments with the legal flexibility to adequately protect the environment. To help policymakers craft trade and investment agreements that support sustainable development objectives, the International Institute for Sustainable Development (IISD) and the United Nations Environment Program (UNEP) created the **Sustainability Toolkit for Trade Negotiators** (**http://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators**). Launched in March 2017 at the **Ministerial meetings of the Partnership for Action on Green Economy (PAGE)**,[5] the toolkit shows how specific provisions within the agreements might better serve those broad goals, citing over 200 text examples drawn from some 90 existing agreements.

Different states will find different appropriate responses to the nexus of environmental and trade and investment policy. This toolkit ensures that negotiators of trade and investment agreements can at least be aware of their options for environmental provisions.

Designed to be an easily-accessible reference guide, the toolkit can help negotiators already schooled in the issues quickly find answers to specific questions. It provides a brief overview of each issue, then discusses options and presents examples from existing or model treaties. For instance, it covers emerging trends in relation to investor responsibilities and obligations and provides examples of clauses relating to investors' compliance with host state laws and regulations on environment, labour, tax and anti-corruption. While trade and investment treaties should not be designed to diminish the role of domestic law applicable to investors, they can contribute to filling gaps or bolstering compliance. This can be achieved, for example, by limiting access to arbitration in certain cases of non-compliance, or by allowing for counterclaims (see for example **Article 11** of India's Model BIT).[6]

The toolkit also provides a broad overview of key issues. It begins with framing questions that drafters will need to consider: what sort of architecture, what sort of commitments? It then examines provisions that are strictly environmental in nature, such as treatment of environmental standards, in relationship to multilateral environmental agreements. It then considers those aspects of treaty text that are not explicitly environmental, but which may have significant impacts on the environment and environmental regulation: investment, government procurement, services and intellectual property rights. In closing, it looks at the process for conceiving, negotiating and implementing regional trade and investment agreements (RTIAs). The toolkit will be regularly updated as new treaties offer interesting approaches to the issues covered.

Trade and investment flows are not ends in and of themselves, but rather are means to an end: enhanced human well-being. Any conceivable definition of human well-being must go beyond immediate personal wealth to include, among other things, preservation of the environmental services that underlie our economy and future development. So if trade and investment law and policy are to achieve their full potential for enhancing human well-being, they must be aligned with priorities that go beyond simply increasing flows of goods, services and funds.

Author

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Notes

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news in brief

TPP-11 to move forward; United States to focus on bilateral negotiations and NAFTA

Trade ministers from 11 signatory countries of the Trans-Pacific Partnership (TPP) met on May 21, 2017 in Hanoi, Vietnam, to **discuss the future of the agreement** during an Asia–Pacific Economic Cooperation (APEC) meeting.

Although **TPP was signed** by 12 Pacific Rim nations in February 2016, **the United States withdrew from the agreement** in January 2017. Since then, Japan and New Zealand have led efforts for TPP to enter into force between the 11 remaining signatories, which account for 13.5 per cent of the global economy (Australia, Brunei Darussalam, Canada, Chile, Japan, Mexico, Malaysia, New Zealand, Peru, Singapore and Vietnam).

The ministers agreed to launch a process to assess options to bring TPP-11 into force expeditiously. The assessment is to be concluded before the APEC Economic Leaders Meeting on November 10–11, 2017 in Da Nang, Vietnam.

Robert Lighthizer, who took office as U.S. Trade Representative on May 15, 2017, defended the U.S. withdrawal. "The president made the decision, which I certainly agree with, that bilateral negotiation is better for the United States than multilateral negotiations," he said in Hanoi.

Lighthizer also notified the U.S. Congress on May 18, 2017 of President Trump's intent to renegotiate the North American Free Trade Agreement (NAFTA), initiating a 90-day congressional consultation period. **The broadly-stated objective of the renegotiation** is to modernize NAFTA by including provisions on intellectual property rights, regulatory practices, services, labour, environment and other areas. Negotiations with Canada and Mexico are expected to start in August, and the USTR hopes to complete them by the end of 2017.

Ecuador denounces its remaining 16 BITs and publishes CAITISA audit report

Ecuadorian President Rafael Correa formalized Ecuador's withdrawal on May 16, 2017 from bilateral investment treaties (BITs) concluded with 16 countries: Argentina, Bolivia, Canada, Chile, China, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States and Venezuela.

Ecuador previously denounced nine BITs in 2008 (with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay) and one in 2010 (with Finland). With the new denunciations, Ecuador has completed the process of withdrawal from all of its BITs. While the treaties with the Dominican Republic, Guatemala and Uruguay are no longer in force, all others are subject to survival clauses ranging from 5 to 20 years.

The recent denunciations follow the recommendation of CAITISA, an audit commission composed of government officials, academics, lawyers and civil society groups that examined Ecuador's BITs between 2013 and 2015. CAITISA's 668-page report (of which drafts were **leaked in January 2016**) was **officially published** and presented to President Correa on May 8, 2017.

For **CAITISA President Cecilia Olivet**, "the auditing process revealed that these treaties not only failed to attract additional investment or advance the country's development plan, they also diverted millions of dollars of government money to fighting costly lawsuits." She added: "We hope other governments will learn from Ecuador's example and review their own investment agreements to find out if they are truly beneficial to their citizens."

Several other developing countries—including Bolivia, **India**, Indonesia and South Africa—have terminated their BITs, or indicated their intention to renegotiate or terminate them, as part of a growing effort to reform and rebalance the international investment regime.

ECJ rules that European Union–Singapore FTA requires ratification by EU member states

The European Court of Justice (ECJ) published its **Opinion 2/15** on the European Union–Singapore Free Trade Agreement (FTA) on May 16, 2017.

It held that the treaty falls within exclusive EU competence, except for certain provisions that fall within a competence shared between the European Union and its member states. The provisions within shared competence include, among others, provisions on investment protection—insofar as they relate to portfolio investment—and investor–state dispute settlement (ISDS).

In line with the ECJ decision, the FTA with Singapore will need to be **concluded as a mixed agreement**, requiring ratification by the European Parliament as well as by national and regional parliaments of EU member states.

EU General Court annuls Commission decision that refused registration of "Stop TTIP"

In September 2014, the European Commission refused to register "Stop TTIP," a petition signed by over three million EU citizens requesting the Commission to stop trade and investment negotiations with the United States and refrain from concluding the Comprehensive Economic and Trade Agreement (CETA) with Canada. In its refusal, the Commission argued that the proposed initiative did not fall within its powers.

However, in a May 10, 2017 judgment, the General Court of the European Union annulled the Commission's decision. **The court reasoned** that "Stop TTIP" constituted a legitimate and timely initiation of a democratic debate, not an inadmissible interference in the legislative procedure, and that the Commission had no legal basis to reject its registration. **The judgment was welcomed** by several groups as a victory for European democracy.

India opposes "trade and investment facilitation" item in WTO General Council agenda

A meeting of the General Council of the World Trade Organization (WTO) was suspended on May 10, 2017 after India objected to the adoption of the proposed agenda, which included a "trade and investment facilitation" item. According to India, the topic falls outside the scope of the WTO.

Attempts to start discussions on investment facilitation at the WTO are being led by Brazil, China, Russia and the MIKTA coalition (Mexico, Indonesia, Korea, Turkey and Australia), with support from several developed countries. Most developing countries remain opposed to such attempts, arguing that WTO rules on investment facilitation would reduce their policy space.

awards and decisions

Highly anticipated NAFTA award rejects patent law–related claim against Canada

Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2

Matthew Levine

An arbitral tribunal constituted under the investment chapter of the North American Free Trade Agreement (NAFTA) has reached the award stage.

The tribunal rejected the claim that judicial invalidation of patents constituted a breach of either Article 1110 (Expropriation) or Article 1105 (Minimum Standard of Treatment) of NAFTA, and awarded Canada legal costs of approximately CAD4.5 million. The claimant was also required to bear the arbitration costs of approximately USD750,000.

The arbitration was conducted pursuant to the rules of the United Nations Commission on International Trade Law (UNCITRAL), and the International Centre for Settlement of Investment Disputes (ICSID) provided administrative services.

Background and claims

The claimant, Eli Lilly and Company (Eli Lilly), is a global pharmaceutical company constituted under U.S. laws. Eli Lilly's business involves marketing proprietary pharmaceuticals in Canada. This includes Strattera, used for the treatment of Attention-Deficit/Hyperactivity Disorder, as well as another psychiatric medicine called Zyprexa.

For a pharmaceutical product to be patentable, the underlying invention must be new and non-obvious and have utility. In terms of utility, which is central to this dispute, Canadian courts increasingly make use of the "promise of the patent" doctrine in their analysis. According to this doctrine, if a patent application sets out an explicit promise of utility, the patent will be void if it does not meet this promised utility. Concurrently, there has been a significant increase in the number of patents invalidated by Canadian courts on the basis of a failure to support the promised utility.

The Canadian courts invalidated Eli Lilly's Canadian patent on Strattera in 2010 and on Zyprexa in 2011. In both cases, the decision was based on a failure to provide proper support for "promised" utility under the Canadian law promise doctrine. After Canada's first-level appellate court dismissed the claimant's appeal, the Supreme Court of Canada (SCC) denied Eli Lilly's applications for leave to appeal in 2011 and 2013 for Strattera and Zyprexa, respectively.

The tribunal was constituted in July 2013. Eli Lilly's principal claims were that Canada breached its NAFTA obligations regarding Expropriation and Minimum Standard of Treatment. It sought damages of not less than CAD500 million.

Tribunal dismisses jurisdictional objection

As a preliminary matter, the tribunal considered Canada's objection that the complaint related to judicial developments outside NAFTA's three-year limitations period.

However, the tribunal noted that the limitations period under NAFTA Articles 1116(2) and 1117(2) only begins to run when an investor first acquires knowledge of the alleged breach. For the tribunal, the alleged breaches in this case were the SCC's denials of leave to appeal in 2011 and 2013. It held that, as a result, the limitation period had not expired.

Tribunal reviews Canadian judicial developments as evidence of "dramatic change"

Eli Lilly's primary argument was that the promise doctrine constituted a "dramatic change" in Canadian patent law. The tribunal observed that it was difficult to accept that there had been a dramatic change "where the relevant Canadian judicial decisions were handed down over a period of more than six years, encompassing a range of cases from first instance to appellate tier" (para. 309). It further observed the need to be mindful of the role of the judiciary in common law jurisdictions.

The tribunal nevertheless examined Eli Lilly's allegation that the promise utility doctrine imposes three elements, which drastically depart from the traditional utility test. The first element is the "promise standard" whereby patent examiners and judges seek to identify a promise in the patent disclosure. The second element relates to the evidentiary burden on patentees whereby evidence of utility such as scientific effectiveness and commercial use is inadmissible if it was generated after the filing date of the patent. Third, pre-filing evidence may not be considered to support a sound prediction unless that pre-filing evidence was referenced in the patent application itself.

On the first element, the tribunal found that the promise standard already existed in earlier Canadian case law. While the tribunal agreed that the approach to post-filing evidence in the relevant SCC jurisprudence had been "unexpected," it found that ultimately the potential for the SCC to reverse lower-court decisions is an aspect of a common-law judicial system. On the third element, pertaining to pre-filing evidence, the tribunal was persuaded by Canada's evidence, which included client alerts issued by the investor's outside counsel in the arbitration that this was an incremental and evolutionary change in Canadian law. As a result, the facts surrounding each of the three elements did not demonstrate a dramatic transformation of the utility requirement in Canadian law.

Tribunal reviews further evidence that promise utility doctrine constituted dramatic change

Despite the above findings, the tribunal was cognizant that Eli Lilly had alleged that the three elements were part of a unitary, cohesive doctrine and that they must be considered together. Therefore, it examined certain further evidence.

Eli Lilly had submitted two versions of the Manual of Patent Office Practice (MOPOP). The MOPOP included the three-part promise utility test in its 2009 version but

not in the 1990 version. The tribunal, however, observed that the MOPOP was not an authoritative document and could not be claimed to be a complete statement of Canadian patent law.

The tribunal was likewise unimpressed with the remainder of Eli Lilly's arguments, which included a comparative examination of patent law in the three NAFTA states and a legitimate expectation that a patent once issued would not be revoked.

On the allegation that the promise utility doctrine is arbitrary and discriminatory, the tribunal found that this could not be sustained. Even if the tribunal were to accept Eli Lilly's position regarding the applicable legal standards, the specific allegations would not succeed.

Costs

The tribunal noted that Article 40(1) of the UNCITRAL Rules adopts the loser pays principle for arbitration costs as default and that in this case there was no reason to proceed otherwise. Therefore, Eli Lilly was ordered to bear all arbitration costs amounting to approximately USD750,000.

In respect of the costs of legal representation and assistance, Article 40(2) of the UNCITRAL Rules confers broad discretion on the tribunal to determine any reasonable apportionment. While Eli Lilly's legal fees totalled almost USD9 million, Canada claimed some CAD5.9 million. In the exercise of its discretion and considering that Canada prevailed on the merits but not on jurisdiction, the tribunal concluded that it was appropriate for Eli Lilly to reimburse Canada for 75 percent of its costs.

Notes: The tribunal was composed of Albert Jan van den Berg (President appointed by ICSID Secretary-General pursuant to NAFTA Article 1128, Dutch national), Gary Born (claimant's appointee, U.S. national) and Daniel Bethlehem (respondent's appointee, British national). The final award of March 8, 2017 is available at http://www.italaw.com/sites/default/files/case-documents/italaw8546.pdf.

SCC tribunal dismisses claims brought by British company and its shareholders against the Czech Republic

Anglia Auto Accessories Ltd. v. Czech Republic (SCC Case No. V 2014/181) and Ivan Peter Busta and James Peter Busta v. Czech Republic (SCC Case No. V 2015/014)

Inaê Siqueira de Oliveira

A tribunal administered by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) dismissed all claims brought against the Czech Republic by British company Anglia Auto Accessories and two of its shareholders, Ivan Busta and James Busta. The case was initiated in 2014 based on the bilateral investment treaty between the United Kingdom and the Czech and Slovak Federal Republic (BIT).

In 2014 the SCC decided to split the case into two proceedings: one for the claims brought by the company and another for those brought by the shareholders. The same arbitral tribunal decided the two cases, and many controversial issues overlapped.

Common preliminary issues: applicability of intra-EU BITs and jurisdiction over claims for breaches of FET and full protection and security

In both cases the tribunal faced the issues of (i) whether the BIT had been terminated upon the Czech Republic's accession to the European Union and (ii) whether the tribunal had jurisdiction to determine breaches of Article 2(2) of the BIT—which provides for fair and equitable treatment (FET) and full protection and security—in view of the restricted wording of the dispute resolution provision.

Disagreeing with the Czech Republic, and noting that the objection "was barely pursued at the Final Hearing" (*Anglia* award, para. 113), the tribunal understood there was no incompatibility between the BIT and the Treaty on the Functioning of the European Union (TFEU), because the treaties do not have the same subject matter. It also noted that neither the Czech Republic nor the United Kingdom sought to terminate the BIT.

The tribunal also dismissed the Czech Republic's argument of partial incompatibility between the BIT and the TFEU, holding that the investor–state dispute settlement provision of the BIT was compatible with Article 267 TFEU and with the jurisdiction of the European Court of Justice (ECJ) to interpret and apply the TFEU.

Under the BIT's dispute resolution provision, only disputes pertaining to certain articles of the BIT could be referred to arbitration. Article 2(2) was not among those listed; thus, the Czech Republic argued that the tribunal lacked jurisdiction to hear claims for breaches of Article 2(2).

The claimants invoked the most-favoured-nation (MFN) provision to rely on a more favourable dispute resolution clause contained in a different treaty, but the tribunal, relying mostly on the straightforward language used in the BIT, sided with Czech Republic and found that it only had jurisdiction over alleged breaches of Article 5 (on expropriation).

The jurisdictional issue in Anglia's case: whether a commercial award is an investment

Anglia's claim arose out of its attempt to enforce a 1997 arbitral award against a former business partner in the Czech Republic. Its main submission was that the Czech judiciary, due to its inactivity, had unlawfully expropriated the value of the arbitral award. The parties disputed whether the award in favour of Anglia was an investment in the first place.

Having set aside the *Salini* test as inapplicable to an arbitration brought under the SCC Arbitration Rules, because it related to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the tribunal turned to the task of interpreting the definition of investment embedded in the BIT. It held that the award qualified

as a "claim to money or to performance under contract having financial value" within the meaning of Article 1(a) of the BIT (*Anglia* award, para. 153).

The admissibility issue in the shareholders' case: whether shareholders can bring claims in respect to loss or damage to company assets

The shareholders' claim for expropriation was related to the loss of goods owned by Sprint CR, a Czech-based company in which they were the sole shareholders. Claiming that certain assets of Sprint CR had been expropriated, they sought compensation for the value of those assets.

The Czech Republic alleged that shareholders did not have standing to bring claims related to loss or damage to company assets. In its view, only losses incurred as a result of a decrease in the value of shares would give shareholders standing to bring claims.

The tribunal understood that the shareholders' claim was one of indirect expropriation and held that, as such, it was encompassed by the BIT.

As Anglia had filed a claim for damages with the Czech courts, the Czech Republic raised a *lis pendens* objection. The tribunal dismissed it, reasoning that the cases were pending in distinct legal orders, each with distinct claimants and different causes of action.

Tribunal dismisses Anglia's indirect expropriation claim based on Czech courts' failure to enforce arbitral award

Anglia entered the Czech market in 1990 through a joint venture with Kyjovan, a local manufacturing cooperative. Following some business disputes, in 1997 Anglia obtained an award in a commercial arbitration against Kyjovan and sought to enforce it in Czech courts in four proceedings initiated between 1998 and 1999.

While acknowledging that Anglia experienced difficulties in the lengthy enforcement proceedings, the tribunal dismissed the claim that the proceedings amounted to expropriation. Applying the test set forth in *Plama v. Bulgaria*, it reasoned that, as Anglia managed to recover 77 per cent of the principal amount under the 1997 award, it had not been permanently deprived of the value of its investment in whole or significant part. Moreover, it concluded that delays in the proceedings "cannot be said to have been caused by the inaction of the Czech Courts" (*Anglia* award, para. 298).

Tribunal dismisses shareholders' indirect expropriation claim based on police conduct

Sprint CR had goods stored in a warehouse. Among hostilities, Kyjovan began to move these goods out of the warehouse. Although notified, the Czech police did not intervene to prevent that because it assumed Kyjovan was acting on legitimate grounds; subsequently the police located the goods and handed them back to Sprint CR.

According to the shareholders, only one-third of the goods taken out of the warehouse was returned. The Czech Republic, on the other hand, "denie[d] that any goods were missing, and t[ook] the position that all goods were ultimately returned to Sprint CR" (*Ivan & James Busta* award, para. 390). Most of the dispute centred on the Czech police's failure to make an itemized list of the goods recovered and handed back to Sprint CR.

Based on the facts and circumstances of the case, the tribunal acknowledged that a discrepancy between the goods removed and the goods returned likely existed, but held that it had not been established "that the conduct of the Police, both on that date and subsequently, amounted to an act of expropriation" (*Ivan & James Busta* award, para. 437).

Allocation of costs

The tribunal did not find it appropriate to apply the "costs follow the event" approach. Noting that each party had partly prevailed and partly failed on its contentions, it decided that each party should bear its own costs, as well as half the costs of the arbitration.

Notes: The tribunal was composed of Yas Banifatemi (President appointed by the SCC, French national), August Reinisch (claimants' appointee, Austrian national) and Philippe Sands (respondent's appointee, French–British national). The March 10, 2017 awards are available in English at http://www.italaw.com/sites/default/files/case-documents/italaw8556.pdf (*Anglia*) and http://www.italaw.com/sites/default/files/case-documents/italaw8558.pdf (*Ivan & James Busta*).

ICSID tribunal dismisses the second known case against China in a summary proceeding

Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25

Joe Zhang

In an award dated March 9, 2017, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) dismissed a case against China for lack of temporal jurisdiction. It ordered the Korean claimant to reimburse China for the costs of the proceeding plus 75 per cent of China's legal fees and expenses.

This was the second known ICSID case brought against China. In 2011 a Malaysian investment initiated an ICSID proceeding against China, but the claim was settled before a tribunal was selected. For details of the first case, see https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/11/15.

Background

The dispute arose out of a Korean developer's golf course project in China. Immediately after the constitution of the arbitral tribunal, China filed an objection based on Rule 41(5) of the ICSID Arbitration Rules, which allows the tribunal to dismiss a claim that is manifestly without legal merit. Given the summary nature of the proceeding, the tribunal "assume[d] the truth of the facts alleged by Claimant" (para. 32).

In late 2006, the Korean-incorporated claimant, Ansung Housing Co. Ltd. (Ansung), entered into an investment agreement with a local government in the Chinese province of Jiangsu to develop a 27-hole golf course.

The agreement approved the development of the first phase of the project (18 holes) and reserved additional land for the second phase (9 holes). Ansung also received land use rights over roughly 80 per cent of the land needed to complete the first phase.

The construction began in March 2007, but between June 2007 and November 2010 Ansung faced several government-caused difficulties that left the project in limbo. The local government imposed additional requirements for the land use rights due to a change in the law, requested a higher price than originally agreed, granted rights that only covered one-third of the land requested, and failed to grant the additional land reserved in the 2006 agreement.

After failing to meet the loan repayment obligations regarding the half-completed project, Ansung sold the golf business in transactions carried out in November and December 2011. On October 7, 2014 it filed a request for ICSID arbitration under the 2007 China–Korea bilateral investment treaty (BIT). The award does not mention the specific claims.

Three-year limitation period: When does it start? When does it end?

One of the key provisions debated by the parties was Article 9(7) of the China–Korea BIT, which provides: "[A] n investor may not make a claim pursuant to paragraph 3 of this Article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage."

China challenged that the arbitration was instituted more than three years after Ansung first acquired knowledge that it had incurred loss or damage, therefore rendering the claim time-barred under Article 9(7). Ansung, on the other hand, asserted that the claim was made well within the three-year limitation period.

In terms of the starting date of the temporal limitation period, the tribunal sided with China, which relied on various decisions rendered by tribunals under the North American Free Trade Agreement (NAFTA) when interpreting similar language in NAFTA. The tribunal held that given the plain meaning of the words used in Article 9(7), "[t]he limitation period begins with an investor's *first* knowledge of the *fact* that it has incurred loss or damage, not with the date on which it gains knowledge of the *quantum* of that loss or damage" (para. 110). Applying the standard to the case and based on the facts as pleaded by Ansung, the tribunal concluded that Ansung had first acquired or should have first acquired the knowledge—thereby starting the clock for the three-year limitation period—before October 2011.

Turning to the ending date, Ansung argued that it should be the date when it submitted the written notice of arbitration to the respondent (May 19, 2014). China, on the other hand, argued that it should be the date when the case was registered with ICSID (November 4, 2014). Not persuaded by either argument, the tribunal found it "not difficult" to conclude that the language of the BIT was referring to "the date on which an investor deposits its request for arbitration with ICSID" (para. 115)—October 7, 2014 in this case. In reaching this conclusion, the tribunal quoted the Decision on Jurisdiction in ***Vannessa Ventures v. Venezuela*** which held that "relevant document regarding the interruption of the statute of limitation is therefore the Request for Arbitration" (para. 116).

After identifying the starting and ending date, the tribunal concluded that the claim was indeed brought after the expiration of the limitation period and was thus "time-barred and, as such, [was] manifestly without legal merit" (para. 122).

Ansung fails in attempt to rely on MFN to bring in less strict temporal limitations

Ansung tried to bypass the temporal limitation by invoking the most-favoured-nation (MFN) clause of the BIT. It contended that the prescription period was among the substantive rights covered by MFN, and claimed protection of other Chinese treaties with no such prescription periods. Alternatively, Ansung argued that MFN treatment should also be interpreted to cover procedural rights including access to investor–state arbitration. The tribunal did not agree, and deemed the limitation period in question as a condition to China's consent to arbitrate, which was not covered by a "plain reading" of the MFN clause (para. 138).

Further, the tribunal noted that paragraph 5 of the MFN clause provides: "Treatment accorded to investors of one Contracting Party within the territory of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defence of their rights shall not be less favourable than that accorded to investors of the latter Contracting Party or to investors of any third State."

In contrast to the express reference to domestic avenues, the tribunal noted the conspicuous absence of any mention to international dispute resolution in the MFN article. It therefore concluded that the state parties clearly did not intend to extend MFN treatment to the situation at hand, and thus swiftly decided to dismiss the claim, as requested by China.

Notes: The tribunal was composed of Lucy Reed (President appointed by the Chairman of the ICSID Administrative Council, U.S. national), Michael Pryles (claimant's appointee, Australian national) and Albert Jan van den Berg (respondent's appointee, Dutch national). The award is available in English at http://www.italaw.com/sites/default/files/case-documents/italaw8538.pdf.

ICSID tribunal finds Egypt in breach of several provisions of the U.S.–Egypt BIT

Ampal-American Israel Corp. and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11

Claudia Maria Arietti Lopez

After finding jurisdiction in a separate decision, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) issued a decision on the merits, finding Egypt in breach of several provisions of the United States–

Egypt bilateral investment treaty (BIT). Another decision on quantum and costs is still pending.

Factual background and claims

The Claimants are a group of U.S.-incorporated companies who are shareholders of the East Mediterranean Gas Company S.A.E. (EMG), a tax-free zone company incorporated in Egypt. EMG's main purpose was to purchase natural gas at the source and export it to Israel through a pipeline. The Egyptian General Petroleum Company (EGPC), a state-owned company, and EMG signed a preliminary agreement for the sale of natural gas in 2000. EGPC and EMG further entered into a Source Gas Sale Purchase Agreement (GSPA) and a Tripartite Agreement in 2005, together with the Egyptian Natural Gas Holding Company (EGAS), which is also a state-owned company. Egypt gave a license to EMG to continue to operate under the private tax-free zone regime in 2006 and the following year it extended EMG's tax-exempt status until 2025.

Claimants alleged that Egypt carried out the following measures that destroyed their investment: first, that Egypt revoked EMG's tax-exempt status in 2008 by enacting a new law; second, that Egypt coerced them into signing an amendment of the GSPA by withholding gas from EMG; third, that even after the amendment was signed, Egypt did not comply with its obligations under the GSPA; fourth, that Egypt failed to protect its pipeline from thirteen attacks during the Arab Spring, delivering no gas to EMG for months; and fifth, that Egypt made up contractual grounds to terminate the GSPA to carry out government policy in order to discontinue all exports to Israel. As result of these measures, Claimants argued that Egypt breached relevant provisions of the BIT, including the fair and equitable treatment (FET) clause, the umbrella clause, the full protection and security clause, as well as the expropriation clause.

1. Attribution

The tribunal first analyzed the issue of attribution. Preliminary, the tribunal stated that the issue of attribution was analyzed only for purposes of assessing the Claimants' claims against Egypt of breach of the BIT based on actions or omissions of EGPC/EGAS.

Claimants argued that EGPC/EGAS' conduct was attributable to Egypt in virtue of Articles 4, 5, 6, 8 and 11 of the ILC Draft Articles on State Responsibility (ILC Articles). Conversely, Egypt argued that the ILC Articles do not provide any basis for attribution.

The tribunal sided with the Claimants and concluded that EGPC/EGAS are state organs under Article 4 of the ILC Articles. The tribunal based its decision on evidence pursuant to Egyptian law, which stated that EGPC is a public authority and that it is overseen by the Ministry of Petroleum. Similar evidence was found regarding EGAS, which is wholly-owned by EGPC and it is chaired by the Minister of Petroleum. The tribunal also found that EGPC/EGAS' actions were attributable to Egypt under Article 8 of the ILC Articles since both acted at all times under the state of Egypt's direction and control. The Tribunal finally held that Egypt acknowledged EGPC/EGAS' acts as its own under Article 11 of the ILC Articles since it ratified the termination of the GSPA.

2. Revocation of the Tax-Free License constituted an Expropriation

The tribunal first analyzed whether the tax-free license constituted an investment under the BIT. Based on the wording of the BIT, it concluded that the license was an investment. The tribunal then held that the revocation amounted to a direct taking of Claimants' investments and that the inclusion of EMG within the tax-free zone system was a fundamental part of the economic structure of the investment. It thus concluded that the revocation of the tax exemption was tantamount to an expropriation. The tribunal held that the expropriation complied with some of the conditions for expropriation set forth in the BIT, such as public purpose and non-discriminatory treatment. However, it did not comply with prompt and adequate compensation.

Claimants also submitted that EMG would have retained its tax-free zone status after 2025 and claimed damages beyond that year. Egypt alleged that this claim was speculative. The tribunal agreed with Egypt and rejected this claim.

3. Claim regarding the Execution of the First Amendment Dismissed.

The tribunal held that the Claimants failed to prove that they were coerced into signing the first amendment. On the contrary, the tribunal found that it was in the Claimants' interest to negotiate and execute an amendment to the GSPA.

4. Delivery failures from the first amendment of the GSPA until the outbreak of the Arab Spring Revolution

The tribunal held that it did not considered that Egypt failed to observe its undertakings during this period, and rejected the Claimants' claim for alleged losses.

5. Delivery failures from the outbreak of the Arab Spring Revolution until the termination of the GSPA

The Claimants submitted that Egypt breached the full protection and security clause under the BIT by not having taken the necessary steps to prevent the attacks. On the other hand, Egypt submitted that those attacks were *force majeure* events under the GSPA.

Noting that its jurisdiction derives from the BIT, the tribunal indicated that it should apply the BIT standard rather than any contractual standard (*force majeure*). Based on previous decisions, the tribunal held that the duty imposed by the international standard upon the host state is not one of strict liability, but one of due diligence to protect the investor's investment.

The tribunal also noted that another tribunal in an ICC arbitration regarding contract matters—in which EMG, EGPC, EGAS and Israel Electric Corporation (IEC) were parties—had issued a final award. The tribunal held that it was entitled to refer to, and to rely upon, the findings of the contract tribunal, provided the award was binding on the parties. Since the Claimants were not part of the ICC arbitration, the tribunal relied on the decisions in *RSM v.*

Grenada, and *Apotex Holdings v. USA* to conclude that the Claimants were in privity of interest with EMG and that Egypt was in privity of interest with EGPC and EGAS. As a result, the tribunal held that the findings of the ICC tribunal, which were relevant to the claims before this tribunal, had a *res judicata* effect between the parties in this proceeding.

Based on the finding of facts of the ICC arbitration and its own evaluation of the evidence presented about the same factual matters, the tribunal concluded that Egypt failed to take material steps to protect the Claimants' investment from damages in reaction to the attacks on the pipeline. This was specially revealed by an EGPC/EGAS technical report of July 2011 (5th attack). Therefore, the failure by Egypt to take steps to protect Claimants' investment from the 5th attack constituted a breach of the obligation of due diligence that Egypt had to exercise to ensure full protection and security of Claimants' investment.

6. Termination of the GSPA

The tribunal first analyzed the termination of the GSPA and stated that the breach of the GSPA was considered only to determine whether there has been a breach of the BIT. To reach a conclusion, the tribunal took into consideration the decision of the ICC tribunal, which found that EGAS termination of the GSPA was unlawful, and also took into consideration its own evaluation of the evidence presented. The tribunal concluded that EGPC/EGAS wrongfully terminated the GSPA.

The tribunal then analyzed whether the wrongful termination of the GSPA constituted an unlawful expropriation under the BIT. In this regard, the tribunal first examined whether the rights conferred to the Claimants by the GSPA constituted an investment protected under the BIT. Based on the wording of the BIT, the tribunal found that the Claimant' property interest in the GSPA was an investment protected under the BIT. Then, the tribunal studied the conditions set forth by the BIT for expropriation (public purpose, due process, non-discrimination, prompt and adequate compensation) and found that none of the conditions were complied with. As a consequence, the tribunal found that Egypt unlawfully expropriated Claimants' property interest in the GSPA by unlawfully terminating the contract.

Notes: The tribunal was composed of L. Yves Fortier (President, Canadian national), Francisco Orrego Vicuña (appointed by the claimants, Chilean national); and Campbell McLachlan (appointed by the respondent, New Zealand national). The award, dated February 21, 2016, is available at https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf. The decision on jurisdiction, dated February 1, 2016, is available at https://www.italaw.com/sites/default/files/case-documents/italaw7310.pdf.

Claims by a Spanish investor declared inadmissible in a case against Costa Rica

Supervisión y Control S.A. v. Republic of Costa Rica, ICSID Case No. ARB/12/4

Maria Florencia Sarmiento

By majority, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) affirmed its jurisdiction over claims initiated by a Spanish investor against Costa Rica. However, it declared that the claims were not admissible either because of the forum selection clause or because of the investor's failure to comply with the waiting period requirement under the Costa Rica-Spain bilateral investment treaty (BIT). The tribunal ordered each party to bear its own legal costs and half of the arbitration costs.

Factual background and claims

Supervisión y Control (SyC), incorporated in Spain, and Transal, based in Costa Rica, formed the Riteve consortium to bid in the tender process for a concession to provide vehicle technical inspection (VTI) services in Costa Rica. Riteve was the successful bidder and concluded a concession agreement with Costa Rica in May 2001.

In several instances between 2001 and 2011, the Ministry of Public Works and Transportation of Costa Rica decided not to effect annual increases to the rates for VTI services as allegedly required by the concession agreement. SyC submitted a request for ICSID arbitration on December 21, 2011, claiming that Costa Rica thus violated the fair and equitable treatment (FET) standard, the article on expropriation, the umbrella clause and other provisions of the Costa Rica-Spain BIT, and requested compensation of €261.6 million.

Tribunal affirms jurisdiction over claims under broadly-worded umbrella clause

The tribunal noted that a breach of a contract between a state and a foreign investor does not constitute by itself an international law or treaty violation, but that Article III.2 of the BIT consisted in an umbrella clause, obliging each state to comply with any obligation it has contracted in relation to investment of investors of the other state.

Costa Rica argued that the tribunal did not have jurisdiction over the claims under the umbrella clause given there was no direct contractual relationship between SyC and Costa Rica under the concession agreement. However, the tribunal considered that the wording of Article III.2—establishing that the state shall comply with obligations "related to investments by investors of the other Contracting Party"—was broad enough to cover the obligations of Costa Rica to Riteve, a company controlled by SyC, going beyond the direct contractual relationship. Consequently, the tribunal found jurisdiction over the claims.

Admissibility: tribunal looks at the forum selection clause in Article XI.3

Article XI.3 of the BIT establishes that if the investor submits the dispute to the domestic courts, it may initiate arbitration provided the court has not issued a decision; to initiate arbitration, the investor must adopt the necessary measures to definitively withdraw from the judicial proceeding. The tribunal considered that the provision constitutes a forum selection clause corresponding to a waiver clause.

According to the tribunal, forum selection is an admissibility

requirement and it was necessary to determine whether SyC submitted the dispute to a competent court in Costa Rica and, if so, whether it withdrew from the judicial proceeding once the arbitration initiated.

First, the tribunal analyzed the proceeding initiated by Riteve before the Administrative Contentious Court (ACC), which Costa Rica considered to be in violation of the forum selection clause. To determine whether the ACC proceedings related to the dispute submitted to arbitration, the tribunal applied the "fundamental basis of a claim" test. According to this test, the tribunal must analyze whether the ACC and arbitral cases shared the fundamental cause of the claim and sought the same effects. As a second step, the tribunal must analyze whether the ACC claims initiated by Riteve were attributable to SyC.

The tribunal considered that the ACC and arbitral proceedings pursued the same effects: compensation for the losses derived from the conduct or omissions of Costa Rica, alleged to violate national law in the local proceedings and alleged to violate the treaty in the arbitration. As to the second step, considering that Riteve was a corporate vehicle acting according to the interests and instruction of SyC, its majority shareholder, the tribunal concluded that the ACC proceedings initiated by Riteve must be considered filed by SyC.

However, the tribunal noted that Riteve failed to withdraw from the ACC proceedings once SyC initiated arbitration, in breach of Article XI.3. Therefore, the tribunal held that the claims forming part of the ACC proceedings—namely, those arising from the conducts or omissions of Costa Rica related to rates for the VTI service—were inadmissible in the arbitration. It also held that the claims raised by SyC, which do not refer to the adjustment of rates, were in principle admissible if they complied with the other admissibility requirements.

Admissibility: consultation and waiting period requirements under Article XI.1

Article XI.1 of the treaty requires the investor to notify any dispute to the respondent state, including detailed information. Formal court or arbitral proceedings may only be initiated if a friendly settlement is not reached within six months of the notice. The tribunal recalled that proper notice is an element of the state's consent to arbitration and that the failure to notify implies inadmissibility of the claim given the lack of mandatory prior negotiation.

The tribunal observed that the only claims that were duly notified by SyC were those related to the adjustment of rates for the VTI and the damages derived from Costa Rica's conduct, which the tribunal had already held inadmissible. It held that the new claims advanced by SyC were also inadmissible, because SyC failed to comply with the Article XI.1 requirement to notify the respondent at least six months before initiating arbitration. Accordingly, the tribunal held that all claims were inadmissible.

Notes: The ICSID tribunal was composed by Claus von Wobeser (president appointed by the chairman of the ICSID Administrative Council, Mexican national), Joseph P. Klock (claimant's appointee, U.S. national) and Eduardo Silva Romero (respondent's appointee, Colombian and French national). The award is available in English at http://www.italaw.com/sites/default/files/case-documents/italaw8230.pdf.

Resubmission tribunal puts an end to a 20-year dispute before ICSID

Victor Pey Casado and Foundation Presidente Allende v. The Republic of Chile, ICSID Case No. ARB/98/2

Amr Arafa Hasaan

On September 13, 2016 a tribunal issued a final award in the case filed by Victor Pey Casado and the Foundation Presidente Allende against Chile under the Chile–Spain bilateral investment treaty (BIT). It found that the claimants' allegations were unsubstantiated or beyond the scope of the resubmission tribunal pursuant to the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID). Determining that the arbitration costs were to be shared in the proportion of three-quarters by the claimants and one-quarter by Chile, the tribunal ordered the claimants to reimburse USD159,509.43 to Chile.

Background

Pey Casado, a naturalized Chilean who was born in Spain, purchased a stake in the left-leaning Chilean newspaper *El Clarín* in 1972. The newspaper was occupied during the 1973 coup d'état against President Salvador Allende. *El Clarín* was formally nationalized two years later by dictator Augusto Pinochet. Pey Casado donated 90 per cent of his stock in the entity owning *El Clarín* to the other claimant, Spain-based Foundation Presidente Allende in January 1990, shortly after democratic rule returned to Chile.

Pey Casado filed a civil case with Chilean courts in October 1995 seeking restitution for the confiscation of a Goss printing press that had been in the premises of *El Clarín* when the seizure of the property took place. Chile initiated a reparation program in July 1998 to compensate victims of property confiscation during the dictatorship, but the claimants waived the right to seek compensation under this program in June 1999. National Assets Ministry Decision 43 of April 2000 authorized compensation to four individuals for the expropriation of *El Clarín*, but the list of beneficiaries did not include the claimants.

The claimants initiated ICSID arbitration in November 1997. The tribunal issued its award on May 8, 2009 on the merits of the dispute. It dismissed the expropriation claims but granted the claimants over USD10 million in damages for breach of fair and equitable treatment (FET), having found that the seven-year delay of the Chilean courts to issue a decision on the merits in the Goss press case amounted to a denial of justice and that exclusion of Pey Casado and Foundation President Allende from compensation authorized under Decision 43 constituted discrimination. Revision and annulment proceedings ensued. The ad hoc committee decided to partially annul the first award as regards the method of calculation of the damages on December 18, 2012.

The claimants resubmitted the dispute to ICSID pursuant to Article 52(6) of the ICSID Convention on June 18, 2013.

Expropriation claim inadmissible as it falls outside tribunal's ratione temporis *jurisdiction*

The claimants sought to broadly interpret FET in order to get compensated for their expropriation claim, which was previously dismissed on rationae temporis objection by the first tribunal. The first tribunal had previously decided that the substantive protections of the 1991 BIT did not extend retroactively to cover the expropriation of claimants' assets by Chile between 1973 and 1975. Considering the *res judicata* effect of these findings and siding with Chile, the resubmission tribunal found that it lacked the authority to re-examine afresh the allegations of expropriation.

As claimants failed to prove injury, tribunal refuses to grant compensation

In the resubmission tribunal's reading, "all of the failings identified by the First Tribunal, including the denial of justice, amount[ed] together, globally, to a failure to accord fair and equitable treatment, and thus constitute[ed] a breach of the BIT," giving the claimants a right to "compensation" (para. 209). However, it noted that the first tribunal failed to identify the nature and extent of the injury caused by the breach. It also recalled that the first award was annulled due to the methodology for estimating such compensation.

The tribunal disagreed with the claimants that "compensation" in the first tribunal's award referred necessarily to monetary compensation. Rather, it read that award "as stating the entitlement to reparation that necessarily follows from the determination of the breach of an international obligation, but without predetermining what form or nature that reparation must take" (para. 201). Accordingly, the tribunal found that its jurisdiction was limited to determining the form of reparation and, should it find that monetary compensation was appropriate, the amount of damages.

The analysis of the tribunal was guided by Article 31 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission (ILC), which sets out the obligation of the responsible state "to make full reparation for the injury caused by the internationally wrongful act." The tribunal indicated "that the operation of the primary rule enunciated by the ILC depends upon injury, and that injury in turn depends on causation" (para. 204).

As the claimants had focused on the quantification of the damage, "without undertaking the prior step of showing the precise nature of the injury, causation and damage itself" (para. 232), the tribunal held that they failed to meet their burden of proving any injury resulting from treaty breaches established in the first award.

The tribunal then gave "anxious consideration" to the options before it (para. 244). It reasoned that it could not grant compensation for expropriation, given that the claim had been excluded by the first tribunal and the annulment committee. Neither could it devise a theory of damages independently from the parties' submissions (which was what the first tribunal had done and was later overruled by the annulment committee), or award moral damages "as a form of consolation," or decide *ex aequo et bono*.

Accordingly, the tribunal dismissed all monetary claims, holding that "its formal recognition of the Claimants' rights and its finding that they were the victims of a denial of justice constitutes in itself a form of satisfaction under international law for the Respondent's breach of Article 4 of the BIT" (para. 256.2).

Resubmission tribunal dismisses new claim regarding unjust enrichment

The claimants alleged that by possessing and using the confiscated assets Chile was unjustly enriched under Chilean and international law, to the detriment of the claimants. In turn, Chile contended that this stand-alone claim of unjust enrichment was not linked to the BIT and would result in awarding compensation without prior determination of a treaty breach.

The tribunal stated that the finding of liability was fixed in the first award and in the decision on annulment. As the claimants did not raise the unjust enrichment claim before the first tribunal, the resubmission tribunal found that the claim was beyond its jurisdiction.

Tribunal dismisses unsubstantiated claim for moral damages

The claimants argued that Pey Casado's inclusion on a list of wanted persons following the ousting was a threat to his personal safety. They also alleged that the refusal to provide reparation for the confiscation of his assets and Chile's conduct in the original arbitration and afterwards compounded their inner suffering. The tribunal dismissed these claims noting that the claimants failed to meet their burden of proving that they suffered any damages of a moral character.

Notes: The ICSID resubmission tribunal was composed of Frank Berman (President appointed by the Chairman of the ICSID Administrative Council, British national), Philippe Sands (claimant's appointee, British national) and Alexis Mourre (respondent's appointee, French national). The September 13, 2016 award is available in English at http://www.italaw.com/sites/default/files/case-documents/italaw7630.pdf, in French at http://www.italaw.com/sites/default/files/case-documents/italaw7605.pdf and in Spanish at http://www.italaw.com/sites/default/files/case-documents/italaw7607.pdf. The award of the first tribunal, the decision on annulment and other relevant documents in the case are available at http://www.italaw.com/cases/829.

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resources and events

Resources

Investor–State Dispute Settlement: Review of developments in 2016

By United Nations Conference on Trade and Development (UNCTAD), Published by UNCTAD, May 2017

The IIA Issues Note reviews developments in treaty-based investor–state dispute settlement (ISDS) in 2016. It contains an overview of cases initiated, overall case outcomes and analyses of decisions. Investors initiated 62 cases, bringing the total to 767 known arbitrations. The new cases were brought against 41 countries, mostly by developed-country investors. Tribunals rendered 57 substantive decisions, 41 of which are public. The note concludes that the wording of specific provisions is a key factor in case outcomes, underlining the importance of balanced and careful treaty drafting. It notes that this applies to future treaties and calls for modernizing old-generation treaties. Available at http://investmentpolicyhub.unctad.org/Publications/Details/172.

International Investment Arbitration: Substantive principles

By Campbell McLachlan, Laurence Shore & Matthew Weiniger, Published by Oxford University Press, May 2017

The legal principles that have developed in investment arbitration are subject to intense debate and are still in a state of flux. While tribunals routinely state that they are applying principles of public international law, many principles applied have only been developed recently, and tribunals are often guided more by the approaches taken by other tribunals than by pre-existing public international law doctrines. This work critically reviews the substantive principles of international law applied by investment tribunals, and describes the present state of the law created, applied and analyzed by tribunals. This updated second edition takes account of arbitration awards rendered since 2007. Available at https://global.oup.com/academic/product/international-investment-arbitration-9780199676798.

International Investment Law and the Global Financial Architecture

By Christian J. Tams, Stephan W. Schill & and Rainer Hofmann (Eds.), Published by Edward Elgar Publishing, February 2017

The global crises of the early 21st century have tested the international financial architecture. To ensure stability, governments have regulated financial and capital markets. This has implicated international investment law, which investors have invoked as a shield against debt restructuring, bail-ins or bail-outs. This book considers where the line should be drawn between legitimate regulation and undue interference with investor rights, and who draws it. It assesses the key challenges facing decision makers, analyzes arbitral and treaty practice, and evaluates ways towards a balanced system of investment protection in the financial sector. Available at http://www.e-elgar.com/shop/international-investment-law-and-the-global-financial-architecture.

The Use of Economics in International Trade and Investment Disputes

By Theresa Carpenter, Marion Jansen & Joost Pauwelyn (Eds.), Published by Cambridge University Press, April 2017

This volume explores insights from the fields of trade law, investment arbitration, competition law and commercial arbitration on the use of economics within disputes, providing a comprehensive overview of existing knowledge and practice regarding the use of economics in international economic law. Available at http://www.cambridge.org/academic/subjects/law/international-trade-law/use-economics-international-trade-and-investment-disputes.

Domestic Law in International Investment Arbitration

By Jarrod Hepburn, Published by Oxford University Press, April 2017

Drawing on case law, international law principles and comparative analysis, this book addresses when and how investment tribunals should engage with domestic law. Part I examines three areas of investment law—fair and equitable treatment, expropriation and remedies—in which the role of domestic law has been under-appreciated, and argues that tribunals are justified in drawing on domestic law in rulings on these issues. Part II evaluates how tribunals have ruled on questions of domestic law to date, and proposes a normative framework for ascertaining the contents of domestic law. The book contends that closer attention to domestic law could reduce criticism of investment arbitration. Available at https://global.oup.com/academic/product/domestic-law-in-international-investment-arbitration-9780198785736.

Events 2017

June 12–14

TRAINING FOR MEDIATORS IN INVESTOR–STATE DISPUTES, Centre for Effective Dispute Resolution (CEDR), International Centre for Settlement of Investment Disputes (ICSID), International Mediation Institute (IMI) & International Energy Charter (IEC), at ICSID, Washington, D.C., United States, https://icsid.worldbank.org/en/Pages/News.aspx?CID=216

June 19

IS A MULTILATERAL INVESTMENT TREATY NEEDED?, World Trade Institute, Bern, Switzerland, https://www.wti.org/outreach/events/589/investment-conference-is-a-multilateral-investment-treaty-needed

June 22

UNIGE–IISD LUNCH SERIES ON INVESTMENT DISPUTES, University of Geneva (UNIGE) & International Institute for Sustainable Development (IISD), at UNIGE, Geneva, Switzerland, http://www.iisd.org/project/unige-iisd-lunch-series-investment-disputes

June 29–30

GLOBAL FORUM ON RESPONSIBLE BUSINESS CONDUCT, Organisation for Economic Co-operation and Development (OECD), Paris, France, http://mneguidelines.oecd.org/global-forum

June 30

TOPICAL ISSUES IN INVESTMENT ARBITRATION, Session 3, "Ne ultra petita," Research Centre on Procurement Law and International Investments (CREDIMI), French National Centre for Scientific Research (CNRS) & University of Burgundy, at Freshfields Bruckhaus Deringer LLP, Paris, France, https://www.transnational-dispute-management.com/news/20170630.pdf

July 12–21

EXECUTIVE TRAINING ON SUSTAINABLE INVESTMENTS IN AGRICULTURE, Columbia Center on Sustainable Investment (CCSI), New York, United States, http://ccsi.columbia.edu/2017/07/12/executive-training-program-on-sustainable-investments-in-agriculture-3

July 24–August 11

REGIONAL COURSE ON KEY ISSUES ON THE INTERNATIONAL ECONOMIC AGENDA, 37th COURSE (LATIN AMERICAN AND CARIBBEAN ECONOMIES), UNCTAD & Colombian Ministry of Foreign Affairs, at EAFIT University, Medellín, Colombia, http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=1443

July 31–August 10

EXECUTIVE TRAINING ON INVESTMENT TREATIES AND ARBITRATION FOR GOVERNMENT OFFICIALS, CCSI, New York, United States, http://ccsi.columbia.edu/2017/07/31/executive-training-on-investment-arbitration-for-government-officials-3

November 6–8

11th ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, Kenya Investment Authority (KenInvest), IISD & South Centre, Nairobi, Kenya, http://www.iisd.org/event/11th-annual-forum-developing-country-investment-negotiators

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