

contents

3 Features

The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice
Levent Sabanogullari

6 Rethinking Investment-Related Dispute Settlement

Nathalie Bernasconi-Osterwalder

9 Experts at UNCTAD Meeting Give Shape to IIA Reform Options

James Zhan and Diana Rosert

12 Investment Law and the 1%: On Which Side of the Divide?

Howard Mann

14 The Brazil–Mozambique and Brazil–Angola Cooperation and Investment Facilitation Agreements (CIFAs): A Descriptive Overview

Martin Dietrich Brauch

16 China’s Antitrust Crackdown Hits Qualcomm with US\$975 Million Fine: What Can Other Host States Learn from the Story?

Joe Zhang

19 News in Brief

European Commission addresses TTIP concerns at European Parliament meeting; TPP Investment Chapter: Re-edition of U.S. BIT, with ISDS carve-outs; India releases Model BIT for comments; United States pushes for negotiations; UNCITRAL Transparency Convention opened for signature in Mauritius

20 Awards and Decisions

31 Resources and Events

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feature 1

The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice

Levent Sabanogullari



The international investment agreement (IIA) regime is experiencing an unprecedented surge in public attention. Prime examples are the debates surrounding the conclusion of the Canada–European Union Comprehensive Trade and Investment Agreement (CETA) and the ongoing negotiations of the Transatlantic Trade and Investment Partnership Agreement between the United States and the European Union (TTIP). In Germany, for example, both agreements have attracted an amount of public attention that is unique in the history of investment treaty making. Bringing the topic of treaty-based foreign investment protection to a broader audience is laudable, as long as it is accompanied by informed discussions on the merits and limitations of IIAs.

One of civil society's key concerns is that IIAs unduly restrict the host states' right to regulate in the public interest. The problem is not new, but results from the growing complexity of investment disputes. While the initial focus of IIAs was the protection against unlawful expropriations, foreign investors nowadays use IIAs to challenge a broad range of host states' regulatory policies, including in the spheres of environment or public health. Arbitrators increasingly decide not only on the legal dimension of a dispute, but also on the broader policy rationales of state measures. This gives rise to questions regarding both the expertise and the mandate of arbitrators to assess public policies. Aggravating the problem, some tribunals have considered public interest justifications put forward by host states, while others adopt a purely economic point of view.

Considered jointly, these developments have led to deep state dissatisfaction with the current IIA regime. While some states decided to turn their backs on the regime to some degree, others are exploring instruments to ensure that investment protection in future IIAs does not restrict regulatory flexibility. Among these instruments are express

provisions on the host state's right to regulate, interpretive statements, investment obligations with narrower scope of application to prevent overly broad interpretations, preambular language underscoring the importance of public policy concerns, and general exception clauses.¹

General exception clauses are intended to relieve host states from treaty liability for good faith measures taken to pursue public welfare objectives. There are two different models of general exceptions in IIAs—one that follows the approach of Article XX of the General Agreement on Tariffs and Trade (GATT)² and another that is modelled on Article XIV of the General Agreement on Trade in Services (GATS).³ On occasion, IIAs also make reference to both provisions, contain a custom-tailored combination of the two, or feature a unique exception provision. The clauses usually share three elements:

1. An exhaustive list of permissible policy objectives; for example, the protection of human, animal, or plant life or health, or the conservation of natural resources;
2. A nexus requirement, denoting the required link between a state measure and a permissible objective; frequently used nexus requirements include “necessary for,” “relating to,” and “designed and applied for”; and
3. A prohibition of discriminatory or arbitrary application.

The rationales and risks of general exception clauses in IIAs

The rationales for including general exception clauses in IIAs are twofold. On the one hand, the clauses are meant to enhance regulatory flexibility, by allowing host states to regulate foreign investment without incurring international liability for their actions. While the degree of flexibility would depend on how investment tribunals interpret the clause, to date, there are no publicly known investment arbitrations involving general exceptions. What is often neglected in the discussions, however, is that treaty drafting can also influence the degree of flexibility. For example, the more comprehensive the list of permissible objectives is, the more regulatory flexibility the clause will grant to a host state. Similarly, more lenient nexus requirements such as “relating to” or “designed and applied for” offer more leeway to host states than the more frequently used and much stricter “necessity” threshold.

On the other hand, general exceptions are intended to increase legal certainty in investment adjudication. By offering express points of

reference to which public interest considerations may be attached, they help host states ensure that tribunals consider the public interest rationales of a challenged measure. Conversely, they enable foreign investors to price in the risk of adverse state action in the covered policy areas when calculating investment costs prior to making the investment.

Even so, many commentators remain critical of including general exceptions in IIAs. While some are concerned about the risk of abusive invocations, the majority apprehends that general exceptions will not provide more regulatory flexibility than already exists in current jurisprudence,⁴ or that their exhaustive lists of permissible objectives and allegedly overly rigid prerequisites may even limit existing flexibility.⁵ To my mind, these risks are overstated.

The risk of abuses is merely theoretical. Demonstrating that the prerequisites of the clause are fulfilled in good faith has proven to be a high threshold in World Trade Organization (WTO) jurisprudence, and it is unlikely that it will vary significantly in investment arbitrations.

As regards flexibility, first, it cannot be said that investment tribunals currently take the public interest into account systematically: while some are willing to consider public interest justifications, others reject them outright. Second, not all investment provisions are equally susceptible to reading public interest considerations into them. On occasion, tribunals have taken into account the public interest under some treaty provisions, but have found themselves unable to do so under other provisions, therefore holding the state liable. In contrast, general exceptions usually apply to all obligations equally. Finally, critics seem to assume that tribunals will interpret general exceptions as exhaustive stipulations of the public interest under the IIA, adopting a purely economic lens in their inquiry into the violation of other treaty provisions. However, nothing in a general exception clause prohibits tribunals from going beyond the flexibility granted by the explicit exceptions, which do not have to be approached as exhaustive stipulations, but should rather be viewed as complementary backstops.

General exception clauses in contemporary state practice

While the merits of general exceptions in IIAs are still controversial, states are increasingly incorporating them in their newly negotiated IIAs. According to the 2014 World Investment Report published by the United Nations Conference on Trade and Development (UNCTAD), as many as 15 of the 18 IIAs concluded in 2013 for which texts are available feature general exceptions.⁶ Similar figures are available for earlier years, revealing, for instance, that 10 out of 17 IIAs concluded in

2012 for which texts were available,⁷ and still 7 out of a total of 47 IIAs concluded in 2011 have general exceptions.⁸ These figures cannot conceal the fact that IIAs with general exceptions still constitute a minority in the ocean of more than 3200 IIAs concluded by the end of 2013.⁹ However, they suggest that general exceptions will become increasingly common in future IIAs.

It is also noteworthy that the proponents of general exceptions in IIAs are geographically and economically diverse. They include both capital-importing countries, such as Colombia, Honduras, Panama, Thailand, and Viet Nam, and capital-exporting countries, such as Australia, Canada, New Zealand, Japan, and South Korea. Geographically, there is a preponderance of countries from the Asia-Pacific region and South America. However, general exception clauses also appear in the treaty programs of countries such as Canada, Mauritius, and Turkey, as well as in multilateral agreements like the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA), making them a truly global phenomenon.

General exception clauses in the CETA

One of the IIAs that have given rise to the current debate is the CETA. What is usually neglected in the discussions is that CETA employs several instruments to address the proper balancing between investment protection and non-economic interests; among these are general exceptions. To date, Canada is the only country of the Organisation for Economic Co-operation and Development (OECD) to habitually incorporate GATT Article XX-like general exception provisions into its IIA program. Despite this considerable experience, Canada did not succeed in pushing for a similarly broad general exception clause in the CETA negotiations with the European Union. The CETA entails two general exception provisions applicable to investment obligations. One of them incorporates GATT Article XX, while the other is modelled on GATS Article XIV. Both are found in Chapter 32, Article X.02 (1) and (2) of the CETA.¹⁰

Unlike the provision in Canada's 2012 model Foreign Investment Promotion and Protection Agreement (FIPA), the exceptions are only applicable to certain sections of the investment chapter. More specifically, host states can only avail themselves of the exceptions in defending a breach of Sections 2 ("Establishment of Investments") and 3 ("Non-Discriminatory Treatment"). This means that the violation of other provisions such as the prohibition of unlawful expropriation or the fair and equitable treatment (FET) standard (both found in Section 4) cannot be remedied by recourse to the exceptions. Since the latter are the two provisions that investors

most frequently—and most successfully—rely on, the limited applicability of the general exceptions under CETA severely thwarts the flexibility-enhancing potential of the provision. Instead, the drafters of the CETA opted for interpretive statements, delimiting the scopes of application of the expropriation and FET provisions. One reason for this decision may have been the uncertainty as to whether and how general exceptions apply to violations of the two standards.¹¹ On the other hand, the exceptions apply to the non-discrimination provisions of national treatment and most-favoured-nation (MFN) treatment, despite similar uncertainties that exist as to the application of general exceptions to provisions that themselves prohibit arbitrary or discriminatory treatment. Moreover, Canada habitually implements both instruments in its FIPA program¹² where either may serve as a backstop if a state measure does not satisfy the prerequisites of the general exceptions. It is therefore unfortunate that the scope of application of the general exception clause is limited in the CETA.

However, the CETA includes interpretive clarifications in its general exceptions aimed at ensuring that tribunals take the public interest into consideration. Instead of merely “copying and pasting” the WTO provisions, the drafters added language to guide the interpretation of the general exceptions as including environmental measures necessary to protect human, animal or plant life or health, and as applying to the conservation of both living and non-living natural resources. These modifications originate in WTO Appellate Body reports, among them *European Communities — Asbestos*¹³ and *United States — Shrimp*,¹⁴ and exemplify how treaty drafters can not only custom tailor the WTO exceptions to their regulatory needs in the investment realm, but also codify and thereby endorse WTO jurisprudence in the IIA drafting process.

Looking forward

The public debate on the merits and limitations of the IIA regime is in full swing. In the absence of official drafts, it is yet too early to speculate whether the TTIP, as the second landmark IIA whose negotiations fuel the public debate, will include general exceptions applicable to investment. Considering that neither the United States nor the European Union have a reputation as particular proponents of general exceptions in IIAs, their inclusion appears unlikely. Even so, state practice suggests that general exceptions will become increasingly common in future IIAs. In my view, a host state's defence profile can potentially benefit greatly from the possibility of invoking such a provision in arbitrations involving the public interest. Alongside other promising instruments treaty drafters have at their disposal, general exceptions can be useful to help safeguard the host states' policy space.

Author

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Notes

- 1 For a cogent account of the various strategies see Spears, S. A. (2010). The quest for policy space in a new generation of international investment agreements, *Journal of International Economic Law*, 13(4), 1037–1075.
- 2 The text of GATT Article XX is available at https://www.wto.org/English/docs/legal_e/gatt47_02_e.htm#articleXX.
- 3 The text of GATS Article XIV is available at https://www.wto.org/English/docs/legal_e/26-gats_01_e.htm#articleXIV.
- 4 See, for example, Newcombe, A. (2011). General exceptions in international investment agreements. In M-C. C. Segger, M. Gehring, & A. Newcombe (Eds.), *Sustainable development in world investment law* (pp. 351–370). The Hague: Kluwer International Law, pp. 355, 369–370.
- 5 See, for example, Lévesque, C. (2013). The inclusion of GATT XX exceptions in IIAs: A potentially risky policy. In R. Ehandi, & P. Sauvé (Eds.), *Prospects in international investment law and policy* (pp. 363–370). Cambridge: Cambridge University Press, p. 364. The criticism goes back to an insightful comparison of GATT Article XX and investment national treatment jurisprudence by DiMascio, N. A., & Pauwelyn, J. (2008). Non-discrimination in trade and investment treaties: Worlds apart or two sides of the same coin? *American Journal of International Law*, 102, 48–89, pp. 76, 82–83. Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669333.
- 6 United Nations Conference on Trade and Development (UNCTAD). (2014). *World investment report 2014: Investing in the SDGs: An action plan*, p. 116. Retrieved from http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf.
- 7 UNCTAD. (2013). *World investment report 2013: Global value chains: Investment and trade for development*, p. 102. Retrieved from http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.
- 8 UNCTAD. (2012). *World investment report 2012: Towards a new generation of investment policies*, pp. 84, 90. Retrieved from http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf.
- 9 UNCTAD (2014, p. 114).
- 10 The text of the CETA is available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
- 11 See, for example, Lévesque (2013, p. 368), and Newcombe (2011, pp. 368–369).
- 12 See, for example, Article XVII and Annex B of the bilateral investment treaty (BIT) between Canada and Romania that entered into force on November 23, 2011, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/631>.
- 13 *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R, adopted April 5, 2001, retrieved from https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm.
- 14 *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, adopted November 6, 1998, retrieved from https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm.

feature 2

Rethinking Investment-Related Dispute Settlement

Nathalie Bernasconi-Osterwalder



Investor–state dispute settlement (ISDS), a concept much unknown to the broader public and even top policy-makers only a year ago, is making headlines, especially as the European Union and the United States contemplate including the mechanism in the deal they are currently negotiating, the Transatlantic Trade and Investment Partnership (TTIP). Public awareness is growing of the supranational dispute settlement system that has gained importance over the past two decades and that allows companies and other investors to challenge sovereign government acts in international arbitration. By 2014, investors are known to have brought 608 cases (the actual number of cases is likely to be significantly higher), and a total of 101 states have faced treaty-based claims.¹ Perhaps because states could not predict how investors (ranging from nuclear companies to bond holders and minority shareholders, among others) would use the ISDS provision to challenge a wide range of measures (including measures to protect public health and environment, tax measures, and supreme court decisions), the role and design of ISDS was never properly discussed. This has led to a regime shaped through practice, controlled primarily by the investors and their lawyers, and arbitrators.² States have been mainly at the receiving end, more or less condemned to accepting a regime that was designed and that evolved without their active involvement, but under which they are exceedingly vulnerable.

This state of affairs is changing, however. Many states now want to take control in redefining the current rules and reassessing the role of ISDS, its relationship to democratic decision-making and its impact on policy space. They have found deep flaws in the investor–state arbitration system and are responding in different ways.³

States and regions have taken and are taking action through their bilateral and regional relations. New approaches to dispute settlement can be seen both in texts of concluded negotiations and in national or regional model treaties on investment. Part 1 of this piece presents several of the proposals for improving the existing regime, in both its procedural and substantive aspects. Part 2 briefly looks at the importance of domestic laws and

processes and of state–state dispute settlement—two readily available alternatives to the existing regime.

Going beyond the idea of fixing the regime or turning to existing alternatives, Part 3 takes a step back and brings in new thinking, by starting from a fundamental question: what should investment-related dispute settlement mechanisms at the international level look like if they were to be built anew?⁴

1. Improving the ISDS regime

Addressing selected issues to improve investor–state arbitration and make it more transparent

Several states address their discontent with the current investor–state arbitration system by introducing selected improvements to the arbitration process while continuing to rely on it as a starting point and the principal manner to settle disputes. For example, the United States and Canada realized early on that investment arbitration could not be as secretive as the applicable arbitration rules allowed it to be—including the rules of the Centre for Settlement of Investment Disputes (ICSID), those of the United Nations Commission on International Trade Law (UNCITRAL), and others. They therefore introduced transparency rules in their investment treaties. Many states are now doing the same. Also in an attempt to improve the current arbitration system, the European Union has attempted to address the (perceived) lack of arbitrator independence and conflicts of interest by introducing a code of conduct for arbitrators and a roster of arbitrators. In the texts negotiated so far, however, the problems remain largely unresolved. For example, the arbitrator roster system that the European Union has put in place in its Comprehensive Economic and Trade Agreement with Canada (CETA) is very loose and only provides for reform at the margins. Further, the European Union does not resolve the problem of the dual roles of arbitrators and counsel in investment arbitration. The 2012 Model Bilateral Investment Treaty (BIT) template of the Southern African Development Community (SADC Model), by contrast, proposes more effective options in this respect, including the requirement of an arbitrator not to act concurrently as counsel in another treaty-based investor–state arbitration.⁵

Requiring the exhaustion of local remedies

Increasingly, states are reintroducing the requirement for investors to exhaust local remedies before bringing claims against states. This is the case in the Indian model BIT (Indian Model)⁶ as well as in the SADC Model. Several EU member states also request that the requirement be included in EU treaties. Exhaustion of local remedies first appeared in the context of international responsibility and diplomatic protection. It is one of the legal requirements for a state to exercise diplomatic protection under customary international law.

Establishing an appellate mechanism

States as well as the business community are expressing their interest in setting up an appellate mechanism for ISDS, and there already are concrete examples of such undertakings. The European Union has included explicit provisions on a possible appellate mechanism under which the legal correctness of arbitral decisions could be challenged.⁷ The United States had also included provisions on the potential establishment of such a mechanism in past treaties.⁸ However, the U.S. provisions were never implemented, and it is unclear when, if and how the European Union will implement its own provisions. Instead of setting up a workable process first, the European Union has moved ahead and finalized several negotiations with ISDS, but without a functioning appellate option in place.⁹

Improving substantive rights under investment treaties

Naturally, new approaches are not only made with respect to dispute settlement. Perhaps more importantly, new thinking is evolving on the substantive rights and obligations as well. Scope and definitions are being more carefully and narrowly tailored as are investor guarantees. Treaties are drafted in a more balanced way and are beginning to include positive investor responsibilities. The Indian Model is an important example of this development,⁶ following examples such as the SADC Model. Brazil has also made public its most innovative approach to investment treaties, which moves away from investment protection and litigation to focus instead on investment facilitation.¹⁰

Redefining the substantive obligations in treaties is essential for reform, as these underpin international investment law. But insofar as the treaties continue to rely and build on existing procedural mechanisms for the settlement of disputes, reform will remain incomplete. Improving substance without improving the system that interprets the substance is an incomplete fix.

2. Turning to existing alternatives to the regime

Strengthening domestic law and processes

Some states are exiting the current international legal framework for investment and building stronger domestic frameworks. South Africa, for example, is introducing a new investment code¹¹ to replace its first-generation investment treaties, which it is successively terminating, and is working domestically on improving substantive law and processes, both administrative and judicial. South Africa was and continues to be active at the regional level in this field as well.

Turning to state–state dispute settlement

Several states have opted for or are considering turning to state–state dispute settlement as the sole dispute settlement mechanism (and not in addition to ISDS). Examples include Australia and the Philippines in some

instances. For example, Australia’s Free Trade Agreement with the United States, and the Philippines’ with Japan, subject investment issues to state–state dispute settlement. The SADC Model also highlights state–state as its preferred option for the settlement of disputes. State–state dispute settlement can take the form of arbitration or rely on existing judicial mechanisms, such as the International Court of Justice (ICJ) or regional courts. Brazil, for instance, has incorporated state–state arbitration in its two recent investment treaties with Angola and Mozambique.¹⁰

3. Establishing new processes and mechanisms

Setting up an investment court

Most recently, the discussions have moved beyond just fixing the current system. This became particularly clear at the World Investment Forum held by the United Nations Conference on Trade and Development (UNCTAD) in October 2014 and at UNCTAD’s Expert Meeting on Transformation of the International Investment Agreement Regime in February 2015, where more profound reform, including the idea of an investment court, formed an important part of the discussion.

The proposal to establish an investment court for ISDS has also become an important point of discussion within the European Union. EU Trade Commissioner Cecilia Malmström expressed support for the creation of a permanent investment court under the TTIP and acknowledged that, as a broader, medium-term solution “a multilateral court would be a more efficient use of resources and have more legitimacy.”¹²

While the idea of an investment court is most intriguing, it seems a lost opportunity to tie the discussion on its establishment to a particular trade deal. Also, it appears as if the European Union is linking the discussion to an already pre-determined decision that the court will deal with treaty-based ISDS. This effort would seem very narrow.

Going beyond a court: Putting in place an investment dispute resolution facility

A better approach would be to build a more forward-looking and innovative mechanism to deal with investment-related disputes. Should such a mechanism be limited to the types of disputes that are currently resolved under treaty-based investor–state arbitration and serve the unique purpose of allowing an investor to bring a legal claim for compensation against a state for alleged violation of investor guarantees? Or should a new mechanism have a broader function—a function of dealing with relationships between a wider set of stakeholders: relationships between the investor or investment and the government, the investment and the local community, the government and the local community, and individual relationships between the investment and local people employed by or living in the vicinity of the investment? These relationships are based on rights, responsibilities and obligations that may run

in both directions between the parties involved, not just one. It seems that efforts to create a new and alternative mechanism to resolve disputes should go beyond a particular negotiation and one particular way to resolve disputes that is more open and multifaceted than the systems in place today.

A new mechanism could ensure not only broad access to justice and the ability to resolve disputes between different stakeholders, but its functions could also be more designed. For example, it could set up a wider range of “services,” such as mediation and conciliation. Mediation would differ from what is currently referenced in some investment treaties, which typically foresee mediation between the state and the investor. A new mechanism could propose a mediation process involving a wider range of stakeholders, including communities affected by the investment, for instance. Beyond mediation, a newly created mechanism could also incorporate an investigation and fact-finding function, inspired by existing processes such as the inspection panels known in some of the development banks.

An investment dispute resolution facility would not necessarily have to be linked to a certain body of substantive law. Like at the ICJ, jurisdiction could be based on a specific agreement amongst all the parties involved to submit a given dispute to the international dispute resolution facility. Unlike at the ICJ, personal jurisdiction could be broader and based on agreement to resolve a dispute among states, investors, individuals, local communities and other interested groups. In addition, jurisdiction could be based on a treaty, contract or other instrument. Instruments such as investment contracts and treaties, community development agreements, or any future binding instrument on business and human rights, for instance, could refer disputes to such a dispute resolution facility.

Different alternatives for financing such a mechanism would have to be explored with contributions from states, the private sector, or both. In particular, it would be important to guarantee access to justice for all, including the most disadvantaged.

Final remarks

Investment-related dispute settlement is in flux. Governments are recognizing the flaws of the current system on democratic processes and decision-making and the effects on policy space, as well as the inherent problems of the arbitration system, such as transparency, the perceived or actual lack of independence of arbitrators, and the preponderance of the finality of awards over their legal correctness. Discussions are resurfacing about the need for putting in place a judicial mechanism, a court, to deal with investor–state conflicts. While there is great value in exploring the merits of a court, this debate should be broadened. Investment-related conflicts go well beyond the type of unidirectional relationship set up in investment treaties that allow for investors to challenge states. The groups of stakeholders involved in investment projects

and the issues arising are manifold. Any mechanism to be discussed should be designed independently of investment treaty negotiations, so that its architecture does not reflect only that unidirectional relationship that most investment treaties currently address. Instead, dealing with investment disputes arising under an investment treaty would be one among many other types of situations the new court or mechanism could resolve.

Notes

- 1 United Nations Conference on Trade and Development (UNCTAD). (2015, February). Recent trends in IIAs and ISDS. *IIA Issues Note No. 1*, p. 5. Retrieved from http://unctad.org/en/publicationslibrary/webdiaepcb2015d1_en.pdf.
- 2 For an investigation on how investment arbitrators have exercised their authority in recent case law, see Van Harten, G. (2013). *Sovereign choices and sovereign constraints: Judicial restraint in investment treaty arbitration*. Oxford: Oxford University Press.
- 3 On selected problems in the arbitration system, see Bernasconi-Osterwalder, N., & Rosert, D. (2014, March 12). *Investment treaty arbitration: Opportunities to reform arbitral rules and processes*. Geneva: IISD. Retrieved from <http://www.iisd.org/publications/investment-treaty-arbitration-opportunities-reform-arbitral-rules-and-processes>.
- 4 This was the starting point of the discussions at an expert meeting held in Montreux in October 2014. For more information, see: International Institute for Sustainable Development (IISD). (2015, February). *Investment-related dispute settlement: Reflections on a new beginning, Results of an IISD expert meeting held in Montreux, Switzerland, October 17–18, 2014*. Geneva: IISD. Retrieved from <https://www.iisd.org/publications/investment-related-dispute-settlement-reflections-new-beginning>.
- 5 Southern African Development Community (SADC). (2012, July). *SADC model bilateral investment treaty template with commentary*. Gaborone: SADC. Retrieved from <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>.
- 6 See the Model Text of the Indian Bilateral Investment Treaty, available at https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.
- 7 See, for example, Article X.42 under Chapter 10, Section 6, of the current text of the Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA), available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf, and Article 9.33(1)(c) of the current text of the current draft European Union–Singapore Free Trade Agreement (FTA), available at http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf.
- 8 See, for example, Article 15.19(10) of the United States–Singapore FTA, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf, and Article 10.20(10) of the Dominican Republic–Central America–United States FTA (CAFTA-DR), available at https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf.
- 9 See, for example, Chapter 10, Section 6, of the current text of the CETA, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
- 10 The text of the Brazil–Mozambique Cooperation and Investment Facilitation Agreement (CIFA) is available in Portuguese at http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR; the text of the Brazil–Angola CIFA, also in Portuguese, is available at http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8520:acordo-brasil-angola-de-cooperacao-e-facilitacao-de-investimentos-acfi-luanda-1-de-abril-de-2015&catid=42&lang=pt-BR&Itemid=280.
- 11 South Africa released a draft of the Promotion and Protection of Investment Bill as released for public comment on October 29, 2013. A revised bill is expected to be submitted to Parliament in 2015. See the original draft, available at http://www.thedti.gov.za/news2013/Protection_Investment_Bill2013.pdf.
- 12 Malmström, C. (2015, March 18). *Discussion on investment in TTIP at the meeting of the International Trade Committee of the European Parliament*. Retrieved from http://europa.eu/rapid/press-release_SPEECH-15-4624_en.htm.

be used in investment arbitration to circumvent and undermine treaties with more refined standards.

With regard to the recent trend of a greater use of pre-establishment national treatment commitments in IIAs, the negative list approach to undertaking such commitments was discussed. Several challenges were noted, such as the need to undertake an extensive and careful domestic audit of existing non-conforming measures and the inability to foresee which new economic sectors might emerge in the future. The positive list approach and best efforts clauses on investment liberalization were also considered.

Increasing the sustainable development dimension of IIAs

The experts highlighted public policy exceptions as an important tool for IIAs. Concerns that public policy exceptions might give greater discretion to states and create uncertainty and the risk of abuse could be addressed by formulating such clauses in a way that prevented arbitrariness and discrimination. Procedural mechanisms for applying exceptions clauses could be created (for example, joint committees of the contracting parties). Finally, the experts discussed whether exceptions should address general policy matters across all sectors or only in specific areas and sectors.

The experts expressed different views on the need to include corporate social responsibility (CSR) standards and investor obligations in IIAs, and on their potential nature (binding versus voluntary) and content. One view was that relevant standards for investor conduct should be set in domestic laws and that the inclusion of investor obligations in IIAs could lead to competitive disadvantages for foreign investors. Another view supported the inclusion of investor obligations. One proposal was to integrate investor obligations in the definition of investment or in a denial-of-benefits clause as a basis for jurisdictional objections to ISDS claims; another was to take into account non-fulfilment of investor obligations at the merits and damages stage and allow for counterclaims by states on this issue.

With respect to rules for the promotion of sustainable development-friendly investments, some experts emphasized the role of domestic law in achieving a sound business climate and stated that IIAs were not the sole or main available tool. While the importance of protection clauses in IIAs was highlighted, more specific rules on investment promotion in IIAs could be included. It was noted that certain IIA provisions (for example, prohibitions of performance requirements) may constrain policy space in this regard.

Discussing whether IIAs should address incentives, some experts were of the view that incentives were a matter of domestic law. Others suggested that the granting and withdrawal of incentives could potentially become an issue in the context of expropriation and the non-discrimination principle in IIAs. The experts noted that some types of incentives and a race to the top in terms of incentives might be contrary to sustainable development objectives.

To clarify the relationship between IIAs and other areas of international law, the experts considered including a closed or open-ended list of other treaties in the annex of an IIA, creating an institutional mechanism for consultations among contracting parties on potential conflicts between different treaties, and referring such conflicts to another body or institution for authoritative interpretation. Generally, the potential for conflict was considered limited, since the Vienna Convention on the Law of Treaties would provide sufficient guidance. At the same time, it was pointed out that other areas of international law were not always sufficiently taken into consideration in investment arbitration.

Assessing tools for modernizing the IIA network

The experts considered that the increasing trend of regionalism could be a means to harmonize the fragmented IIA regime. However, a concern was expressed that, in both multilateral and regional processes, “powerful” states might impose their wills on smaller or less developed states. A proposal was made to grant non-participating states observer status during negotiations and to increase the overall transparency of regional negotiations.

The experts discussed the opportunities arising from multilateral approaches to achieve greater consolidation of the IIA regime and support reform efforts. In light of the limited prospect of reaching multilateral consensus on reform of the IIA regime in the near future, the experts considered the renegotiation of treaties a viable way forward. While it would allow contracting parties to coordinate reform, it could pose serious capacity problems to some countries and would depend on mutual consent. Another proposal was to use multilateral engagement to start with softer instruments, such as model laws, best practices, guidelines, recommendations, toolboxes or checklists for IIA negotiators, and thereby progressively move towards finding common ground.

Treaty interpretation, without amending treaty language, was considered a useful alternative to renegotiation. It could focus on the most controversial clauses to which tribunals had attributed contradictory meanings (for example, MFN, FET, umbrella clauses). Amongst others, contracting parties to a treaty could issue interpretative statements for the specific treaty or non-disputing contracting parties in ISDS proceedings could make submissions to assist in interpretation. The timing of interpretation notes, that is, whether a note was issued before, during or after a dispute, was noted as an issue that could raise fairness concerns.

The experts noted that political and economic concerns may deter states from terminating treaties. However, termination would not necessarily reduce attractiveness, as investor concerns might be addressed through domestic law and investment facilitation. It was also discussed that contracting parties could make a joint decision to revoke the survival clause before termination or provide for different lengths of continued application in

future treaties (for example, depending on the needs of different sectors).

It was repeatedly suggested that a possible way forward might resemble the opt-in approach of the Convention on Transparency in Treaty-based Investor–State Arbitration developed by the United Nations Commission on International Trade Law (UNCITRAL). This approach could potentially be used to address other key issues, such as FET or indirect expropriation, and allow states to improve their entire portfolios of investment treaties at once. However, experts considered it a challenge to reach consensus among all states on controversial substantive provisions; the differences in wording found in a myriad of IIAs would further complicate such efforts.

Reforming investment dispute settlement

The experts discussed the need to reform existing ISDS mechanisms, sharing their national experiences in taking steps in this regard.

The experts considered that a single, standing appeals mechanism might be preferable to multiple *ad hoc* mechanisms, as it would better address the lack of legal consistency and predictability of arbitral decisions. However, in light of differences in the language of IIAs, an appeals facility would be unlikely to resolve these problems fully, even though it could considerably enhance the regime’s legitimacy. The Appellate Body of the World Trade Organization (WTO) was seen as a possible model, and the International Centre for Settlement of Investment Disputes (ICSID), as a possible forum, albeit with some limitations. A more detailed analysis would be needed of different ways in which an appeals facility could be established, the potential scope of appellate review and other specific issues.

Some experts considered that an international investment court could resolve concerns related to the overall legitimacy of ISDS and the independence and impartiality of arbitrators, including by providing access to stakeholders other than investors and states (for example, communities affected by investment projects). However, it was noted that the court might raise sovereignty concerns among states, involve costs for a broader range of countries and contribute to the politicization of disputes. It was also pointed out that considerable political will was required for its creation. Several delegates encouraged more research by UNCTAD and other institutions on the prospective court (focusing, for example, on the relationship to ISDS and state–state procedures; jurisdiction; remedies and enforcement mechanism; and best practices of international and regional courts, tribunals and mechanisms).

With regard to investor access to ISDS, one view was that ISDS should no longer be provided for, in view of the well-known deficiencies of the regime; at a minimum, local remedies should be pursued first (that is, for a certain time or until exhaustion). The experts shared national experiences to circumscribe

investors’ access to ISDS and to shift focus towards greater reliance on domestic remedies. The other view emphasized the difficulties that investors faced when investing abroad and that, in response, IIAs had internationalized rule-of-law issues. Proposals were made to improve ISDS mechanisms, for example, through increased transparency; an arbitrator code of conduct; better use of cooling-off periods; mechanisms for appeals, collective actions by smaller investors, and the early dismissal of frivolous claims; fork-in-the-road provisions; clear rules on interest calculation and cost allocation; and enhanced provisions on the right to regulate.

The experts considered it important that home states and arbitral institutions advocate the advantages of increased transparency for investors. Other suggestions included piloting projects on transparency with individual countries, restricting the enforcement of arbitral awards that were not publicly available, using adherence to the UNCITRAL Rules on Transparency as a condition for loans from international financial institutions, and applying transparency rules to settlements.

The road towards IIA reform

There is an inherent challenge in attempting to develop a comprehensive and coordinated plan for reforming a network of IIAs that is multilayered, multifaceted and highly atomized. Some guiding principles are needed for the long road towards such reform. Sustainable development should be the overarching goal of reform of the IIA regime, while the focus of action should be on the systemic deficiencies, and synergies with other public policy–making processes should be ensured. Future action should be collaborative in spirit, benefiting from the collective wisdom of all stakeholders, and oriented towards finding concrete solutions. There is need for further multilateral, multistakeholder and multidisciplinary engagement on the matter at hand.

Multistakeholder discussions will continue at the next IIA conference during the World Investment Forum, to be held in March 2016 in Lima, Peru.

Information and documents related to this Expert Meeting, including a background note, the chair’s summary, presentations, rapporteurs’ synopses and the results of the UNCTAD “report-back” project, are available at <http://unctad-worldinvestmentforum.org/followup-events/single-year-expert-meeting/>.

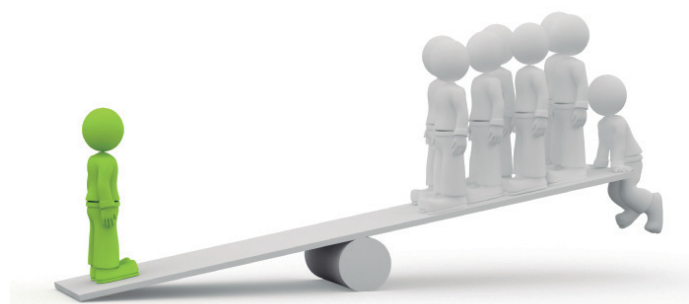
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feature 4

Investment Law and the 1%: On Which Side of the Divide?

Howard Mann



The increasing concentration of wealth—often referred to as “the 1% issue”—raises serious concerns. The World Economic Forum, in its top ten trends of 2015, states:

At the top of this year’s list is worsening income inequality. As the world’s rich continue to accumulate wealth at record rates, the middle class is struggling. Today, the top 1% of the population receives a quarter of the income in the United States. Over the last 25 years, the average income of the top 0.1% has grown 20 times compared to that of the average citizen. Last year, this trend ranked second place in the Outlook; this year, it rises to the top.¹

The Credit Suisse 2014 Global Wealth Report shows that the numbers are increasingly stark: 0.7 per cent of the global population controls 44 per cent of global wealth, while 69 per cent exists on just 2.9 per cent of global wealth.²

Starting from the premise that it is important to address income disparity, the question is whether international investment law, as the primary source of international law regulating the movement of capital, promotes the increased concentration or dispersion of capital.

The scope of the existing investment law regime is limited to expanding the rights of investors to invest internationally (investment liberalization) and protecting the rights of investors (capital owners) when they move capital from one country to another. In essence, the regime is geared towards protecting the investors’ assets and expanding their rights to use those assets for their own economic gain.

One theory behind this approach was that promoting investor rights would allow states to attract more foreign direct investment (FDI). With this theory now generally discredited,³ the relationship of this approach to equitable and inclusive growth—critical factors in pursuing sustainable development—is becoming increasingly important to address.

The United Nations Conference on Trade and Development (UNCTAD) has noted:

[The] new generation of investment policies has been in the making for some time, and is

reflected in the dichotomy in policy directions over the last few years – with simultaneous moves to further liberalize investment regimes and promote foreign investment, on the one hand, and to regulate investment in pursuit of public policy objectives on the other. It reflects the recognition that liberalization, if it is to generate sustainable development outcomes, has to be accompanied—if not preceded—by the establishment of proper regulatory and institutional frameworks.⁴

Does investment law today support or inhibit the ability of governments to establish such regulatory frameworks as it relates to equitable and inclusive economic development? While several elements of investment law—freedom of capital transfers, investor protection, restrictions on performance requirements, and others—impact on income distribution issues, this piece looks at the 1% issue through some more specific development lenses: the ability of governments to:

1. Regulate the establishment of investments
2. Require certain levels of dispersed ownership of foreign investments
3. Protect infant industries or promote local economic actors by requiring foreign investors to partner with them
4. Require foreign investors to generate local economic linkages

Managing these issues can be important to promote inclusive and equitable growth. Do investment treaties enable governments to manage these issues or restrict governments from managing them?

1. Right of establishment

More investment agreements are including provisions allowing foreign investors rights of entry to invest on the same basis as domestic investors. These investment liberalization rules prevent governments from favouring domestic investors over foreign investors. In many economies, there will be sectors where it makes good economic and social sense to protect small retailers from international competition or to try to foster competitive domestic firms by, among other things, temporarily sheltering them from foreign competition. Like any other economic tool, this is not always a good strategy and can lead to market inefficiencies and political capture. Yet rules liberalizing the rights of foreign investors to enter markets seek to forestall discrimination even when it makes good policy sense.

For developing countries, this means that some investment opportunities may simply be open to the highest bidder, with domestic investors having no advantage in domestic markets. This is especially important in major infrastructure and natural resource projects that are often put to tender. But the idea also applies in other sectors; for example, competition for retail or other consumer markets where large-size foreign investors can often afford to capture market share over smaller local retail owners, with significant economic and social impacts.

A related issue is the growth in restrictions on quotas on foreign investment. Originally set out in relation to investment in services, under the Canada–European Union Comprehensive Economic and Trade Agreement (CETA) and the Singapore–European Union agreement new prohibitions on investment market quotas cover all sectors. It creates a light switch requirement: a sector is either open or closed. This precludes government from reserving a certain portion of economic sectors for domestic actors or for infant firms.

FDI can be a critical source of development resources and the dispersion of sustainable products and production methods so badly needed for the global environment. The issue is not whether government should be open to FDI, but whether investment treaties seek to impose a one-size-fits-all approach⁵ that prevents governments from exercising ongoing judgment as to when or in what sectors such FDI will be beneficial or harmful to their economies.

2. Equity ownership

Some recent agreements also preclude governments from regulating equity ownership requirements. For example, laws requiring minimum levels of domestic shareholdings for investments into a country are being banned, as are quotas on the number of foreign investors who can enter a sector. Should these new agreements be applied to South Africa, for example, they would have banned the Black Economic Empowerment Act, a central feature of post-Apartheid social policy. South Africa, however, is not entering into such agreements, to ensure, among other things, that such a result does not arise. The prohibition would apply equally to general obligations or more specific ones, for example, for equity ownership for unions or local communities.

It is true that equity ownership requirements have a mixed record. For example, when ownership becomes concentrated within a small number of domestic elites, there is little benefit in terms of equitable and inclusive growth. But such examples, or even deliberate abuse, should not bar transparent efforts to promote wider equity ownership as part of a development strategy, especially when used to redress decades of economic suppression of domestic actors.

3. Mandated joint ventures

Joint venture requirements are another tool to promote the development of new or stronger economic actors. They can help create national champions or carve out space for domestic players in sectors considered vital to the interests of the host country, build competitive capacity in domestic partners, and improve management practices and access to global marketing channels.⁶

Some new investment treaties—such as the CETA and the Singapore–European Union agreement—seek to prohibit this option in all sectors. The ability of governments to promote new actors or strengthen existing ones is curtailed in favour of existing capital owners. Joint venture requirements have been abused or misused and can often be more effective in creating political connections for investors than anything else. But when used properly, they can be very useful for improving skills, developing and transferring technology, creating larger enterprises, and so on.

4. Performance requirements

Finally, the right of governments to impose performance requirements (PRs) on investors is under increasing

constraint, in terms of scope and geography. Government-imposed PRs, such as purchasing local supplies and services or training employees for management positions, can promote economic spillovers in the local community or the country as a whole. The economic multiplier effects of foreign investment can be central to achieving its benefits, yet the expansion of PR prohibitions is preventing governments from increasing these effects. This privileges the freedom of investors to maximize their profits at the cost of domestic governments' ability to seek other economic benefits from that investment.

Conclusion

Current trends in investment treaties show an expanding focus on investor rights to establish and operate investments in a manner that will support the increased concentration of wealth. Indeed, while there is much talk of improving policy space on issues such as environmental protection and human health, the United States, European Union, Canada and some other major players in investment treaty negotiations are pursuing a growing and deliberate limitation of government policy space aimed at improving equitable and inclusive development.

It has long been the case that international investment law reflects the legal rights and remedies of one group of stakeholders in the globalization processes: the capital owners. While it does not empower them to block new actors, and new actors have of course emerged, it does, and increasingly so, prevent governments from taking steps to ensure greater economic balance.

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Notes

¹ World Economic Forum. (2015). *Outlook on the global agenda 2015*, p. 7. Retrieved from http://www3.weforum.org/docs/GAC14/WEF_GAC14_OutlookGlobalAgenda_Report.pdf. See also, for example, OXFAM. (2015, January). *Wealth: Having it all and wanting more* (OXFAM Issue Briefing). Retrieved from <http://oxfamlibrary.openrepository.com/oxfam/bitstream/10546/338125/8/ib-wealth-having-all-wanting-more-190115-en.pdf>.

² Credit Suisse Research Institute. (2014, October). *Global wealth report 2014*, p. 24. Retrieved from <https://www.credit-suisse.com/ch/en/news-and-expertise/research/credit-suisse-research-institute/publications.html>.

³ United Nations Conference on Trade and Development (UNCTAD). (2009). *The role of international investment agreements in attracting foreign direct investment to developing countries* (UNCTAD Series on International Investment Policies for Development). New York and Geneva: UNCTAD. Retrieved from http://unctad.org/en/docs/diaeia20095_en.pdf; Sauvants, K. P., & Sachs, L. E. (2009). BITs, DTTs, and FDI flows: An overview. In K. P. Sauvants & L. E. Sachs (Eds.), *The effect of treaties on foreign direct investment: Bilateral investment treaties, double taxation treaties, and investment flows* (pp. xxvii–lxii). New York: Oxford University Press. Retrieved from <http://ccsi.columbia.edu/files/2014/01/Overview-SachsSauvants-Final.pdf>; Yackee, J. W. (2010–2011). Do bilateral investment treaties promote foreign direct investment? Some hints from alternative evidence. *Virginia Journal of International Law*, 51(2), 397–442. Retrieved from <http://www.vjil.org/assets/pdfs/vol51/issue2/Yackee.pdf>; Poulsen, L. N. S. (2010). The importance of BITs for foreign direct investment and political risk insurance: Revisiting the evidence. In K. P. Sauvants (Ed.), *Yearbook on international investment law & policy 2009/2010* (pp. 539–574). New York: Oxford University Press. Retrieved from http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=lauge_poulsen.

⁴ UNCTAD. (2012). *Investment policy framework for sustainable development*, p. 5. Retrieved from http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf.

⁵ This is subject to the ability to list exceptions in so-called “negative list” annexes in most cases. Nonetheless, it sets the starting point at negating government policy space to control entry of economic actors based on domestic or foreign origins.

⁶ See Cosbey, A., Mann, H., & Cunningham, M. (2014). *Bilateral investment treaties, mining and national champions: Making it work*. Winnipeg: IISD. Retrieved from <https://www.iisd.org/publications/bilateral-investment-treaties-mining-and-national-champions-making-it-work>.

feature 5

The Brazil–Mozambique and Brazil–Angola Cooperation and Investment Facilitation Agreements (CIFAs): A Descriptive Overview

Martin Dietrich Brauch



Brazil and Mozambique signed on March 30, 2015 the first Cooperation and Investment Facilitation Agreement (CIFA) based on Brazil's new model bilateral investment treaty (BIT). The second was signed on April 1, 2015 between Brazil and Angola.

Unlike traditional BITs, which are geared towards investor protection, the CIFAs focus primarily on cooperation and investment facilitation. They promote amicable ways to settle disputes and propose state–state dispute settlement as a backup; notably, they do not include provisions on investor–state arbitration.

Throughout the 1990s, Brazil had signed 14 traditional-type BITs, which its National Congress refused to ratify. Based on the reasons for that refusal, Brazil determined that it would only negotiate investment agreements expressly safeguarding the right to regulate, excluding coverage of portfolio investments and indirect expropriation, and providing for state–state dispute settlement only.¹

Negotiations of the first CIFAs were initiated in 2013. Negotiations with Malawi are reported to have been concluded,² but the text has yet to be published. Brazil is also negotiating with Algeria, Chile, Colombia, Morocco, Nigeria, Peru, South Africa and Tunisia.³

The Brazilian Ministry of Development, Industry and Commerce (MDIC) led the preparation of the model, collaborating with the Ministry of Foreign Relations, the Ministry of Labour and Employment, the Central Bank of Brazil, the National Confederation of Industries (*Confederação Nacional da Indústria* [CNI]) and the Federation of Industries of the State of São Paulo (*Federação das Indústrias do Estado de São Paulo* [FIESP]). Consultations were also held with private sector representatives.⁴ This process lasted several years. In 2013, Brazil shared the table of contents of the new model and some insights about its content.⁵

While Brazil has not published a template, the texts of the two agreements concluded allow us to draw the main lines of the new model that Brazil has been promoting in recent years.⁶

Preamble

The parties wish to deepen the bonds of friendship and the spirit of cooperation, broadly reaffirming their legislative autonomy and public policy space. They also recognize the

importance of a transparent, swift and friendly investment environment, seeking technical dialogue and government initiatives to increase investments between the countries. Strengthening the ties between private sector and government is another goal expressed. Furthermore, the parties acknowledge the “essential role of investment in the promotion of sustainable development” and other public policy objectives, and express their understanding that a strategic partnership on investment will bring broad benefits to both parties.

General Provisions (Section I)

Object (Art. 1). The object of the Angola CIFA is to facilitate and foster investments, to intensify and increase business opportunities and activities between the parties, while the object of the Mozambique CIFA is the cooperation between the parties to facilitate and foster investments.

Implementation Mechanisms (Art. 2). The government institutions of the states and the Joint Committee (described below) created under the CIFAs are in charge of implementing the agreements. They have a mandate to develop thematic agendas for cooperation and facilitation, risk reduction and dispute prevention mechanisms, amongst other instruments.

Definitions (Art. 3). The Angola CIFA subjects all definitions to domestic law.

In turn, the Mozambique CIFA adopts an asset-based definition of “investment,” the first part of which is similar to that under the 2012 U.S. Model BIT: investment is “any type of asset or right owned or controlled directly or indirectly by an investor of one of the Parties in the territory of the other Party.” Instead of using the characteristics of investment presented in the U.S. Model BIT, however, the CIFA qualifies investment as having “the purpose of establishing long-lasting economy relations” and being “aimed at the production of goods and services.” This is followed by a non-exhaustive list of assets, including partnerships, enterprises, equity in partnerships or enterprises, movable or immovable property, and amounts invested in business concession rights.

Under the Mozambique CIFA, “investors” may be:

- (i) natural persons who are nationals of the parties;
- (ii) legal persons structured under the law of the host state,
- (iii) legal persons controlled by an investor under (i) or (ii);
- (iv) legal persons having their headquarters and the center of their economic activities in the territory of a party; (v) natural or legal persons making an investment and authorized to do so when required by the law of a party.

Institutional Management or Governance (Section II)

Joint Committee (Art. 4). Each CIFA creates a Joint Committee of government representatives of both parties, responsible for monitoring the implementation of the CIFA, discussing and sharing investment opportunities, and coordinating the implementation of the cooperation and facilitation agendas.

The Joint Committee may invite the private sector and civil society to participate when appropriate. The parties may also create *ad hoc* working groups, in which, with the Joint Committee's permission, the private sector may participate. Another function is seeking consensus and amicably resolving investment questions or conflicts.

The Angola CIFA expressly allows the Joint Committee to invite non-governmental organizations (NGOs) to deliver presentations on certain matters. It also directs the Joint Committee to define or elaborate a standard dispute settlement procedure by means of state–state arbitration.

Focal Points or Ombudsmen (Art. 5). Each party will establish a Focal Point within the government to provide support to the foreign investors. The Focal Points must follow the guidance of the Joint Committee (Mozambique CIFA) or undertake efforts to follow its recommendations (Angola CIFA). The Focal Points will interact with each other and with other government authorities, recommending and reporting to the Joint Committee on measures taken to address suggestions and complaints received from foreign investors. They must supply information to the parties on investment-related legal matters and respond swiftly and attentively to their requests. Finally, they have an important role in preventing investment disputes and facilitating their resolution.

Exchange of Information (Art. 6). The parties commit to exchange relevant information on business opportunities and procedures and conditions for investment, particularly by means of the Joint Committee and the Focal Points. To this end, they commit to sharing information that may create favourable investment conditions, such as treaties, laws and policies on various matters (investment, foreign exchange, labour, immigration), specific incentives, customs and tax regimes, statistical information on markets, available infrastructure and public services, and regional investment projects. They also agree to discuss how to strengthen investment in Public–Private Partnerships (PPPs) through greater transparency and swifter access to regulations. All information sharing is subject to the level of protection requested by the supplying state.

Relationship with the Private Sector (Art. 7). The parties agree to disseminate among the pertinent business sectors information on investment, laws in force and business opportunities in the territory of the other party. They also encourage the engagement of the private sector, “as a fundamental intervener.”

Thematic Agendas (Section III: Art. 8)

The Joint Committee has a mandate to develop thematic agendas of cooperation and facilitation in areas relevant to promote and increase bilateral investments and to coordinate their implementation through specific commitments. Annex I presents initial lists of topics and objectives, which the states will discuss with a view to achieving common understandings and entering into additional protocols or agreements.

Risk Mitigation and Dispute Prevention (Section IV)

Expropriation, Nationalization and Compensation (Art. 9). This article is modelled after the U.S. Model BIT. It prohibits expropriations or nationalizations of foreign investments, except (i) for purposes and by reasons of public interest or utility, (ii) in a non-discriminatory manner, (iii) on payment of fair, adequate and effective compensation and (iv) in accordance with due process (para. 1).

Compensation shall (i) be paid without delay, in accordance with the law of the host state; (ii) be equivalent to the fair market value of the expropriated investment immediately after the expropriation; (iii) not reflect a negative change in the market value due to knowledge of the intention to

expropriate prior to the date of expropriation; and (iv) be fully realizable and freely transferable, in accordance with the Article on Transfers (para. 2).

If the fair market value is denominated in an internationally usable currency, compensation shall be no less than that value plus interest accrued from the date of expropriation until the date of payment (para. 3); if not, compensation shall include interest and an adjustment for inflation (para. 4); in either case, in accordance with the law of the host Party.

The language in both treaties refers only to “expropriation.” While Brazil has clarified in the past that it wishes to cover only direct expropriation in its treaties, this formulation could be interpreted to include and extend to indirect expropriation.

Corporate Social Responsibility (Art. 10). Foreign investors and investments have a best-efforts obligation “to carry out the highest level possible of contributions to the sustainable development of the host State and the local community,” by means of adopting “a high degree of socially responsible practices.” The voluntary principles and standards indicated in Annex II cover environmental protection, sustainable development, human rights, and local capacity building, among other areas.

Treatment of Investors and Investments (Art. 11). Under the Mozambique CIFA, each party, in accordance with its domestic law, commits to allow and encourage investments of the other party and to create favourable conditions for such investments. Under the Angola CIFA, “each party shall promote and accept investments of investors of the other Party, and may restrict certain investments in accordance with its laws.”

The national treatment (NT) provision determines that “each Party, in accordance with the applicable law, shall allow the investors of the other Party to establish investments and conduct businesses in conditions no less favourable than those available to domestic investors” (para. 2). The most-favoured-nation treatment (MFN) obligation provides that “each Party shall allow the investments of the other Party to establish investments and conduct businesses in conditions no less favourable than those available to other foreign investors” (para. 3). The treaties also ensure that neither NT nor MFN are interpreted as an obligation to grant to foreign investors the benefit of any treatment, preference or privilege resulting from any existing or future free trade area, customs union, common market or double taxation agreement to which the host state is or becomes a party.

Thus, NT relating to establishment seems to be subject to domestic law, while MFN is not. Notably, unlike many recent treaties, the CIFAs contain no explicit exception to MFN in relation to substantive or procedural treatment granted under other investment treaties.

The Angola CIFA has three additional paragraphs:

- The host state may provide, under domestic law, special formalities relating to the investment activities of the investors of the other state, as long as that these formalities do not affect the substance of their rights and the principle of non-discrimination (para. 6).
- The host state must grant the investors of the other state NT or MFN “with respect to the access to courts of law and administrative agencies, or, furthermore, to the defense of the rights of such investors” (para. 7).

- Paragraph 8 states that “[e]ach Party shall comply with the obligations expressly assumed in relation to the investments of investors of the other Party.” This is an umbrella clause, which has been interpreted to equal the breach of an investment contract between the host state and the investor to a treaty breach.

Compensation (Art. 12). This article provides that foreign investors who suffer losses of their investments due to war or other armed conflict, state of emergency, revolt, insurgency or disorders shall be granted—with respect to restitution, compensation or other solution—the most favourable of either NT or MFN. Payments must be promptly transferrable in freely usable currency (para. 1). Foreign investors who suffer damages in any of the situations mentioned, whether as a result of requisitioning or destruction of their investment, have a right to receive prompt, adequate and effective restitution or compensation (para. 2).

Transparency (Art. 13). The parties agree to ensure that measures affecting investments are administered in a reasonable, objective and impartial manner. They also guarantee that investment-related laws and regulations are published promptly and, whenever possible, electronically. In addition, they agree to a best-efforts commitment to give reasonable opportunity for relevant stakeholders to be heard on proposed investment-related measures. Finally, they commit to giving publicity to the CIFA.

Transfers (Art. 14). Similar to transfers provisions in traditional BITs, this article allows the transfer of investment-related funds, subject to compliance with registration and authorization procedures established under domestic law. Among the funds listed are contributions to capital, profits directly related to the investment, proceeds from its total or partial sale or liquidation, amortization of loans and the amount of compensation for expropriation or requisitioning of the investment. Paragraph 2 safeguards the states’ right to adopt non-discriminatory regulatory measures restricting transfers during balance-of-payment crises, the right to use exchange measures and other rights under the Articles of Agreement of the International Monetary Fund.

Dispute Prevention and Resolution (Art. 15). The CIFAs mandate the Focal Points and the Joint Committee to prevent, manage and resolve disputes between the states. In particular, prior to the initiation of an arbitral proceeding, any dispute is subject to assessment, by means of consultations and negotiations, and to a preliminary examination by the Joint Committee. A proceeding for a state to submit to the Joint Committee a claim on behalf of an investor is also established. While the Joint Committees may elaborate on the procedural details, the main lines of the procedure are the following:

- The home state of the investor presents a written request to the Joint Committee, specifying the name of the investor and the challenges or difficulties faced.
- The Joint Committee has 60 days, extendable by mutual agreement and upon justification for another 60 days, to present information pertinent to the case.
- Representatives of the investor, government entities and NGOs involved may participate in the meetings.
- The proceeding of bilateral dialogue and consultations is concluded by the initiative of either state with the presentation of a summary report in the subsequent meeting of the Joint Committee.

- The summary report must include the identification of the state and of the investors involved, the description of the challenged measure and the position of the states regarding the measure.
- The Joint Committee holds extraordinary meetings to consider the issues before it and may issue a recommendation.
- Only if the dispute is not resolved by the recommendation, the two parties may resort to state–state arbitration.
- Except for the summary report, all documents and meetings of the proceedings are confidential.

Application of the Agreement (Art. 16). Common to both CIFAs are the prohibition to invoke them to question disputes finally resolved before their entry into force and the guarantee that they do not restrict the rights of benefits of foreign investors under domestic law. The Mozambique CIFA expressly applies to investments made before or after its entry into force.

The Angola CIFA includes a denial-of-benefits clause: a party may deny the benefits of the CIFA to a natural person who is not a national or permanent resident of the other party. It may also deny the application of the CIFA to a legal person which (a) is not constituted under the law of the other party, is not headquartered in the other party and does not carry out substantial activities there, or which (b) is not effectively owned or controlled, directly or indirectly, by nationals or permanent residents of the other party.

Final and Provisional Provisions (Art. 17). The Joint Committee and Focal Points do not replace diplomatic exchanges. Their main purpose is “the encouragement of institutional government of investment, by means of the establishment of a specific forum and of technical channels that act as facilitators between the governments and the private sector.”

The CIFAs will enter into force 30 days after receipt of the last notice of ratification. The Mozambique CIFA will remain in force for 20 years, and the Angola CIFA, for 10 years. Both treaties are renewable automatically for equal and successive periods. A party may denounce the treaty with minimum advance notice of 12 months.

Author

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Notes

¹ Report of the 4th Annual Forum of Developing Country Investment Negotiators, retrieved from https://www.iisd.org/pdf/2011/dci_2010_report.pdf.

² Brazilian Ministry of Foreign Relations. (2015, March 31). Brasil e Moçambique assinam Acordo de Cooperação e Facilitação de Investimentos. *Blog Diplomacia Pública*. Retrieved from <http://diplomaciapublica.itamaraty.gov.br/22-assuntos-economicos-e-financeiros/124-brasil-e-mocambique-assinam-acordo-de-cooperacao-e-facilitacao-de-investimentos>

³ Presidency of the Federative Republic of Brazil. (2015, January). *Mensagem ao Congresso 2015*, p. 44. Retrieved from <http://www.casacivil.gov.br/acesso-a-informacao/mensagem-presidencial/mensagem-ao-congresso-2015.pdf/@download/file/Mensagem%20ao%20Congresso%202015.pdf>.

⁴ Brazilian Ministry of Development, Industry and Commerce. (2015, April 1). *Brasil e Angola assinam Acordo de Cooperação e Facilitação de Investimentos (ACFI)*. Retrieved from <http://www.mdic.gov.br/portalmDIC/sitio/interna/noticia.php?area=5¬icia=13688>; Brazilian Ministry of Finance. Secretariat of International Affairs. (2015). *Investimentos: Assinatura dos dois primeiros acordos ACFI*. Retrieved from http://www.sain.fazenda.gov.br/estrutura_home_site/bloco_tres.

⁵ Report of the 7th Annual Forum of Developing Country Investment Negotiators, retrieved from https://www.iisd.org/pdf/2013/7th_annual_forum_report.pdf.

⁶ The text of the Brazil–Mozambique CIFA is available at http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR; the text of the Brazil–Angola CIFA, at http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8520:acordo-brasil-angola-de-cooperacao-e-facilitacao-de-investimentos-aciluaanda-1-de-abril-de-2015&catid=42&lang=pt-BR&Itemid=280.

China's Antitrust Crackdown Hits Qualcomm with US\$975 Million Fine: What Can Other Host States Learn from the Story?

Joe Zhang

feature 6



In February 2015, Qualcomm Inc. (Qualcomm), the world's leading cellular chip maker, headquartered in California, was ordered by the Chinese anti-monopoly authority to pay a fine of RMB 6.088 billion (approximately US\$975 million) for antitrust offenses against Chinese consumers,¹ following a 14-month-long investigation of the company's anti-competitive practices. Seen by many as one of the most contentious antitrust investigations since China promulgated its Anti-monopoly Law in 2008, this certainly marked the largest fine ever issued by China's anti-monopoly regulators.

The National Development and Reform Commission (NDRC), one of the three antitrust regulators in China, officially launched the investigation against Qualcomm in November 2013 after several complaints had been filed against the company in the preceding years. Before that, the company had also been investigated by antitrust authorities in Japan and South Korea. The commencement of the investigation by the Chinese authority immediately drew the world's attention as China's investigation related to Qualcomm's controversial core business model, namely, charging excessively high licensing fees and setting unreasonable conditions for licensing its patents. One example is the criterion used by Qualcomm to calculate royalties. It is a common practice of patent holders to calculate royalties on the basis of where the patent is used in a device rather than based on the value of the whole device. For example, if a company owns a patent for tires of heavy-duty trucks, it will mostly likely charge a percentage of the value of tires where the patent is used instead of charging a percentage of the entire truck's value. What Qualcomm did, however, was to charge a certain percent of the wholesale price of the entire device. For example, if a licensee uses Qualcomm's patent in producing a cellular chip for iPhone, Qualcomm could calculate the royalty of such patent on the basis of an iPhone's wholesale price, even though the phone has many other components.

Despite Qualcomm's attempt to "vigorously defend" itself,² the NDRC found that Qualcomm abused its market-dominant position and that the company's challenged practices restricted and excluded market competition, hampered innovation and technology development, harmed consumers' rights and interests, and thus violated Chinese anti-monopoly rules.¹

As a consequence, in addition to paying the unprecedented fine, Qualcomm is also required to implement a rectification plan that modifies certain aspects of its business practices in China to fully satisfy the requirements set by the NDRC.

After a careful reading of the decision and the rectification plan as approved by the Chinese authority, one may find that the punishment imposed is serious yet fairly amicable, as the result could have been worse for Qualcomm.

First, China's Anti-monopoly Law allows antitrust regulators to fine up to 10 per cent of the violator's revenue for the fiscal year preceding the year when the decision is made. The amount of the fine actually imposed, however, was calculated based on 8 per cent of Qualcomm's sales in China in 2013, much less than the maximum amount allowed by the law. Second, while the Chinese regulators had the authority to force Qualcomm to license its patent for free, they declined to do so in this case. Third, although Qualcomm agreed to cease its most controversial practice of calculating royalties on the full wholesale price of the entire device, it only committed to reducing the calculation base to 65 per cent of the wholesale price of the entire device, instead of reducing it to the price of the smallest saleable patent-practicing unit, which is the common practice in the industry.

The NDRC later explained to Chinese media that, by fully cooperating during the investigation, Qualcomm deserved the lenient terms.³ According to Qualcomm's own press release, such terms reflected the Chinese regulator's "acknowledgment of the value and importance of Qualcomm's technology and many contributions to China."⁴

What is of particular interest in this case is the reported fact that Qualcomm aggressively defended itself against the allegations put forward by the Chinese regulators. As a part of its defence strategy in the investigation, Qualcomm hired one of the drafters of the China Anti-monopoly Law, Zhang Xinzhu. At the time of drafting, he was an advisor to the Expert Consultation Group of the State Council's Anti-monopoly Committee, but was later stripped of his position due to an apparent conflict of interest. According to Zhang, Qualcomm was the first company putting up a serious defence against the Chinese government.⁵

Qualcomm ultimately reached a settlement agreement with the Chinese government and committed, as

stated in its press release, to “not pursue further legal proceedings contesting the NDRC’s findings.”⁴ The Chinese regulators attributed this to the high level of transparency and effective communication between themselves and Qualcomm during the entire probe process. At the same time, it is also very difficult to turn a blind eye to the fact that half of Qualcomm’s revenue comes from China,⁶ a market it cannot afford to lose, especially considering that the Chinese regulator had already made certain concessions when rendering its decision, as discussed above

Timeline of Qualcomm Investigation

November 2013

The Chinese regulator NDRC conducted raids at Qualcomm’s Beijing and Shanghai offices after receiving multiple complaints against the company.

December 2013

The NDRC officially announced that Qualcomm was under investigation for alleged antitrust violations. On the same day, Qualcomm issued a press release denying the allegations.

July 2014

The NDRC determined that Qualcomm has a monopoly market position in China and began to inquire Qualcomm’s financial figures from the company’s offices in China. Qualcomm’s president Derek Aberle was also questioned by the NDRC.

October & December 2014

A Qualcomm delegation led by Derek Aberle paid two more visits to the NDRC to discuss the possibility of a settlement. Throughout the investigation, NDRC had 28 meetings with the Qualcomm delegation to exchange views.

February 2015

The NDRC announced its decision, holding that Qualcomm violated Chinese Anti-monopoly Law by abusing its dominant position. The decision included a RMB 6.088 billion (US\$975 million) fine and ordered Qualcomm to change certain practices. Qualcomm announced in a press release that it would not challenge the decision and made the full payment of the fine within three days of the decision.

Source: National Development and Reform Commission, *China News Network*

The result of the Qualcomm decision—the amount of the fine combined with NDRC’s willingness to pursue contentious cases—seems to confirm the Chinese authority’s determination to tackle complex anticompetitive practices. This is in line with a recent global trend witnessed by the competition law community⁷—an increasing number of emerging market economies are stepping up to establish or reform their competition law regimes. For example, Brazil reformed its competition regime in 2012. Russia also adopted a significant package of reforms to its competition regime around the same time. At least 20 African countries

developed their competition law regimes in 2014. Also, a draft bill to amend the Indonesian competition law—extending its application to foreign companies and including greater financial penalties for infringements—received parliamentary approval several months ago. The increasing globalization of competition law is due to the recognition that a well-designed competition regime can greatly contribute to the sustainable economic growth of a country.

However, what is clear from the Qualcomm example is that companies may challenge the actions of new regulatory bodies that are still learning on the job. It is one thing if they are implementing the law, and this is reviewed by domestic courts. But we are beginning to hear speculations that companies could also challenge the implementation of the new competition laws based on investment treaties. Surely, states did not intend to give investment tribunals the role of a competition supervisory body when they negotiated investment treaties. There are no known investment treaty claims against China to challenge its enforcement of the Qualcomm decision. It can only be assumed the decision was made due to business considerations rather than legal barriers. At the international level—although China has not concluded any bilateral investment treaties with the United States—it should not have taken Qualcomm very long to identify a proper vehicle that can file the complaint under any of the more than 130 existing bilateral investment treaties signed by China.

While there is no indication that China faced any such threats, the implementation of the new competition laws in developing and emerging economies and the possible related litigation are to be looked out for and watched at both domestic and international levels.

Author

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Notes

- 1 See National Development and Reform Commission Administrative Sanction Decision (Fagaibanjiajianchufa [2015] No. 1), available in Chinese at NDRC’s website http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html.
- 2 See Bradshaw, T. (2014, November 6). Qualcomm faces two new antitrust probes. *The Financial Times*. Retrieved from <http://www.ft.com/intl/cms/s/0/fa223b00-6543-11e4-91b1-00144feabd0c.html#axzz3ZUYpAQev>.
- 3 See Li, L. (2015, February 10). Details of Qualcomm antitrust investigation: The reason for the 8% fine [in Chinese]. *China News Network*. Retrieved from <http://finance.chinanews.com/cj/2015/02-10/7051881.shtml>.
- 4 Qualcomm. (2015, February 9). *Qualcomm and China’s National Development and Reform Commission reach resolution*, Press Release. Retrieved from http://files.shareholder.com/downloads/QCOM/3864235320x0x808060/382E59E5-B9AA-4D59-ABFF-BDFB9AB-8F1E9/Qualcomm_and_China_NDRC_Resolution_final.pdf.
- 5 See Clover, C. (2015, January 25). China: Monopoly position. *The Financial Times*. Retrieved from <http://www.ft.com/intl/cms/s/0/22704a96-9ff2-11e4-9a74-00144feab7de.html>.
- 6 Zacks Equity Research. (2015, February 10). *Qualcomm settles Chinese antitrust charges, ups guidance*. Retrieved from <http://www.zacks.com/stock/news/163900/qualcomm-settles-chinese-antitrust-charges-ups-guidance>.
- 7 Lex Mundi Report (2015). *Changing competition regimes: Organizational best practices for navigating cross-border legal and political risks*. Houston: Lex Mundi. An excerpt of the report is available at http://www.lexmundi.com/lexmundi/Changing_Competition_Regimes_Report_Preview.asp.

news in brief

European Commission addresses TTIP concerns at European Parliament meeting

At a March 18, 2015 meeting at the European Parliament's International Trade Committee, EU Trade Commissioner Cecilia Malmström presented **four "preliminary ideas"** to address public concerns about investment in the Transatlantic Trade and Investment Partnership (TTIP) in negotiation between the European Union and the United States.

To prevent conflicts of interest resulting from the dual role (arbitrator–lawyer) in investor–state arbitration, the Commissioner emphasized the role of arbitrator rosters. She also supported the idea of a permanent investment court—but aiming at a multilateral one, as a parallel medium-term objective.

The Commissioner also suggested including in TTIP an appeal body with permanent members to review decisions and ensure their consistency. In addition, to prevent giving investors "a second chance to overrule the decisions of national courts," she proposed provisions to clarify the relationship between domestic systems and investor–state arbitration.

Malmström also discussed clauses to address the concern "that investment arbitration in TTIP will be a barrier to Europe's noble tradition of high quality regulation." Such concern is increasingly widespread in Europe. On April 18, thousands in several German cities **protested against the TTIP** fearing an erosion of food, labour and environmental standards.

In the European Parliament, the leading European People's Party favours investor–state arbitration in the TTIP, but **six committees have drafted opinions** against it. While not binding, these opinions will be taken into account in the International Trade Committee's report, to be put to vote on May 28 and presented to the Parliament in June 2015.

TPP Investment Chapter: Re-edition of U.S. BIT, with ISDS carve-outs

A January 20, 2015 negotiating draft of the **Investment Chapter** of the Trans-Pacific Partnership Agreement (TPP) was leaked on March 25, 2015.

The TPP has been under negotiation for five years by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Since the draft texts are not shared with the public, interested observers must rely on periodic leaks.

Most of the latest leaked chapter is copy-pasted from the U.S. model bilateral investment treaty (BIT), with slight differences. Investment authorizations and contracts, normally within the scope of U.S. BITs, appear in square brackets, indicating that their inclusion is not yet confirmed. Performance requirements are broadly prohibited, but an exception covering "measures to protect legitimate public welfare objectives" was added. And states recognize that voluntary corporate social responsibility should be encouraged.

Several negotiating countries carved out measures and sectors from the scope of investor–state dispute settlement (ISDS). Notably, a footnote expressly indicates that ISDS will not be available for use by Australian investors or against Australia. Yet the footnote is followed

by an intriguing note: "deletion of footnote is subject to certain conditions." It is not clear what Australia would trade for its anti-ISDS stance.

India releases Model BIT for comments; United States pushes for negotiations

The Indian government published a draft of its **model bilateral investment treaty** (BIT) for public comment on March 24, 2015. By April 11, the deadline for submission, 185 comments were posted on the government's **online forum**. The new text is set to replace the country's 1993 model Bilateral Investment Promotion and Protection Agreement (BIPA) and results from an inter-ministerial review process started in mid-2012.

India's new model includes obligations on foreign investors and investments and on their home state aimed at ensuring that investment contributes to inclusive growth and sustainable development. Investors and investments that breach obligations regarding corruption, disclosures and taxation do not benefit from the treaty benefits—and are subject to counterclaims by the host state. While retaining investor–state dispute settlement provisions, the model requires a foreign investor to exhaust administrative and judicial remedies before initiating arbitration against the host state.

Increasingly concerned with investor–state arbitration, **India is reported to be considering** renegotiating or exiting its BITs (currently, 83 signed, 72 in force). Although the country does not have an investment treaty with the United States, sporadic negotiations are reported to be occurring since 2008. The completion of India's new model has motivated a **new round of talks**, as indicated in March 2015 by U.S. Assistant Secretary of State Nisha Desai Biswal.

UNCITRAL Transparency Convention opened for signature in Mauritius

The United Nations (UN) Convention on Transparency in Treaty-based Investor–State Arbitration was opened for signature in an official ceremony on March 17, 2015 in Mauritius.

Now also known as the **Mauritius Convention on Transparency**, the treaty results from the work of the UN Commission on International Trade Law (UNCITRAL) on transparency in investment arbitration dating back from 2010.

Another product of this work, the **UNCITRAL Rules on Transparency** in Treaty-based Investor–State Arbitration were adopted in 2013 and have been effective since April 1, 2014. They require publication of basic information about the arbitration, disclosure of key documents (including the tribunal's decisions) and open hearings. The rules automatically apply to any UNCITRAL arbitration proceeding under a treaty concluded after April 1, 2014.

By signing the Transparency Convention, a state commits to applying the transparency standards of the UNCITRAL Rules on Transparency to any investor–state arbitration proceeding under treaties concluded *before* April 1, 2014, even if those treaties do not refer to UNCITRAL Arbitration Rules.

The first signatories of the Mauritius Convention were Canada, Finland, France, Germany, Mauritius, Sweden, the United Kingdom and the United States. It will enter into force six months after the deposit of the third instrument of ratification.

awards & decisions

UNCITRAL tribunal finds Canada's environmental assessment breached international minimum standard of treatment and national treatment standard

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL

Marquita Davis

Background

In an award dated March 17, 2015, a majority of Bruno Simma (chair) and Bryan Schwartz (investor's nominee) of a tribunal under the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL) found that Canada's environmental assessment of the investors' proposed quarry and marine terminal project breached the minimum standard of treatment and national treatment provisions under the investment chapter of the North-American Free Trade Agreement (NAFTA). Canada's nominee, Donald McRae, strongly dissented from the majority's analysis of the facts and application of the NAFTA Article 1105 standard. The tribunal deferred the calculation of damages; the investors—four U.S. nationals and a company constituted under U.S. law—initially claimed \$300 million.

In April 2002, a permit was issued to build and operate a quarry in the Canadian province of Nova Scotia. In 2004, through a Canadian subsidiary, the claimant company (Bilcon) acquired the quarry and a marine terminal at Whites Point (the Project). Canada and Nova Scotia established a Joint Review Panel (JRP) to conduct an environmental assessment (EA) of the Project. Based on a 2007 JRP report, Nova Scotia and then Canada rejected the Project for its incompatibility with "community core values." Bilcon initiated arbitration in June 2008, alleging defects in the JRP process and report and in Canada's subsequent rejection of the project.

At the outset of the analysis, the tribunal addressed Canada's jurisdictional objections, including that some claimants did not qualify as "investors," that some claims were time barred, and that the JRP's acts could not be attributed to Canada. Yet the tribunal upheld its jurisdiction and set out to analyze the key substantive aspects of the case.

Majority declares international minimum treatment standard is bound by FTC Note, but decides standard has evolved since Neer case

The investors argued for the fair and equitable treatment (FET) standard in NAFTA Article 1105 to be interpreted as an autonomous standard encompassing the investor's legitimate expectations, protection against arbitrary and discriminatory measures, and a general requirement that the state "act reasonably" (para. 359). Canada countered that the standard did not include stand-alone obligations such as legitimate expectations, but that the NAFTA Free Trade Commission's (FTC) Notes of Interpretation of Certain Chapter Eleven Provisions limited FET to the international minimum standard in accordance with customary international law. The tribunal agreed with Canada that it was bound by the interpretation under

the FTC Note and that there was a "high threshold" for Article 1105 to apply (para. 441).

The tribunal then determined that the general standard for Article 1105 as articulated in *Waste Management* was the most appropriate interpretation. According to *Waste Management*, "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety" (para. 442).

But the tribunal then decided that an international breach was not limited to "outrageous" state conduct, because the current international minimum standard had evolved to provide greater protection than that under the *Neer* case. It determined that a tribunal must be fact-sensitive, which included weighing investors' "reasonably relied-on representations by a host state" to determine if Article 1105 was breached (para. 444).

Majority finds Canada in breach of international minimum standard of treatment

Based on specific declarations by Nova Scotia officials, and even on the province's general investment promotion materials and policy statements, the tribunal held that the investors were clearly and repeatedly encouraged to pursue the Project. According to the tribunal, Canada led the investors to the reasonable belief that, subject to compliance with federal and provincial laws, the Whites Point area was not a "no go" zone for investment (para. 590), as the majority concluded it turned out to be through the JRP's assessment. In McRae's dissent, he argued that the fact that Nova Scotia officials encouraged investment in mining and any consequent "legitimate expectations" are irrelevant to whether the JRP has met the Article 1105 standards. He determined that any investor would have the expectation that Canadian law would be properly applied during an environmental assessment and this expectation has nothing to do with any assurances or encouragement provincial officials provided.

The majority found the review was arbitrary because the JRP failed to determine the Project's viability based on the "likely significant adverse effects after mitigation" criterion. According to the majority, the JRP exceeded its mandate by, without notice or proper legal authority, adopting a new standard of "community core values" assessment, which the majority compared to a public referendum on the project.

Though the majority hedged that a "mere error in legal or factual analysis" (para. 594) would not be sufficient to meet the high threshold of international responsibility, it determined that the breach in this case did rise to that level. First, the majority considered that the investors had reasonable expectations and invested substantial resources and reputation in the JRP process. Second, it took into account their lack of notice regarding the "community core values" assessment standard. Finally,

it considered that the JRP fundamentally departed from the standard of evaluation required under Canadian law.

McRae criticized the majority's reliance on investors' experts and witnesses for alleged issues in the JRP hearing process, saying the majority did not examine the actual hearing record. According to him, the majority wrongly interpreted the JRP's elaboration of "community core values." He stated that a closer examination of the actual report showed that "core values" and "community core values" were simply names given to address "human environmental effects," a term that was a key component of the JRP's terms of reference (para. 15). In its analysis, the JRP found that the investors had failed to address human environmental effects in their Environmental Impact Statement, even though the JRP's terms or reference gave them notice of the need to address those effects. McRae rejected the majority's finding that the JRP in effect made a "zoning decision," arguing that its recommendations were based on the specific details of the investors' project (para. 27). He also determined that the JRP had provided sufficient reasoning for its decision not to include individual mitigation measures. Ultimately, McRae concluded that the majority's finding that the JRP's actions were arbitrary was not supported by any evidence or reasoning.

Finally, McRae argued that even if the JRP's report was incompatible with domestic law, this was not sufficient to sustain a NAFTA breach, as the breach did not meet the high threshold of the *Waste Management* standard. McRae determined that the JRP's actions were not arbitrary, and the majority did not show that other elements of the *Waste Management* standard were met. McRae argued that, "[b]y treating a potential violation of Canadian law as itself a violation of NAFTA Article 1105[,] the majority had in effect introduced the potential for getting damages for what is a breach of Canadian law, where Canadian law does not provide a damages claim for such a breach" (para 43).

Majority finds Canada did not accord national treatment to Bilcon's investment

Bilcon argued that Canada accorded it treatment less favourable than that accorded to domestic investors, by subjecting it to the rarely used JRP review method and by failing to apply the "likely significant adverse effects after mitigation" standard. While the tribunal dismissed the first claim as time-barred, it upheld the second claim.

The majority rejected Canada's attempt to restrict comparators to investments or investors in "like circumstances" such as those undergoing the more stringent JRP or those projects with significant pushback from a local community. It determined that the broad language in Article 1102 and NAFTA's general objective to materially increase investments meant that the range of comparators should be broader.

Of the comparison cases involving quarries and taking place in sensitive coastal areas, at least three underwent "likely significant adverse effects" assessments. For the majority, this was sufficient to show that they received more favorable treatment than the investors. The majority

determined that a state could justify its differential and adverse treatment under the *Pope & Talbot* test, but found that Canada did not provide compelling justification for its actions.

McRae disagreed with this finding as well, stating that the investors were treated in accordance with Canadian law.

Investors' other claims dismissed and majority makes caveat to ruling

The investors claimed other issues with the JRP assessment, but the majority determined that these factors did not rise to the level of international liability.

The majority also decided it was unnecessary to determine if Canada breached the most-favoured-nation (MFN) provision since it would not affect the measure of damages.

The majority also took pains to stress that its finding in favour of the investors was not an assessment of substantive Canadian environmental law, but that its decision was based on the specific facts of the investors' claims and the JRP report's non-compliance with existing Canadian environmental law.

McRae disagreed, stating that the majority added a control at the international level for investors to challenge decisions of domestic environmental review panels. He warned that this was "a significant intrusion into domestic jurisdiction and will create a chill in the operation of environmental review panels" (para. 48). For him, the most troubling aspect of the majority decision was that a state was held liable in damages to an investor for putting important value on how a project affects the human environment and for taking into account the community's articulation of its own interests and values.

Notes:

The tribunal was composed of Bruno Simma, Bryan Schwartz and Donald McRae. The majority award is available at <http://www.italaw.com/cases/documents/2984> and the dissent, at <http://www.italaw.com/cases/documents/2985>.

ICSID tribunal finds Venezuela's 2009 seizure to be lawful expropriation and awards US\$46.4 million in compensation

Tidewater Investment SRL & Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela, ICSID Case No ARB/10/5
Matthew Levine

An oil and gas marine services dispute with Venezuela has resulted in an arbitration award at the International Centre for Settlement of Investment Disputes (ICSID).

The tribunal agreed with the claimants, two companies within the Tidewater group, that the government's 2009 seizure constituted an expropriation under the Barbados-Venezuela bilateral investment treaty (BIT). It awarded US\$46.4 million in compensation plus interest compounded from the date of expropriation.

The damages awarded fell significantly short of the claimants' ask of US\$234 million. The tribunal did not accept that the expropriation was illegal under the BIT. In addition, the tribunal's discounted cash flow (DCF)

analysis led to an assessment of fair market value that was significantly lower than the claimants' suggestion.

Background

SEMARCA, a Venezuelan company within the Tidewater group, has been operating marine transportation services since 1958. From 1975 onwards, SEMARCA provided maritime support services to subsidiaries of Venezuela's national oil company, PDVSA, under various contracts.

On May 7, 2009, Venezuela enacted the "Organic Law that Reserves to the State the Assets and Services Related to Primary Activities of Hydrocarbons" (Reserve Law). The following day, May 8, 2009, Venezuela issued Resolution No. 51, identifying the claimants, along with 38 other service providers, as subject to the Reserve Law. PDVSA's subsidiaries seized SEMARCA's assets on Lake Maracaibo—its offices and 11 vessels—almost immediately and, later, its four vessels in the Gulf of Paria. Tidewater initiated arbitration in February 2010.

In its February 2013 Decision on Jurisdiction, the tribunal dismissed the claims of six of eight claimants from the Tidewater group. The tribunal found jurisdiction over only Tidewater Caribe, C.A., a Venezuelan company that owned SEMARCA at all material times, and Tidewater Investment SRL, a Barbados company that owned Tidewater Caribe, C.A., since 2009 (jointly referred to as Tidewater).

Seizure of Tidewater's assets had effect of expropriation

The tribunal assessed whether the seizure of Tidewater's vessels constituted an expropriation. It remarked that BIT Article 5 on expropriation included a formulation that is commonly found in many investment treaties. The tribunal highlighted the question of "effect," stating that "it is well accepted in international law that expropriation need not involve a taking of legal title to property. It is sufficient if the State's measures have an equivalent effect" (para. 104).

In assessing whether the measures in the current case had an effect equivalent to expropriation, the tribunal found it useful to consider the factors relied upon by the tribunal in *Pope & Talbot*, namely, whether:

- the investment has been nationalized or the measure is confiscatory;
- the state has taken over control of the investment and directs its day-to-day operations;
- the state now supervises the work of employees of the investment; and
- the state takes the proceeds of the company's sales.

On the evidence, including the statements of witnesses from Tidewater and PDVSA's subsidiaries, the tribunal found that expropriation had occurred upon the physical seizure of the vessels.

The tribunal found that, "[w]hilst the seizure would have come as a surprise," it was natural for the claimants not to accept its effect immediately. According to the tribunal, "the scope of that effect upon Claimants' investment did not finally become clear until the seizure

of the remainder of the vessels at Corocoro [in the Gulf of Paria] some two months later. In these circumstances, documents from Claimants asserting the continuation of their business in the intervening period are consistent with a dawning realisation that their business had been nationalised" (para. 109).

Tidewater fails to establish that expropriation was unlawful

Tidewater had sought to convince the tribunal that the government's failure to pay compensation rendered the expropriation illegal under the BIT. Based on the parties' pleadings, the tribunal reviewed the international case law from *Chorzow Factory* onwards pertaining to a taking that lacks only the payment of fair compensation to be lawful. It further noted recent investment arbitrations following a consistent approach. The tribunal in *Goetz v. Burundi*, for example, held that "all other conditions for a lawful taking having been met, the failure to pay prompt and adequate compensation did not suffice 'to taint this measure as illegal under international law'" (para. 135).

In the present case, Tidewater argued that the taking was illegal since Venezuela's contemplated level of compensation under the Reserve Law was inconsistent with the standard of compensation required by the BIT. The tribunal observed that, while the BIT defines the compensation payable for expropriation as market value immediately before an expropriation, the determination of that market value is delegated to the tribunal.

Fair and Equitable Treatment claim is quickly dismissed

The real focus of the claim was not on the procedural fairness of Venezuela's treatment of the claimants, but on its taking of their property. The tribunal saw as simply inapposite claims for breach of fair and equitable treatment as well as arguments based on national treatment and most-favored-nation treatment.

Material factors of fair market value, such as country risk, determined by tribunal

The tribunal found that determining fair market value by reference to either the liquidation value or the book value of the seized assets, as Venezuela proposed, would likely only be appropriate where the enterprise was not a proven going concern. Rather, given that SEMARCA was not a publicly listed company and that its business was limited to one country and one customer, a DCF analysis was appropriate.

As the parties' expert reports tended to contain overly optimistic estimates, the tribunal made its own assessment as to each of six key factors in the DCF analysis, namely: scope of business, accounts receivable, historical cash flow, equity risk, country risk, and business risk. In terms of country risk, the claimants' expert had discounted a very modest 1.5 per cent to induce willing buyers prior to the 2009 taking. Venezuela's expert, on the other hand, had been in the potentially awkward position of discounting 14.75 per cent in respect of perceived political risks. The tribunal found the respondent's position reasonable adopting a 14.75 per cent premium. Ultimately, the expropriated assets' market value was determined to be significantly lower than claimed.

Notes:

The tribunal was composed of Campbell McLachlan QC (President appointed by the Chairman of the ICSID Administrative Counsel, New Zealand national), Andrés Rigo Sureda (claimant's appointee, Spanish national), and Brigitte Stern (respondent's appointee, French national). The final award of March 13, 2015 is available at http://www.italaw.com/sites/default/files/case-documents/italaw4206_0.pdf

Venezuela ordered to pay for unlawful expropriation of Owens-Illinois investments

OI European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25

Martin Dietrich Brauch

Venezuela was ordered to pay US\$372,461,982 plus interest to a company within the Owens-Illinois Group, one of the world's largest producers of glass containers, for the expropriation of its investments in Venezuela. A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) rendered the award on March 10, 2015.

Background and claims

The claimant, OI European Group B.V. (O-I), is a company constituted under Dutch law. Through two companies it controlled—Owens-Illinois de Venezuela C.A. (OldV) and Fábrica de Vidrios los Andes C.A. (Favianca)—O-I owned the largest industrial plants for the production, processing and distribution of glass containers in Venezuela.

Venezuela's intention to expropriate OldV and Favianca became known on October 25, 2010, when then-President Hugo Chávez—during a television broadcast—ordered the Vice-President to take over the companies. The Expropriation Decree was issued the following day, directing the Office of the Attorney General to initiate the appropriate proceeding under Venezuela's 2002 Expropriation Law. Armed National Guard officers were sent to the plants to control access and protect the assets.

At the employees' urging, Venezuela took over the management of the plants a few days after the Expropriation Decree, and production was never halted. The newly created state-owned company Venvidrio has been managing the companies since April 30, 2011. At the time the arbitral award was rendered, the expropriation proceeding was still ongoing, and no compensation had been paid.

O-I initiated arbitration against Venezuela under the Venezuela–Netherlands bilateral investment treaty (BIT) in September 2011, alleging Venezuela breached the BIT clauses and standards on expropriation, fair and equitable treatment (FET), full physical protection and security, freedom of transfers, and the umbrella clause (through a breach of Venezuela's Investment Law). O-I also asked for indirect and moral damages, claiming a total amount of damages of no less than US\$929,544,714, plus interest.

Tribunal rejects Venezuela's two jurisdictional objections

Venezuela objected that O-I did not have a covered

investment, but the tribunal reasoned that O-I's business assets, by their very nature, fulfill the definition of "investment" under the BIT and the ICSID Convention and the objective of the treaties to promote economic development. Referencing *KT Asia v. Kazakhstan*, Venezuela countered that, by acquiring the companies through corporate reorganization, without an effective contribution, O-I did not make an "investment." The tribunal rejected the argument as well, pointing out that O-I and the Owens-Illinois Group had legitimately acquired the companies, made significant capital contributions and reinvested dividends.

O-I had also asked for damages of US\$50 million for losses it would experience because of Venvidrio in the Brazilian market. In its second objection, Venezuela affirmed that the damages to O-I's businesses outside Venezuela were beyond the scope of the tribunal's jurisdiction. The tribunal, reasoning that issues of damages were intrinsically connected to the determination of a breach, decided to deal with Venezuela's objection in the merits phase.

Tribunal holds that expropriation was unlawful

O-I's main claim was that Venezuela unlawfully expropriated its investment. The tribunal found that the expropriation was carried out in the public interest (to favour domestic development) and was not discriminatory, but a strategic decision, considering that O-I's companies held 60 per cent of the glass container market. However, it also found that the expropriation was not conducted under due process, as the assets to be expropriated were not precisely identified, and that Venezuela had unjustifiably delayed payment of compensation.

Unlawful expropriation also an FET breach, tribunal holds

After an analysis of the FET clause under the BIT, the tribunal held that the standard obligates Venezuela to treat foreign investors in accordance with international law and, in particular, without arbitrariness or discrimination. For the tribunal, given that the expropriation was unlawful as Venezuela failed to comply with due process and to compensate O-I, Venezuela also breached FET, "as it is difficult to imagine an illicit direct expropriation that does not result in a breach of this standard" (para. 501). Venezuela was also held to have acted arbitrarily by taking control of O-I's production plants through ill-founded administrative acts, the actual purpose of which was to avoid seeking a court order as required by the Expropriation Law.

Full protection and security, freedom of transfers, and umbrella clause claims

The tribunal agreed with Venezuela's defense that, by sending the National Guard to the plants for the first weeks after the expropriation, the country was ensuring compliance with the full protection and security standard rather than breaching it. It also sided with Venezuela in holding that O-I waived its right to free transfers under the treaty when it opted to transfer funds via the parallel exchange market. Yet it upheld the investor's umbrella clause claim, considering Venezuela's breaches of the country's Investment Law to be treaty breaches.

No sufficient basis for moral damages claim

O-I claimed for US\$10 million in moral damages it allegedly suffered during the six months following the expropriation. Arguing that Venezuela's conduct was "atrocious" (para. 904) during that period, O-I referred to some of the facts already claimed as breaches of the FET and full protection and security standards. However, the tribunal held that O-I did not appropriately describe the facts and their effects. It concluded that the claimant could not demonstrate that Venezuela's officials harassed or threatened the employees to continue working in the plants, or were physically aggressive or threatening when dealing with the companies, or caused any psychic suffering or reputation loss to O-I or its agents.

Damages, costs, legal expenses

The tribunal analyzed in great depth the calculation of damages owing to O-I for expropriation. Finally adopting the discounted cash flow (DCF) method, it concluded that the market value of the expropriated companies as calculated by the experts was both reasonable and confirmed by alternative methodologies. The value of the two companies was estimated at US\$510,340,740. Taking into account O-I's shareholding of 72.983 per cent of the companies, the tribunal awarded O-I damages amounting to US\$372,461,982. It also set interest at the 1-year LIBOR rate plus 4 per cent, compounded annually, accruing from the date of Expropriation Decree until the date of payment.

In determining costs, the tribunal considered that O-I was successful in most of its claims. It ordered Venezuela to reimburse O-I for its contribution of US\$500,000 to the costs of the proceeding, and to pay US\$5,750,000 for reasonable defense costs, plus post-award interest.

Notes:

The ICSID tribunal was composed of Juan Fernández-Armesto (President appointed by the Chairman of the Administrative Council, Spanish national), Alexis Mourre, (claimants' appointee, French national) and Francisco Orrego Vicuña (respondent's appointee, Chilean national). The award is available, in Spanish only, at <http://www.italaw.com/sites/default/files/case-documents/italaw4209.pdf>.

Tribunal holds Romania in breach of Fair and Equitable Treatment

Hassan Awdi, Enterprise Business Consultants, Inc. and Alpha El Corporation v. Romania, ICSID Case No. ARB/10/13

Joe Zhang

In an award dated March 2, 2015, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) found Romania violated the fair and equitable treatment (FET) standard under the 2012 Romania–United States bilateral investment treaty (BIT). The tribunal awarded the claimants over €7.7 million in compensation and legal fees and costs, plus interest, dismissing expropriation claims of more than €400 million.

Background

The proceeding was initiated in 2010 by Hassan Awdi (a U.S. national) and two U.S. companies controlled by him. They alleged Romania breached the BIT in its treatment of their investments, namely Rodipet S.A., a formerly state-owned press distribution and retail company acquired by them through a privatization process, and Casa Bucur, a historic property acquired from Romania and remodelled by them into a luxury hotel and restaurant.

In particular, the claimants challenged two Romanian court decisions. First, a decision by the Romanian Constitutional Court, declaring Law 442 unconstitutional. Law 442 granted Rodipet the right to long-term concessions over the land housing its 1,400 existing news kiosks across the country and future kiosks it established. Second, a decision by the Romanian Supreme Court determining that Casa Bucur should be returned to its original owners.

At the outset of the proceeding, Romania challenged the tribunal's jurisdiction and the admissibility of the claims on several bases. Rejecting all of the jurisdictional challenges, the tribunal held Romania liable for breaching FET standards in two separate occasions, but rejected the claimants' expropriation and denial of justice claims.

"Investment" under ICSID Convention revisited

Romania challenged the jurisdiction of the tribunal claiming the alleged investment by Mr. Awdi and the group of companies directly and indirectly owned by him (Awdi Group) was "a dizzying carousel of transactions" intended to "strip Rodipet of its business and assets" (para. 137). Romania further complained that, during Rodipet's privatization, none of the claimants made any active contribution in the country and alleged that their practice were divestment rather than investment.

The tribunal rejected Romania's contention that the *Salini* criteria, in particular, the requirement of a contribution to the development of the host state, should be read into the term "investment" under the ICSID Convention. It noted that, instead, the meaning of "investment" should be determined exclusively and strictly as set forth in the BIT, with no room for additions or subtractions. It went on to hold that the open-ended asset-based definition under the BIT made the mere existence of an economic linkage between the claimants and the investments sufficient for purpose of jurisdiction.

Romania also challenged the jurisdiction on the basis that Mr. Awdi only owned a minority interest in Rodipet through some indirect arrangement. Noting that the BIT covered investments "owned or controlled directly or indirectly by nationals or companies of the other Party," the tribunal rejected Romania's objection. Recognizing minority shareholders and indirect shareholders both have rights to "bring investment treaty claims [...] within the limits of their shareholding" (para. 194), the tribunal found Mr. Awdi, although a minority shareholder, dominated the decision-making structure of the entity that acquired Rodipet and, thus, gained *de facto* control sufficient for establishing jurisdiction.

Ongoing criminal proceedings insufficient for inadmissibility challenges

Romania objected to the admissibility of the claims, alleging that the claimants' investments were illegal and made in bad faith. Mr. Awdi was subject to three different criminal investigations and proceedings in Romania. He was acquitted by the trial court in one of the proceedings relating to human trafficking charges, but convicted in a separate proceeding, confirmed by an appellate court. The third proceeding was still pending. The tribunal found the diverging outcome of those investigations and proceedings rendered it impossible to draw any convincing evidence to make out Romania's case.

Fork-in-the-road challenge dismissed due to lack of parallel litigation

Romania also raised admissibility objections on the basis that the claimants had sought to resolve the Casa Bucur-related dispute in Romanian courts and, thus, should be barred from submitting it to the tribunal, as the BIT contained a fork-in-the-road provision. Noting that the local proceeding was annulled due to the claimants' failure to pay court fees and was never heard by the courts, the tribunal rejected Romania's challenge and found there was no parallel litigation, hence no room for application of the fork-in-the-road provision.

Repeal of Law 442 amounted to FET breach, but not expropriation or denial of justice

Turning to the merits, the tribunal rejected the claimants' argument that Law 442 itself constituted a land concession, but sided with Romania's contention that the law merely gave them a right to negotiate such concession, which was not covered by the BIT as an investment and, thus, not subject to expropriation claims. In addition, the tribunal rejected the claimants' contention that the Romanian Constitutional Court's proceeding repealing Law 442 was "so egregiously wrong under international law" that would warrant a finding of a denial of justice or of an arbitrary or discriminatory treatment (para. 326).

Even so, the tribunal considered that the repealing of Law 442 coupled with Romania's failure to provide any alternative measures to remedy the situation constituted a breach by Romania of its commitment made in Rodipet's Privatization Contract to make "all reasonable efforts" to facilitate Rodipet's land concessions, which was relied upon by the claimants when making the investment. According to the tribunal, such failure to act, after the enactment of Law 442 had created relevant legitimate expectations, resulted in the breach of the FET standard under the BIT.

Restitution of Casa Bucur to its original owner did not amount to expropriation, but Claimants had a legitimate expectation for the return of the purchase price

The tribunal also found Romania liable for a separate FET breach in relation to the Casa Bucur dispute. The purchase of Casa Bucur was completed when Romania

was reforming its property law and restituting many state-owned historical buildings to their original owners. Evidence showed that Casa Bucur's title had long been contested by different parties. It also showed that the claimants were aware of and expressly assumed the uncertainty regarding the title and the risk of restitution when purchasing the property. The property was eventually taken and returned to its original owner pursuant to a ruling by the Romanian Supreme Court. The claimants argued that the result was a "text book example of an expropriation" (para. 426).

The tribunal disagreed. It found that the claimants were indeed fully aware of the risks and uncertainties when purchasing the property. However, the tribunal did note that the claimants had a legitimate expectation that, if the risk materialized, the purchase price of the property would at least be returned. Thus, the tribunal held that Romania's failure to return the purchase price to the claimants constituted a breach of the BIT's FET standard.

Damages

The tribunal awarded the claimants approximately €7.5 million as compensation for the FET breach regarding Rodipet and approximately €147,000 for the breach regarding Casa Bucur. Both amounts were based on documented sunk cost suffered by the claimants. In addition, the tribunal also ordered Romania to reimburse the Claimants US\$1 million for part of their legal fees and costs as well as awarded approximately €482,000 to the claimants as half of the cost incurred to gaining access to documents seized by the government. All other bases for compensation, as requested by the claimants, including loss of profit and possible future sales, were rejected by the tribunal.

Notes:

The Tribunal was composed of Piero Bernardini (President appointed by agreement of the co-arbitrators, Italian national), Hamid Gharavi (claimants' appointee, French and Iranian national), and Rudolf Dolzer (respondent's appointee, German national). The award is available at <http://www.italaw.com/sites/default/files/case-documents/italaw4208.pdf>.

Tribunal finds an abuse of process in claimants' corporate restructuring; Peru recoups costs

Renée Rose Levy and Gremcitel S.A. v. Republic of Peru, ICSID Case No. ARB/11/17

Martin Dietrich Brauch

In an award of January 9, 2015, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) dismissed on jurisdictional grounds the case of Renée Rose Levy (a French national) and Gremcitel S.A. (Gremcitel) against Peru. The tribunal found an abuse of process in the corporate reorganization carried out by the claimants, whose sole purpose was to gain access to arbitration against Peru under the France-Peru bilateral investment treaty (BIT).

Factual background

Morro Solar is a historical site in Peru, protected under Peruvian law since 1977. In 1995, the Levy Group purchased land in the surroundings of Morro Solar to

develop the Costazul tourism and real estate project. Between 2003 and 2004, the land and the rights to the project were consolidated in claimant Gremcitel, a Levy Group company incorporated in Peru.

In 2001, the Levy Group submitted to the Peruvian National Institute of Culture (INC, in its Spanish acronym) a proposal for the historical delimitation of Morro Solar. The INC decided in 2003 that there were no grounds to lift the site's protected status, requiring the Levy Group to submit a project for prospecting and excavation of its land, and stressing that any urban development plans would depend on INC approval.

The INC also created a commission to study the delimitation of the boundaries of Morro Solar. The studies were concluded by a 2005 report, and a 2007 resolution based on that report formalized the delimitation. Only one day before the 2007 resolution was issued, direct control over Gremcitel was transferred to the claimant, Ms. Levy.

Levy and Gremcitel bring FET claims

For Ms. Levy and Gremcitel, the 2007 resolution imposed on their land a status of intangibility that did not previously exist, frustrating their legitimate expectations to develop the Costazul project. They initiated arbitration in May 2011, alleging that Peru had breached the fair and equitable treatment (FET) standard under the BIT and seeking damages quantified by their expert at US\$41 billion.

The status of claimants as "investors" when the dispute arose

Peru's first objection to the tribunal's jurisdiction was that the claimants had not demonstrated that they were "investors" within the meaning of the BIT and the ICSID Convention when the events giving rise to the dispute occurred. The tribunal reasoned that "the Treaty must be in force and the national or company must have already made its investment when the alleged breach occurs, for the Tribunal to have jurisdiction over a breach of that Treaty's substantive standards" (para. 146). Peru also asserted that "the critical date is the one on which the State adopts the disputed measure, even when the measure represents the culmination of a process or sequence of events" (para. 146). Setting the date of publication of the 2007 resolution as the critical date, the tribunal found that both Ms. Levy (as a French national) and Gremcitel (then directly controlled by Ms. Levy) fulfilled the personal and temporal requirements to qualify as "investors."

Abuse of process precludes tribunal from exercising jurisdiction

Peru argued that control of Gremcitel was transferred to Ms. Levy because of her French nationality, for the sole purpose of allowing the Levy Group to bring a treaty claim in a dispute that was "existing or foreseeable, and otherwise purely domestic" (para. 85). Alleging that this constituted an abuse of process, Peru objected to the tribunal's jurisdiction.

The tribunal reasoned that a corporate reorganization to obtain treaty benefits is not illegitimate in itself. However, carrying it out to invoke treaty protections may constitute an abuse of process if a specific future dispute is "foresee[able] [...] as a very high probability and not

merely as a possible controversy," according to the test in *Pac Rim v. El Salvador* (para. 185). It agreed with the claimants that a finding of abuse of rights was not to be presumed, but required a high threshold, to be met only "in very exceptional circumstances," as per *Chevron and Texaco v. Venezuela* (para. 186). It then followed *Mobil v. Venezuela* in taking into account "all the circumstances of the case" (para. 186) to determine whether, when Ms. Levy acquired control of Gremcitel, the dispute was "foreseeable as a very high probability."

For the tribunal, it was no coincidence that the transfer of Gremcitel's shares to Ms. Levy happened "in a great hurry" and was perfected one day before the 2007 resolution was issued. The tribunal was convinced that the claimants—through an agent with connections in the INC—had knowledge of the contents of the 2005 report and could foresee that the land delimitation was to be formalized in 2007.

The claimants explained that the transfer of shares resulted from a family decision to internationalize the project. However, the tribunal did "not see how transferring shares to a family member with a foreign nationality would internationalize *the project*"; rather, it agreed with Peru that the only intention behind the transfer was to internationalize the "soon-to-be-crystallized domestic dispute," to obtain access to ICSID arbitration (para. 191).

In addition, the tribunal took as "extremely serious" the claimants' attempt to show through documents that were "untrustworthy, if not utterly misleading" that Ms. Levy had become an indirect shareholder in Gremcitel already in 2005 (par. 194). At the hearing, a notary public had admitted that twice, at the request of the claimants, she had altered the dates of notarized documents relating to the transfer of shares. The claimants later relied on these documents to attempt to establish the tribunal's jurisdiction. According to the tribunal, the claimants' "pattern of manipulative conduct [casted] a bad light on their actions" (para. 194).

In view of the circumstances, the tribunal held that the restructuring that made Levy the main shareholder of Gremcitel was an abuse of process, precluding the tribunal from exercising jurisdiction. Based on considerations of judicial economy, it also found that it was unnecessary to address Peru's third jurisdictional objection—namely, that the claimants did not have an "investment," as they could not demonstrate that they had a right to develop the Costazul project, and had not made monetary contributions or undertaken risks.

Peru obtains award on costs

Based on the finding of abuse of process against the claimants, the tribunal ordered them to pay for all costs of the proceeding, including the arbitrators' fees.

The claimants' legal fees and expenses amounted to more than US\$1.5 million, while Peru's amounted to roughly US\$5.3 million. For the tribunal, this disparity showed that the claimants tried to minimize costs, while Peru did not. It ordered the claimants to contribute US\$1.5 million toward Peru's fees and expenses—the same amount that they had spent.

Notes:

The ICSID tribunal was composed of Gabrielle Kaufmann-Kohler (President appointed by the Chairman of the Administrative Council, Swiss national), Eduardo Zuleta (claimants' appointee, Colombian national) and Raúl E. Vinuesa (respondent's appointee, Argentinean and Spanish national). The award is available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5652_En&caseId=C1640.

UNCITRAL tribunal finds denial of justice by Indonesian courts, but denies claimant damages due to unclean hands

Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL Marquita Davis

In an award dated December 15, 2014, an UNCITRAL tribunal found a denial of justice in Indonesia's criminal proceedings in absentia for claimant Hesham T. M. Al Warraq, a Saudi citizen.

Despite a finding that Indonesia breached its fair and equitable treatment (FET) obligations under the investment agreement of the Organization of the Islamic Conference (OIC Agreement), the majority of the tribunal determined that Warraq's expropriation claim was inadmissible as he violated his obligation under the OIC Agreement to observe Indonesian laws. The tribunal dismissed Indonesia's counterclaims on the merits and ordered the parties to bear their own legal expenses and split arbitration costs.

Background

In 2004, Warraq became the sole shareholder in First Gulf Asia Holdings Limited ("FGAH"), a Bahamian company, which had acquired shares in three Indonesian banks that eventually merged into Bank Century. At the time of the arbitration, FGAH held approximately US\$14 million worth in shares in Bank Century.

In October 2008, Bank Century was experiencing liquidity issues. Warraq, as its majority shareholder, and other shareholders signed a letter of commitment to Bank Indonesia, the central bank of Indonesia, to execute turnaround strategies. In November 2008, Bank Century requested short-term liquidity support from Bank Indonesia, which approved a bailout of Bank Century and placed it under "special surveillance" and, later, under the administration of Indonesia's Deposit Insurance Agency.

Several investigations were commenced to address public claims surrounding the legality of the bailout. Bank Indonesia reported Warraq to the National Police for banking irregularities. These were followed by a criminal investigation of Warraq and others in connection with the collapse of Bank Century. A warrant was issued for Warraq's arrest in December 2008, and in March 2010 he was charged with banking fraud, mismanagement and illegal transfer of banking funds. He did not travel to Indonesia for the court proceeding, fearing he would not be afforded a fair trial. His trial was conducted in his absence, he was convicted of various crimes on December 16, 2010, and approximately US\$230,000 of his assets were seized as a result. Warraq initiated arbitration on August 1, 2011.

Warraq qualifies as an "investor" under the OIC Agreement

Warraq argued that he qualified as investor through his ownership of FGAH and his Saudi citizenship, while Indonesia countered that the OIC Agreement only afforded protection for "direct investments." Reasoning that the OIC Agreement did not explicitly require investors to hold capital directly, the tribunal agreed that Warraq qualified as an investor "by his indirect shareholding in Bank Century through FGAH" (para. 517).

Tribunal rejects claim that 2008 bailout constituted an expropriation

The tribunal then examined the claim that Bank Indonesia's bailout of Bank Century and its resulting equity holding in Bank Century amounted to an expropriation of Warraq's investment. Siding with Indonesia, the tribunal held that Warraq had full knowledge of and consented to the terms of the bailout and still maintained control over his pre-bailout shares. It further held that Indonesia had the discretion and authority to initiate the bailout.

Bank Indonesia's supervision of Bank Century was not negligent

Warraq argued that Bank Indonesia's negligent supervision of Bank Century amounted to expropriation. Supported by the statement of Indonesia's expert, who affirmed that the weaknesses in the supervision did not reach the threshold level of negligence, the tribunal dismissed this claim, finding that Bank Indonesia exercised "sufficient diligence in its supervisory functions" (para. 538).

Legitimate expectations and adequate protection and security claims dismissed

Warraq raised a legitimate expectations claim based on Bank Indonesia's supervision of Bank Century. The tribunal rejected the claim declaring that Bank Indonesia's primary duty of care was to the depositors and not to portfolio investors such as Warraq.

It also dismissed the claim that Indonesia breached its duty to provide "adequate protection and security" during the bailout and its supervision of Bank Century. The tribunal stated that the host country had an obligation to provide "no more than a reasonable measure of protection, which a well administered government could be expected to exercise in similar circumstances" (para. 625), and that Indonesia met this standard.

Finally, it dismissed Warraq's claim that Indonesia breached its adequate protection and security duty when it violated his due process rights during his trial, because it determined protection only extended to "investments" and not "investors."

Tribunal rejects argument that the OIC Agreement entitles investors to a fair trial

Article 10 of the OIC Agreement provides "basic rights" for investors. Claimant argued that these encompassed "fundamental rights" and "human and civil and political rights codified in international law" (para. 519), including the right to a fair trial under Article 14 of the International Convention on Civil and Political Rights (ICCPR).

The tribunal determined that “basic rights” referred only to “basic property rights” related to the ownership, use, control, and enjoyment of the investment. However, it noted that it would revisit the argument when it examined the FET claim.

FET provision imported through MFN clause

Although the OIC Agreement contained no FET provision, Warraq sought to import the FET obligation contained in the United Kingdom–Indonesia bilateral investment treaty (BIT) by way of the most-favoured-nation (MFN) clause in the OIC Agreement. Indonesia countered that the MFN provision only applied within the context of the same economic activity and that the two treaties addressed different activities. The tribunal imported the FET clause, reasoning that the object and purpose of the OIC Agreement, as emphasized in the preamble, was investment promotion and protection, which conferred a broad range of rights on investors.

FET and the ICCPR

The tribunal emphasized that states had no obligation under international law to provide a “perfect system of justice but a system of justice where serious errors are avoided or corrected” (para. 620). It stressed that there was a high bar for a finding of a denial of justice and declared that a denial of justice constituted a violation of FET. According to the tribunal, the ICCPR was a relevant vehicle to measure the Indonesian courts’ conformity to international standards on due process to determine whether a denial of justice had occurred. For this determination, without elaboration on the elements of the FET standard itself, the tribunal relied heavily on the ICCPR, which it interpreted as containing binding legal obligations for Indonesia as a state party. It also determined that, beyond explicit provisions, the ICCPR incorporated a binding general “good faith” principle on states.

The tribunal stated that “all persons charged with a criminal offence have a primary, unrestricted right to be present at the trial and to defend themselves” under the ICCPR (para. 564), but qualified that a trial in absentia was not an automatic violation of the ICCPR. It found that Warraq was not properly notified of his criminal charges or conviction, was not examined as suspect, and was barred from appointing legal counsel at his trial and during the appeal process. Thus, Indonesia failed to comply with the basic procedural safeguards outlined in the ICCPR, constituting a denial of justice in breach of FET.

The tribunal dismissed Warraq’s claims that alleged solicitation of bribes by Indonesian officials constituted a FET breach citing both a lack of evidence and a lack of connection between the alleged conduct and deprivation of Warraq’s investment.

Claimant’s breach of the OIC Agreement renders damages claim inadmissible

Article 9 of the OIC Agreement explicitly obligates investors to observe certain norms of conduct and abstain from illegal activity.

The tribunal found that Warraq engaged in six types of banking fraud and breached his Article 9 obligation not

to act in a manner “prejudicial to the public interest” by not having full awareness of his obligations under Indonesian law as the sole member of the Board of Commissioners of Bank Century.

Invoking the doctrine of “clean hands,” a majority of the tribunal held that, because Warraq violated Indonesian law, he deprived himself of the protections under the OIC Agreement, and his damages claim was rendered inadmissible. One arbitrator disagreed that the “clean hands” doctrine rendered Warraq’s claims inadmissible, as his illegality did not relate to the acquisition of his investment. He stated that Warraq should be entitled to damages for legal expenses he incurred connected to his wrongful conviction.

Tribunal affirmed jurisdiction over counterclaims, but dismissed all on the merits

Based on a specific authorization in the OIC Agreement, the tribunal affirmed jurisdiction over Indonesia’s counterclaims regarding Warraq’s alleged banking fraud. Although the counterclaims were closely related to both the investment and the claims involving the bailout, they failed at the merit stage because Indonesia failed to define Warraq’s personal liability separate from all relevant individuals and entities not parties to the arbitration.

Notes:

The tribunal was composed of Bernardo M. Cremades (President appointed by agreement of the co-arbitrators), Michael Hwang (claimant’s appointee), and Fali S. Nariman (respondent’s appointee). The final award is available at <http://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf>.

After claimant’s notice of withdrawal, the Czech Republic obtains an award of costs
Forminster Enterprises Limited (Cyprus) v. the Czech Republic, UNCITRAL
Joe Zhang

In a final award dated December 5, 2014, an UNCITRAL tribunal decided that the investor could not unilaterally terminate the arbitration proceeding by withdrawing its notice of arbitration and ordered it to reimburse the Czech Republic all costs and expenses incurred in relation to the proceeding.

Background

On January 9, 2014, the Cyprus-incorporated claimant, Forminster Enterprise Limited (Forminster), filed a notice of arbitration against the Czech Republic, claiming that the country had expropriated Forminster’s investment in breach of the Czech Republic–Cyprus Bilateral Investment Treaty (BIT). The Czech Republic acknowledged receipt of the notice of arbitration on January 21.

Only a few weeks later, on February 6, Forminster sent a notice of withdrawal to the Czech Republic, stating that it would change the forum “to take another course of action” (para. 14). Forminster claimed in the same letter that, since the arbitral tribunal had not been constituted, the proceeding should be terminated without prejudice upon delivery of the letter.

On February 26, the Czech Republic answered Forminster’s

notice of withdrawal, objected to the termination of the proceeding and reserved its rights to claim for costs.

One month later, a three-person tribunal was constituted under the 1976 UNCITRAL Arbitration Rules (UNCITRAL Rules).

On July 10, the Czech Republic filed its first and only submission, requesting the tribunal to terminate the proceeding and to award it all costs and expenses incurred in relation to the proceeding.

In its submission of August 11, Forminster argued that the proceeding should have been terminated upon its notice of withdrawal either as a consequence of the notice itself or as the proceeding had become “unnecessary” within the meaning of Article 34(2) of the UNCITRAL Rules. It further argued that no cost should be awarded to the respondent.

Since neither of the parties disputed the facts giving rise to the dispute, the tribunal limited the subject matter of the arbitration to the termination of proceedings and the Czech Republic’s claim for costs.

Unilateral termination unacceptable

The tribunal first rejected Forminster’s argument that it was entitled to unilaterally terminate the arbitral proceeding by a notice of withdrawal, prior to and without the constitution of an arbitral tribunal. The tribunal found such argument would allow Forminster to walk away from respondent’s claim for costs, a result that would be “unacceptable by any standards” (para. 70).

Although acknowledging that the UNCITRAL Rules allowed a tribunal to terminate the proceeding when it deemed the proceedings became “unnecessary,” the tribunal refused to apply such provision as it saw that the respondent still had “a legitimate interest in asserting its claim for costs” (para. 77) and that the proceeding could not be terminated before such claim for costs was determined.

The Czech Republic’s claim for costs

The tribunal established its jurisdiction to hear the claim for costs, which the Czech Republic had timely reserved and later presented. It then found that the Czech Republic incurred significant costs due to Forminster’s failure to prosecute its claims after filing its notice of arbitration. Consequently, the tribunal held that the Czech Republic was entitled to an award on those costs.

The costs claimed by the Czech Republic were partly incurred prior to 2014, concerning a previous proceeding initiated by Forminster. The tribunal rejected that portion of the claim, as the Czech Republic failed to demonstrate how those costs related to the 2014 proceeding. However, the tribunal awarded the Czech Republic all of the remaining amount, as it took the view that “fairness requires that the amount of costs awarded to the Respondent in relation to the year 2014 should not be further reduced on the basis that the Respondent failed to recover any costs [incurred in the previous years].”

The costs awarded to the Czech Republic amounted to approximately €12,700 for in-house and external counsel and to €20,000 for the arbitration costs it had deposited in advance. The tribunal indicated that, in studying the file and making three procedural orders and the final award, the three arbitrators spent 80 hours altogether on the case.

However, the tribunal did not apply the hourly rate of €400 it had previously established (para. 22), which would have resulted in arbitration costs of €32,000. Instead, allocating fees of €8,000 for the president of the tribunal and €6,000 for each of the party-appointed arbitrators, the tribunal indicated that the entire deposit of €20,000 had been expended.

Notes:

The tribunal was composed of Paolo Michele Patocchi (President appointed by agreement of the co-arbitrators), Martin Hunter (claimant’s appointee), and August Reinisch (respondent’s appointee). The award is available at <http://www.italaw.com/sites/default/files/case-documents/italaw4109.pdf>.

German investor’s claim against the Philippines over Manila airport concession fails for the second time at ICSID

Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/11/12
Matthew Levine

A second arbitration tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has reached the award stage in a long-running dispute between German multinational Fraport and the Republic of the Philippines.

The ICSID tribunal found that illegalities associated with Fraport’s initial investment resulted in a lack of subject matter jurisdiction under the 1997 Germany–Philippines bilateral investment treaty (BIT). At the same time, the tribunal declined jurisdiction over counterclaims pertaining to Fraport’s alleged corruption and fraud.

The tribunal ordered Fraport to pay US\$5 million towards the fees and costs of the Philippines, in a partial application of the “loser pays” principle.

Background

The Philippine government of then President Ramos decided in the early 1990s to establish a third passenger terminal at Manila’s main airport. A local consortium successfully bid for the project and incorporated Philippines International Air Terminals Co., Inc. (PIATCO) to hold the concession agreement.

Fraport, an experienced airport operator, purchased stock in both PIATCO and a “cascade” of Philippine companies holding interests in PIATCO in 1999. Between 2001 and 2002, the relationship between PIATCO and the government soured. In November 2002, as construction of the new terminal neared completion (according to Fraport), then President Macapagal-Arroyo announced that the concession agreement was legally invalid and would not be honoured. Subsequently, the Philippine Supreme Court declared the concession to be void from the beginning. Pursuant to expropriation procedures under domestic law, a court transferred

possession to the government, which began operating the new terminal in 2008. Domestic court proceedings to determine the amount of compensation are still ongoing.

In 2007 a first ICSID tribunal dismissed Fraport's claims under the Germany–Philippines BIT finding that it had circumvented a domestic law (namely, the “Anti-Dummy Law”). In 2010, however, an ICSID *ad hoc* committee annulled the 2007 award.

Following the annulment of the 2007 award, Fraport filed a new request for arbitration with ICSID in 2011.

Admission is condition precedent of investment

The Philippines objected to the tribunal's jurisdiction on the basis that Fraport's venture had not been accepted in accordance with domestic law and therefore did not qualify as an investment under the BIT.

Article 1(1) of the BIT defines “investment” as “any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State.” While Fraport attempted to argue that this language should be understood as an “admittance clause,” the tribunal accepted that it was a “legality requirement.” The tribunal then noted *EDF International and others v. Argentina* and observed: “even absent the sort of explicit legality requirement that exists here, it would be still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment” (para. 332).

Investment not admitted due to violation of domestic law

The Philippines successfully argued that the share agreements through which Fraport invested in PIATCO and its affiliates triggered violations of a domestic law. The Anti-Dummy Law prohibits foreign intervention in the management, operation, administration, or control of a public utility; however, Fraport's share purchase agreements dictated that the Philippine shareholders in PIATCO would in certain circumstances act upon Fraport's recommendation. The tribunal agreed that these arrangements violated domestic law and that Fraport had not been “admitted” in accordance with Article 1(1) of the BIT. There was therefore no “investment” for the purpose of the tribunal's jurisdiction.

Fraport unsuccessfully suggested that the share agreements constituted mere “planning” to intervene in management, operation, administration, or control of PIATCO and that such planning was insufficient grounds for the tribunal to find a violation of domestic law. Fraport also stated that it had amended the offending shareholder agreements, but the tribunal found that at domestic law the original breach could not be cured. Finally, the tribunal did not accept that Fraport had merely relied in good faith on the advice of local counsel. Instead, it found that it had been made aware of the illegality and nonetheless decided to take a risk.

Allegations of corruption and fraud not substantiated

The tribunal also considered whether jurisdiction was vitiated and the claims were inadmissible as a result of Fraport's corruption and fraud. It held that, in view of the difficulty of proving corruption by direct evidence, circumstantial evidence could be considered, but that it must be clear and convincing so as to reasonably make one believe that the facts, as alleged, have occurred. In this case, upon review of the submissions and the underlying evidence, the tribunal was not satisfied that the standard had been met.

No jurisdiction over counterclaims

The Philippines raised twelve counterclaims, primarily on the basis that the delayed completion of the new terminal was attributable to Fraport or PIATCO. It argued that the reference to “all kinds of divergencies [...] concerning an investment” in Article 9 of the BIT represents the parties' consent to arbitrate counterclaims. It further argued that the close factual connection between the original claim and the counterclaims means that the counterclaims arose directly out of the subject matter of the dispute for the purpose of ICSID Arbitration Rule 40(1).

Upon finding no jurisdiction over Fraport's claims, however, the tribunal found that it consequently lacked jurisdiction over the respondent's counterclaims, in view of their necessary connection with the subject matter of the dispute, pursuant to Article 46 of the ICSID Convention.

“Loser pays” principle appropriate to certain extent

The tribunal noted that, while traditionally the parties in investment arbitration bear their own legal fees and share the arbitration costs equally, there have been a number of cases that have departed from this principle, awarding fees and costs on a “loser pays” basis. In the circumstances of this particular arbitration, it found the application of the “loser pays” principle to be appropriate to a certain extent, and ordered Fraport to pay US\$5 million towards respondent's fees and costs.

Notes:

The tribunal was composed of Piero Bernardini (President appointed by agreement of the parties, Italian national), Stanimir A. Alexandrov (claimant's appointee, Bulgarian national), and Albert Jan van den Berg (respondent's appointee, Dutch national). The final award of December 10, 2014 is available at <http://www.italaw.com/sites/default/files/case-documents/italaw4114.pdf>.

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resources and events

Resources

IISD Handbook on Mining Contract Negotiations for Developing Countries, Volume I: Preparing for Success

By Howard Mann, Published by the International Institute for Sustainable Development, April 2015

Recognizing the need for a tool to help guide developing countries through the process of negotiating investment contracts with mining companies, this handbook seeks to assist government officials to identify their needs and goals and to prepare themselves to negotiate effectively, with the goal of creating maximum shared value from mining for developing countries. The work distills the experience of the author and colleagues in developing and delivering training programs, curricula, model contracts, and reviews of international best practice in developing countries and with international institutions. Part 1, the introduction, presents the orientation and structure of the handbook. The main goal of Part 2, on legal context, is to note how mining contracts fit into the legal context of three forms of legal sources relating to large mining investments: domestic law, investment treaties and mining contracts. Part 2 also considers how the handbook relates to the Model Mining Development Agreement (MMDA) of the International Bar Association (IBA). Part 3, on shifting from win-lose to win-win-win paradigms, addresses changing assumptions, such as the recognition of the need for a social license to operate and the legitimacy of community needs and objectives. Part 4 sets out key steps to prepare for negotiations, including: understanding the full economic value of the resource and the proposed project, identifying needs and opportunities of the developing country relating to the specific project, clarifying the role of domestic law, preparing internally for the negotiations (strategy, objectives, goals), building capacity in the negotiating team, managing the negotiating process with the company, and managing the political side. Available at <https://www.iisd.org/publications/iisd-handbook-mining-contract-negotiations-developing-countries-volume-1>

Resistance and Change in the International Law on Foreign Investment

By M. Sornarajah, Published by Cambridge University Press, April 2015

Since the 1990s, conflicts within international law on foreign investment have arisen as a result of several competing interests. The neoliberal philosophy ensured inflexible investment protection given by a network of investment treaties interpreted in an expansive manner. However, NGOs committed to single causes such as human rights and the environment protested against inflexible investment protection. The rise to prominence of arguments against the fragmentation of international law also affected the development of investment law as an autonomous regime. These factors have resulted in some states renouncing the system of arbitration and other states creating new treaties which undermine inflexible investment protection. The treaty-based system of investment protection has therefore become tenuous, and change has become inevitable. Emphasizing the changes resulting from resistance to a system based on neoliberal foundations, this study looks at recent developments in the area. The book places in their political context the changes in international investment law in response to resistance, explains the rapidity of changes in the light of economic theories and their dismantling when the theories do not work, and highlights the instrumentality of law as a purveyor of power and economic theory. Available at

<http://www.cambridge.org/us/academic/subjects/law/private-law/resistance-and-change-international-law-foreign-investment>

Foreign Investment and the Environment in International Law

By Jorge E. Viñuales, Published by Cambridge University Press, April 2015

Conflicts between foreign investment law and environmental law are becoming increasingly frequent. On the one hand, the rise of environmental regulation poses significant challenges to foreign investors in several industries. On the other, the surge in investment arbitration proceedings is making states aware of the important litigation risks that may result from the adoption of environmental regulation. This study of the relationship between these two areas of law adopts both a policy and a practical perspective. It identifies the major challenges facing states, foreign investors and their legal advisers as a result of the potential friction between investment law and environmental law and provides a detailed analysis of all the major legal issues on the basis of a comprehensive study of the jurisprudence from investment tribunals, human rights courts and bodies, the International Court of Justice (ICJ), the World Trade Organization (WTO), the International Tribunal for the Law of the Sea (ITLOS), the Court of Justice of the European Union (CJEU) and other adjudication mechanisms. The book analyzes international jurisprudence beyond investment cases, to cover cases decided by many different tribunals, courts and bodies. Finally, it provides a balanced and reliable account of the current state of the law that avoids activism and disentangles “hard” law from progressive development. Available at <http://www.cambridge.org/us/academic/subjects/law/public-international-law/foreign-investment-and-environment-international-law>

Events 2015

May 27

ISDS: A WAY FORWARD – JOINT SEMINAR OF THE AIA, THE ARBITRATION INSTITUTE OF THE SCC AND THE BRUSSELS DIPLOMATIC AGENCY, Vrije Universiteit Brussel, Brussels, Belgium, <http://sccinstitute.com/media/56088/isds-a-way-forward-pdf.pdf>

June 2–3

OECD FORUM 2015: INVESTING IN THE FUTURE: PEOPLE, PLANET, PROSPERITY, OECD, Paris, France, <http://www.oecd.org/forum>

June 8–19

EXECUTIVE TRAINING PROGRAM ON EXTRACTIVE INDUSTRIES AND SUSTAINABLE DEVELOPMENT, Columbia University, New York, United States, <http://ccsi.columbia.edu/2013/12/14/executive-training-program-on-extractive-industries-and-sustainable-development>

July 10

EXPERT ROUNDTABLE ON INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT, University Panthéon-Assas, Paris, France, <http://cred.u-paris2.fr/investmentlaw2015>

July 13–17

EXECUTIVE TRAINING ON INVESTMENT ARBITRATION FOR GOVERNMENT OFFICIALS, Columbia University, New York, United States, <http://ccsi.columbia.edu/2013/12/12/executive-training-on-investment-arbitration-for-government-officials>



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