



Special Issue: Investor-State Contracts and Sustainable Development

Rethinking investor-state contracts through a sustainable development lens

by Lorenzo Cotula

Stabilization in investment contracts: Rethinking the context, reformulating the result

by Howard Mann

Principles for responsible contracts: Integrating the management of human rights risks into investor-state contract negotiations

by Andrea Shemberg

Going public to improve investment in agriculture

by Carin Smaller

Foreign investment contracts in the oil & gas sector: A survey of environmentally relevant clauses

by Kyla Tienhaara

Also in this issue: News briefs, summaries of recent arbitration awards and decisions, resources and events.

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editor's note

Investment law, policy and sustainable development—this is the remit we have set for ourselves at Investment Treaty News. In practice, however, we have tended to focus on a particular aspect of the international investment law regime: international investment treaties. Yet, international investment law and policy also comprises two other important components: the domestic laws that apply to foreign investors, and the contracts between an investor and host state. All three components are intrinsically interlinked, and have significant implications for the balance of rights and obligations between investors and states.

In this issue of ITN, we turn our attention to investor-state contracts, also known as host-government agreements or investment contracts. In the following pages we gather the views of experts who are thinking critically about these agreements—how they relate to sustainable development, where they are lacking and how they can be improved.

The first article by Lorenzo Cotula, a senior researcher at the International Institute for Environment and Development, explains how contracts matter to sustainable development, given that they contribute to defining the quality of investment and its ability to improve livelihoods while protecting the environment. IISD's Senior International Law Advisor, Howard Mann, builds on this article by calling for a reassessment of the objectives behind so-called stabilization provisions, which are often included in investor-state contracts, especially in developing countries, to reduce investors' risks.

Throughout these pages you will see reference to the work of Professor John Ruggie, the recent United Nations Special Representative on Business and Human Rights, who has had a considerable impact on shaping how governments and businesses view their respective duties and responsibilities to protect human rights. In another of our guest articles, Andrea Shemberg, Professor Ruggie's former legal advisor, highlights an aspect of that work that relates to investor-state contracts: a set of principles for responsible contracts, along with guidance for negotiators.

Our final two articles identify scope for improvement. The first, by IISD's legal advisor on agriculture and investment, Carin Smaller, makes the case for governments to allow more public scrutiny of investor-state contracts in the agriculture sector. Despite the strong public interest in long-term agricultural deals between governments and foreign investors, the contracts involved usually remain secret.

Finally, we benefit from Professor Kyla Tienhaara's review of environmental provisions in oil and gas contracts. Her assessment of contracts from the last 15 years reveals multiple provisions that relate to the environment, although these are often overly vague. Indeed, in some cases the contracts signed today look little different from those drafted several decades ago.

This is not the first time we have devoted coverage to investor-state contracts, nor will it be last. Nonetheless, we are pleased to have brought together some of the leading experts on the issue, and we hope their ideas spark further debate.

As always, we welcome feedback and written contributions. Please direct these to dvisdunbar@iisd.org.

Best wishes,
Damon Vis-Dunbar
Editor

Rethinking investor-state contracts through a sustainable development lens

Lorenzo Cotula

feature 1



Why contracts matter

In recent years, economic liberalisation, improved transport and communication systems, and the global demand for energy, minerals and agricultural commodities have fostered investment in agriculture, mining and petroleum projects in many poorer countries. For some commentators, this trend provides new opportunities to promote growth, generate public revenues and create employment in countries that have limited alternative development options. Similarly, investors often emphasise benefits like job creation and social infrastructure development, partly as a way to promote local support for their operations. Other commentators stress the major risks involved in natural resource investments. For example, people may lose key livelihood assets like land, water and grazing, whilst environmental damage may have lasting effects on the resource base and repercussions on public health.

Together with applicable national and international law, investor-state contracts define the terms of an investment project, and the way risks, costs and benefits are distributed. Who has the authority to sign the contract and through what process greatly influences the extent to which people can have their voices heard. Therefore, interrogating these contracts is an important mechanism to ground-test competing claims about natural resource investments (e.g., to what extent are job promises entrenched in legally binding commitments?), to assess the extent to which opportunities are maximised and risks minimised, and to increase accountability in public decision-making.

Of course, contract analysis is no replacement for empirical assessments of social, environmental and economic impacts: well negotiated contracts may be poorly implemented and produce disappointing results; conversely, an investment may improve livelihoods even if the contract is lacking, though a weak contract means that mechanisms to hold the investor to account are less effective.

Contracts through a sustainable development lens

Sustainable development provides a useful lens to scrutinise investment contracts. In this perspective, for host countries attracting investment is not an end in itself, but a means to an end. The ultimate goal is to improve local livelihoods whilst protecting the environment. While many governments have made efforts to attract more investment, not all investment

is good—the quality of the investment is as important as its quantity. Quality is assessed based on core characteristics of the investment, rather than corporate social responsibility programmes at the fringes. This involves a thorough scrutiny of the social, environmental and economic considerations at stake.

Different people define sustainable development in different ways. Here, sustainable development is defined as the policy imperative to balance economic, social and environmental considerations. This concept has been criticised for being too vague, but it has important implications for key aspects of investment contracts:

- **The contracting process**—from negotiation through to contract management. A critical issue is the extent to which affected people have a voice in decision making, and the public at large can hold governments and investors to account through transparency and public scrutiny. This aspect is linked to Principles 1 and 10 of the 1992 Rio Declaration on Environment and Development, which state that sustainable development entails putting people at the centre of the development process, and that sustainable development issues are best handled with the participation of all concerned citizens.
- The **fairness of the economic deal** between investor and host country, including contractual issues like revenue-sharing, capital contributions, income generation through employment and business links, technology transfer and infrastructure development. With regard to job creation, for example, key issues include: the specificity and enforceability of contractual provisions about job numbers and types (skilled/unskilled; temporary/permanent); and sliding scales whereby more skilled positions are gradually filled by local nationals, with training schedules to ensure that the necessary capacity is in place.
- The degree of **integration of social and environmental considerations**, for instance through impact assessments and applicable standards, and through the distribution of risks, costs and benefits within the host country. Indeed, even a deal that is economically beneficial to the country as a whole is bad news if social and environmental interests are not properly taken into account. This aspect involves minimising negative impacts on the environment and on people's lives, for instance linked to land takings, water abstraction or resource degradation; and ensuring that economic benefits are distributed equitably and used for poverty reduction and broad-based development.
- The **extent to which the balance between economic, social and environmental considerations can evolve** over often long contract durations, for example as ill-designed stabilisation clauses that protect the 'economic equilibrium' of the contract may make it more difficult for host states to take action to improve social or environmental standards (an issue that is further discussed below).

Sustainable development issues vary across different sectors. This is partly due to sectoral specificities. For example, while petroleum operations necessarily involve large-scale investment, in agriculture family farms have proved competitive in many parts of the world, and it should not be assumed that large-scale investment is the way to go. Diversity across sectors is also linked to differences in contractual practice. Revenues are typically crucial in extractive industry contracts, but some agriculture contracts involve no or little land fees—employment and infrastructure are seen as the main benefits, so the content and specificity of clauses regulating these issues is particularly important.

Two examples: Safeguarding Local Resource Rights and Stabilisation Clauses

A couple of examples can help illustrate the implications of using a sustainable development lens. The first concerns safeguards for local rights to land, water and natural resources. Some agricultural investments involve the taking of very large areas of land. Land takings can also occur in extractive industries. Takings can have devastating impacts on people who depend on natural resources for their livelihoods.

Contracts may commit the government to make land available to the investor 'free of any encumbrances'. Such provisions must be read in conjunction with applicable national law. In many poorer countries, the gap between legality (whereby the government may formally own the land and allocate it to investors) and legitimacy (whereby local people feel the land they have used for generations is theirs) exposes local groups to the risk of dispossession and investors to that of contestation. Also, protection of local rights is often weakened by productive use requirements (which undermine local claims to rangelands, hunting-gathering grounds or sacred sites); by wide powers of eminent domain (whereby investments are legislatively considered to be for a public purpose that enables expropriation of local rights); by weak compensation requirements (e.g. whereby compensation is limited to improvements like trees and crops, to the exclusion of land values); and by inadequate social impact or local consultation requirements.

Contracts for irrigation agriculture may also grant the investor enforceable rights to the water needed. In times of water scarcity, these clauses may disadvantage local farmers. As contract durations can be very long, this risk is greater where climate change increases fluctuations in water availability. While some agriculture contracts require the investor to pay water fees, others do not. Lack of water fees can lead to waste and deprives the government of a revenue stream. Where local farmers pay water fees, free water rights constitute a subsidy to large-scale agriculture.

From a sustainable development perspective, addressing these issues requires rethinking national law as much as contractual practice. Local landholders must have greater voice in contracting processes affecting their lives. They must also have stronger land rights—for instance through robust impact assessments, tighter public-purpose requirements, protection of rights irrespective of productive use, and compensation tied to restoration of local livelihoods. Where national law falls short, contracts can refer to international standards like those developed by the IFC—but this must be properly resourced and monitored to be effective. While much depends on context, proper water pricing and flexible water allocations according to fluctuating water supply are usually essential in meeting competing water demands.

The second example concerns stabilisation clauses. While contractual practice is extremely diverse, stabilisation clauses usually commit the host government not to change

the regulatory framework governing the investment ('freezing clauses'), or to restore the economic equilibrium of the contract if regulatory change adversely affects the investment ('economic equilibrium clauses'). Stabilisation clauses have received much public attention of late, including through the mandate of the UN Special Representative of the Secretary-General on Business and Human Rights. The mandate produced a landmark study on stabilisation clauses and human rights, and culminated earlier this year in the adoption, among other things, of 'Principles for Responsible Contracts' that specifically address the human rights issues raised by stabilisation clauses.

Proponents argue that stabilisation clauses are primarily aimed at preventing arbitrary host state action that may adversely affect the project. Once most of the investment is made—e.g. after project infrastructure is constructed—the investor becomes vulnerable to arbitrary regulatory changes that may undermine the project, especially in countries where political risk is high.

But if not properly formulated, stabilisation clauses may restrict the ability of the host state to improve social or environmental standards. The balancing of economic, social and environmental considerations required by sustainable development evolves, for example as social needs and sensitivities change, new hazards are discovered, or new technologies are developed that more effectively mitigate social and environmental risks. Many contracts have long durations, and social and environmental safeguards are currently weak in many poorer countries. Examples of regulatory changes that may adversely affect ongoing investments include carbon taxation to tackle climate change, the banning of hazardous chemicals, or more stringent requirements for land takings or local consultations. Where public finances are strained, an obligation to compensate investors for losses caused by these measures may make it more difficult for host governments to take action needed to protect people or the environment.

Measures to bring stabilisation clauses in line with sustainable development involve using stabilisation clauses only when and to the extent they are genuinely needed to protect investment against arbitrary interference; favouring more flexible types of clauses that emphasise protecting the economic equilibrium and good-faith negotiation, rather than freezing the regulatory framework; and clearly defining the scope of stabilisation to ensure that non-discriminatory, bona fide action in social and environmental matters is not covered by the stabilisation clause.

What next

Ensuring that investment promotes sustainable development requires rethinking aspects of the legal frameworks that regulate investment—including investor-state contracts. And for sustainable development to matter, it must be fully reflected in those legal frameworks. This requires rethinking legal and contractual practice, as illustrated by the examples discussed here. It also requires strong capacity among negotiators, implementers and scrutinisers to translate new concepts into real change.

Author

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The article is based on two reports: Investment Contracts and Sustainable Development—How to Make Contracts for Fairer and More Sustainable Natural Resource Investments (<http://pubs.iied.org/17507IIED.html>); and Land Deals in Africa—What is in the Contracts? (<http://pubs.iied.org/12568IIED.html>).

feature 2

Stabilization in investment contracts: Rethinking the context, reformulating the result

Howard Mann



Over the past two decades, stabilization provisions in investment contracts (and in the domestic law in some developing countries) became a popular demand of investors into developing countries. Rarely used and largely unconstitutional in most developed countries,¹ these provisions essentially limit the ability of governments to have new laws and regulations apply to a foreign investor that is the beneficiary of such a provision.

Andrea Shemberg's study for the mandate of the United Nations Special Representative on Business and Human Rights, Prof. John Ruggie,² categorized stabilization provisions in terms of their scope and nature. With respect to scope, two broad categories were identified: fiscal issues (taxes, royalties, rents, rates of payment for services provided, etc. paid to the government or by end users) and non-fiscal regulatory areas, such as environment, labour, health and safety. Closely related to this is the need to distinguish those provisions that address selling prices of goods or services produced for the government (such as water, highway tolls and electricity), usually under some form of public-private partnership agreement, and the much broader fiscal and non-fiscal provisions that are found, in particular, in natural resources sector contracts. The scope and impact of the former type is significantly narrower and more carefully defined than most stabilization provisions in relation to the extractive industries.

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Precluding a government from regulating on key social and economic development issues or environmental sustainability is clearly not in the interests of promoting sustainable development and enhancing human rights.
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In terms of their nature, Shemberg identified the differences between freezing clauses that freeze the law applicable to an investment as that which existed at the time the investment was made; and financial equilibrium clauses that require government compensation for any costs incurred in

meeting the new legal standards or a waiver from meeting them. While in principle freezing clauses can be more extreme than equilibrium clauses, in practice the impact is the same as most governments cannot afford to pay foreign investors to comply with changes in domestic law applicable to the investment. Nor can governments accept a situation where foreign investors are compensated but domestic businesses are not. Consequently, both of these types of clauses have significant impacts on the ability of governments to enact new legal measures in the pursuit of sustainable development objectives, including the protection and promotion of human rights.

Stabilization provisions were notionally developed to respond to significant political and legal instability that was presumed to exist in some developing countries, thereby making foreign investments too risky. However, they grew to become routinely advocated by organizations such as the OECD and World Bank Group as a means for governments to contribute positively to the “investment environment” for foreign investors. The need to generate such a welcoming investment environment often led to a contest among states born of a second presumption of the need to compete for foreign investors. In effect, their use migrated from addressing political instability to become a standard feature for advocates of an investment-friendly environment.

The rationale for stabilization clauses unraveled

The original rationale for stabilization provisions, it seems, was to use legal mechanisms to address political instability in, primarily, developing countries. This was seen as a requirement for some financing situations as well. Their migration to being seen as a standard feature of a “welcoming” investment environment, and the expanded scope and timelines for many of these clauses (Shemberg notes a 100 year operational time period for one such clause in her article in the present volume of ITN) raise multiple doubts as to their actual ongoing purpose.

A 2009 report by the International Council on Mining and Metals and the Commonwealth Secretariat questions whether the very legal and political stability that these provisions were meant to create may now actually be jeopardized by these provisions.³ One argument in this direction is that such clauses have appeared to lock in illegitimate and often inequitable deals for mining companies. Another is that by creating immutable legal conditions over lengthy periods, political leaders are being forced into more aggressive measures to review, revise or cancel contracts where appropriate adjustments are not

available. In addition, it is increasingly evident that many of the most stringent stabilization provisions have been concluded with governments that may not have been elected, may have military origins and/or may have been subject to significant corruption, supporting the appearance of illegitimacy. Where democratic governments are now coming into more mature and stable circumstances, it is evident that political leaders are being called on to ensure fairer revenue sharing and other beneficial social conditions prevail at ongoing operations. Finally, where stabilization provisions are included in contracts obtained through corruption, it is also now increasingly unlikely that investors will find them enforceable in international arbitration.⁴

In an earlier ITN article Prof Robert Howse suggested that empirical analysis reveals such provisions are largely rent-seeking behavior by investors.⁵ After reviewing several economic studies which conclude that, from an economics perspective, government compensation for the cost impacts of regulatory changes is not efficient, Howse notes that, “If we begin from the default position that compensation for regulatory change is not efficient, then our preliminary conceptualization of a stabilization clause will be that it confers a benefit or rent on the firm.”

In other words, if the investors or their lawyers can get a stabilization provision, they will, as it increases the profit margin.

Shemberg's initial analysis noted above demonstrates that the practice is indeed inconsistent and spotty both across different countries with relatively similar political circumstances, and within countries. This again suggests, in this writer's opinion, that factors other than legal certainty and economic need—as opposed to economic desires of firms—are the key issues in the spread of such clauses. The argument that they are indeed more about negotiating opportunism than critical need must be considered as a major factor.

From stabilization clauses to operational predictability

Stabilization provisions and operational predictability for an investor are not the same thing. While the stabilization clauses were intended to generate operational stability and thus predictability, this has not been the result. Contract reviews and renegotiations are continually taking place. Resource nationalism has expanded rather than contracted during the period of their increased use. Concepts of fairness and equity have grown in their wake and now override the legal value of the clauses anticipated by companies in most political contexts.

Similarly, precluding a government from regulating on key social and economic development issues or environmental sustainability is clearly not in the interests of promoting sustainable development and enhancing human rights. But the analysis of why the focus must change from stabilization clauses to operational predictability takes us much further

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Stabilization clauses can create a disincentive for investors to meet widely accepted business standards.

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than such generalities.

Modern investment theory and practice that incorporates sustainable development principles tells us at least two critical things.⁶ First, no investment today should be made without state-of-the-art technologies relating to the environment and human health being incorporated into the investment. This standard is not defined simply on the basis of legal compliance in the host state. Rather it is based on the fundamental view that it is inexcusable for any investor to use outdated technology, including by shipping outdated technology from one country to install it in another, just because it is legal for it to do so.

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Predictability, at least when married to a proper accounting and monitoring process, enhances stability by encouraging fairness in the allocation of rents from public resources rather than simplistic win-lose formulations.

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Second, every major business management standard today requires the investor to assess, plan for and routinely incorporate technological improvements over the life of a project as it relates to environmental, human health and social development factors, including human rights. Again, this is not just a legal compliance assessment, but a best practice assessment that focuses on improved social and environmental outcomes, and the ongoing reduction of external impacts from the investment. Acting on these management standards requires the investor to incorporate such costs into the financial planning of the investment from the beginning, rather than waiting for a governmental requirement to do so.

Seen in this way, it becomes evident that stabilization clauses can create a disincentive for investors to meet widely accepted business standards. Rather, it would pay an investor to wait for new legislation and pass on the costs to the host government, while the ongoing externalities of such behaviour—environmental or human health damage, for example—are also passed on to the local citizens.

Where does this leave stabilization at the conceptual and pragmatic levels? Perhaps a reconsideration of the underlying objectives behind stabilization provisions is important. For fiscal stabilization, one must ask now if the appropriate goal is complete stability, or whether it should be better understood as predictability? Must the tax and royalty regimes be the same year to year throughout a project, or must the investor and government understand how amounts may vary as the actual factors related to costs, revenues and profits fluctuate so that they are predictable, but variable? The difference is critical.⁷ Stability provisions have been designed to prevent alterations in the share of revenues irrespective of market price, cost inputs, or other factors. Predictability sets out the rules for adjusting rent sharing when significant changes in costs or revenues occur. Predictability, at least when married to a proper accounting and monitoring process, enhances stability by encouraging

fairness in the allocation of rents from public resources rather than simplistic win-lose formulations. Windfall profits, often a key issue in this context, thus become a definable and regulated matter in the contract, rather than a factor that causes the very instability investors seek to avoid.

On non-fiscal issues, the rationale for stabilization has been based on both costs for the investment and the fear of arbitrary changes designed for ulterior reasons relating to the control of an investment. Considering the preceding analysis, however, the cost issue becomes largely a misdirection and reflects the rent-seeking objective that characterizes overly broad stabilization clauses. In the context of human rights, it becomes a barrier to the protection and promotion of such rights in contradiction to the protect and respect principles set out by Prof. Ruggie.⁸ As confirmed more directly in the Responsible Contracting documents issued by Prof. Ruggie, investors should not seek to lay off these costs on others.⁹ The examples of this used in the Responsible Contracting report highlight the indivisible linkages between human rights and sustainable development in this context.

That leaves the issue of arbitrary treatment. Here, specific language around arbitrary, or arbitrary and discriminatory treatment can and has been fashioned. Both the International Bar Association's Model Mining Development Agreement and Prof Ruggie's Responsible Contracting process recommend similar approaches.¹⁰ The focus here is to return to the original intent of stabilization provisions on significant political risk: to protect the investor against measures that are arbitrary, discriminatory or reflect bad faith of the government; in other words, nefarious conduct by the government rather than legitimate public interest measures.

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Efforts are now underway to re-characterize the notion of stabilization towards predictability and the protection from arbitrary government acts.
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To make this approach effective, one final element is needed: ensuring a safe haven wherein a government is presumed to be acting for good faith reasons, absent proof to the contrary. This can be achieved by clarifying that regulations that take a host state to levels of regulation seen in more advanced regulatory states are not arbitrary or discriminatory. These levels may be found in Europe, the United States, Canada or other jurisdictions, or in the limited number of international standards that might be relevant here.¹¹ This safe zone helps make it clear where the responsibility of both governments and industry lie.

Conclusions

Whatever may have been the original intent, it is clear that the focus on expansive stabilization provisions as a “required” element for an investment friendly environment led to a breadth and depth for such clauses that went beyond what sound investment policy would support. Efforts are now underway to re-characterize the notion of

stabilization towards predictability and the protection from arbitrary government acts. This provides a much more limited interference with the right of states to regulate in the public interest, while maintaining a useful protection for investors, when needed. Critically, it also removes stabilization away from the rent seeking behaviour that has characterized investment contract negotiations more broadly. This will be an important part of an overall shift to more balanced contracts between host states and investors.

Author

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Notes

1 It is a widely accepted principle in most developed countries that one legislature cannot bind a future legislature, and that an executive act of government cannot bind a legislative body. Stabilization provisions often violate these precepts.

2 Shemberg, Andrea “Stabilization Clauses and Human Rights”, 11 March 2008, [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf)

3 International Council on Mining and Metals (ICMM) and Commonwealth Secretariat, “Mining Taxation Regimes: A review of issues and challenges in their design and application”, February 2009. See in particular Chapter 3, including Box 3.1.

4 This is the result of an increasing number of arbitration decisions that highlight international corruption as a singular scourge against international public order, rather than notion of business as usual that may have prevailed in a previous era. As a result, arbitrators are increasingly refusing to hear arbitrations based on contracts obtained by corruption of government officials.

5 Howse, Robert, “Freezing government policy: Stabilization clauses in investment contracts”, *Investment Treaty News*, 4 April 2011, <http://www.iisd.org/itn/2011/04/04/freezing-government-policy-stabilization-clauses-in-investment-contracts-2/>

6 See, e.g, ICMM, Sustainable Development Framework, 10 Principles, Principle 2 and 6, at <http://www.icmm.com/our-work/sustainable-development-framework/10-principles>. For a recent iteration on these lines, see the OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in a Global Context, May 2011, Principle 6, Environment and the related discussion, pp. 40-44.

7 The ICMM appears to take a similar approach, referring to the strategic negotiating goal of creating a balanced fiscal regime over the long term of a mining concession, rather than stabilization of the regime. See “Taxing Challenges II: A studied Approach to Minerals Taxation Regimes” ICMM Spotlight Series 13, September 2008.

8 Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 7 April 2011, <http://www.business-humanrights.org/Links/Repository/965591>

9 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators, 25 May 2011, <http://www.business-humanrights.org/media/documents/ruggie/report-principles-for-responsible-contracts-25-may-2011.pdf>

10 Responsible Contracting, *Ibid*, see the discussion under Principle 4 at pp. 12-14; International Bar Association, Model Mining Development Agreement 1.0, Articles 13.2 and 14, April 2011.

11 There are very few such standards with specific details for performance purposes. Still, an array of potentially relevant standards can now be found collected at <http://www.sds.org/archives/links-for-sustainable-development-of-natural-resources/>

Principles for responsible contracts: integrating the management of human rights risks into investor-state contract negotiations

Andrea Shemberg

feature 3

The UN shines the spotlight on business and human rights

In July 2005, the then United Nations Secretary-General Kofi Annan appointed John Ruggie as his Special Representative on Business and Human Rights. Ban Ki-Moon continued the appointment, and this June Ruggie delivered his final report to the Human Rights Council. Ruggie's mandate is highly significant for States and companies because it led to the first-ever policy statements by the UN Human Rights Council regarding the responsibilities of business to respect human rights. In 2008 the Council unanimously endorsed the "Protect, Respect and Remedy" framework outlining States' and companies' respective duties and responsibilities with respect to human rights.¹ And this June, in an unprecedented move, the UN Human Rights Council unanimously endorsed the Guiding Principles presented by Ruggie on how to implement the framework. Together these mark the foundations of what the most authoritative human rights body in the world views as the responsibility of companies and the duties of States to protect human rights in the context of business activity.

But beyond providing these foundational documents, Ruggie also produced a document holding direct significance for investment projects and the international contracts between investors and host States that underpin them. Along with his final report, Ruggie submitted "Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators".² These Principles, specific to the negotiation of investor-State contracts, are the fruit of four years of research and detailed policy discussions with commercial and State representatives, lenders, banks, union representatives, non-governmental organizations, academics and other stakeholders from all over the globe.

While the impact of these Principles on how investment contracts are shaped in the future is hard to predict, they offer a contribution to building a better understanding of the relationship between international investment contracts and human rights.

Ruggie's research on investment contracts and human rights

As Legal Advisor to John Ruggie, I was charged with leading the work on investment contracts. His work in this area stemmed from a heated debate about stabilization clauses and human rights among participants to a consultation on the financial sector. The allegations made at the consultation included that stabilization clauses allow companies to legally exempt themselves from laws and policies aimed at protecting human rights, such as environmental and labour laws. Subsequent to this consultation, Ruggie and the International Finance Corporation (IFC) agreed to cooperate in a joint research project on stabilization clauses and human rights to foster an informed debate on the issue based on empirical findings.

The study examined the question of whether stabilization clauses used in modern investment contracts between investors and host states can either limit the application of new social and environmental regulations to investment activities over the life of the investment, or can be used to shift the costs of compliance to host States.

The findings of the study were published first in a consultation draft in March 2008, and then in a final report in May 2009 called "Stabilization Clauses and Human Rights".³

Some of the key empirical findings include the following:

- a. Contracts examined from the most developed economies (OECD countries) included stabilization clauses, but none of them provided exemptions from future laws. Fifteen percent (two of thirteen) of such contracts offered an opportunity for compensation for compliance with new laws, including social and environmental laws, during the long-term project.⁴
- b. In lesser developed economies (non-OECD countries), 59% of the contracts reviewed (or forty-four of seventy-five) allowed exemptions or the opportunity for compensation for any new law applied to the investment project—including environmental and social laws—irrespective of purpose.
- c. The most prevalent inclusion of exemptions from all future laws was in the contracts for extractive industries from Sub-Saharan Africa. One such contract contained the most sweeping set of exemptions. It provided for exemptions from all new laws for the duration of the contract (fifty years, renewable at the investor's choice for another fifty years).

These and other empirical findings led to the conclusion that "investors and governments continue to conclude investment contracts in which they agree to exempt the investor from—or compensate the investor for the costs of—the application of new laws even when they are designed to promote environmental, social, or human rights goals." Importantly, the data indicate that the formulation of the stabilization clause is much more relevant to its potential to interfere with human rights protection than whether or not such a clause exists.

With these findings, and with a series of unanswered questions stemming from the research, we set out to test the conclusions of the study and to gain further insights into the findings. We organized a series of our own consultations and actively sought out opportunities to engage with those directly involved in negotiating and drafting investment contracts and civil society organizations that monitor human rights issues in the context of investment.

Ruggie's consultations on investment contracts and human rights

We presented the research and discussed the findings to a wide range of stakeholders including large international law firms, investment negotiators from developing countries, relevant representatives of the World Bank Group and of other public institutions supporting investment, international and domestic NGOs, trade unions and academics involved in monitoring investment projects. Consultations were carried out in large multi-stakeholder meetings, single stakeholder meetings, one-to-one settings and small workshops. Consultations allowed us to confirm that our findings were consistent with the experience of practitioners and to reflect on how our work on stabilization clauses could result in useful guidance for States, business and others. Perhaps most importantly, what emerged from our discussions was that an isolated guidance document on stabilization clauses would not offer the best ideas on how to get to the heart of the issue: ensuring rights are respected in the context of investment projects. In June 2009, we convened an expert meeting to discuss how best Ruggie's mandate could use its research and consultations to create something useful.

There were at least two significant findings from the expert meeting that guided Ruggie's work to accomplish the Principles for responsible contracts: (1) that the relationship

between human rights and investment contracts is not well-understood among practitioners or even among human rights professionals; and (2) that human rights risks can be best avoided and mitigated if identified and managed from the earliest stages of investment projects. It was proposed that Ruggie provide a basic awareness tool on a whole set of issues related to contracting and human rights. The tool's main aim would be to assist State and commercial negotiators in thinking about human rights implications early on in projects, and specifically as the parties' obligations and risks are being negotiated. The tool could also be useful to other institutions that support investment projects and civil society organizations or others interested in reviewing and monitoring contracts.

The Principles for Responsible Contracts

The 10 Principles represent a set of key areas where human rights should be considered at the negotiation stage of investment projects. The range of subjects covered includes operating standards, stabilization clauses, compliance and monitoring, transparency and grievance mechanisms for third parties. Each Principle is supported by a brief explanation,

a list of key implications of the Principle, and a negotiator's checklist.

The Principles are based on the premise that respect for human rights in the context of investment projects requires early identification and management of potential negative human rights impacts; the establishment of clear roles and responsibilities for the prevention and mitigation of potential impacts and the remediation of impacts when they occur; appropriate assessments and cost allocations for the prevention, mitigation and remedy of negative human rights impacts; and agreed procedures for managing human rights issues as they arise throughout the life-cycle of the project.

With the publication of these Principles, Ruggie has offered States, commercial investors, lawyers, industry groups, banks, lenders, NGOs and others a guide that should inform how they consider human rights in the context of investment deals. These Principles should also contribute to efforts to foster positive impacts of investment while minimizing any negative impacts on people and societies.

Principles for responsible contracts

1. Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.

2. Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized.

3. Project operating standards: The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project.

4. Stabilization clauses: Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.

5. "Additional goods or service provision": Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities.

6. Physical security for the project: Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.

7. Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.

8. Project monitoring and compliance: The State should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.

9. Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.

10. Transparency/Disclosure of contract terms: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.

Author

Andrea Shemberg, is a former Legal Adviser to the SRSG for Business and Human Rights. This paper is written in her personal capacity and none of the views expressed in this article should be attributed to John Ruggie or to the Mandate of the SRSG.

Note

1 Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 7 April 2011, <http://www.business-humanrights.org/Links/Repository/965591>

2 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations:

guidance for negotiators, 25 May 2011, <http://www.business-humanrights.org/media/documents/ruggie/report-principles-for-responsible-contracts-25-may-2011.pdf>

3 Shemberg, Andrea "Stabilization Clauses and Human Rights", 11 March 2008, [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf)

4 The contract data used in this research came from a sample of then-current investment contracts and model contracts. (The contracts represent actual agreements between government parties and investors. The models represent government starting places for negotiation and may change significantly before actual agreements are reached.)¹ These contracts and models came principally from private international law firms that responded to a request from IFC to participate in the study. These law firms provided a sample of contracts from the year 2000 forward, spanning a broad range of industries and regions of the world including infrastructure, extractives and energy projects.

feature 4

Going public to improve investment in agriculture

Carin Smaller

The public began to hunger for information about investment in the agriculture sector when a massive wave of foreign investment in farmland and water was triggered, in 2008, by a confluence of the biofuels boom, global food crisis, sharp spike in oil prices and the financial crisis. Alarming information started to emerge in the media. The Korean company Daewoo was exposed for trying to take over half the arable land of Madagascar, free of charge. An American Wall Street investor was found to have acquired vast tracts of farmland from a notorious Sudanese warlord. The Chinese government negotiated a lease on millions of hectares of land for palm oil plantations in war-stricken Congo. And the Indian company, Karturi Global, secured 300, 000 hectares of land to export food from famine-prone Ethiopia.

Some of the media reports were later found to be unsubstantiated, exaggerated or false, but the sheer scale and consequences of these investments unleashed a major drive to uncover the truth and ensure responsible and sustainable investment in the agriculture sector.

Today, there is a comprehensive body of information confirming the scale and consequences of recent agricultural investments¹, thanks to the investigative work of journalists, UN agencies, the World Bank, and a vibrant civil society. The World Bank found that reported land deals in 2009 alone, amounted to 45 million hectares. The top targets for investors were countries with weak land governance and often in conflict or post-conflict situations. They include Sudan (4 million hectares), Mozambique (2.7 million hectares), Liberia (1.6 million hectares) and Ethiopia (between 1.3 and 3.6 million hectares).

Despite the information that emerged, governments and foreign investors are still reluctant to be transparent about their investment activities, particularly when it comes to disclosing the details of the contracts. In most cases, the investor-state agreements, also known as host government contracts, remain strictly confidential.

The culture of secrecy that surrounds agricultural land deals raises concerns about government conduct in relation to issues of public interest. The lack of transparency undermines government accountability, and increases the opportunities for corruption and other inappropriate acts. It raises concerns about the right to information (Article 19 of the UN Covenant on Civil and Political Rights). It has potential implications for access to land, water and food for individuals and communities, impacting their human right to an adequate standard of living (the backbone of the UN Covenant on Economic, Social and Cultural Rights, Article 11).²

There is a growing global consensus in favor of contract transparency. This year, both the International Bar Association and the UN Special Representative on Business and Human Rights, explicitly called for transparency in contracts. A set of principles for responsible agricultural investment, prepared by the World Bank, FAO, IFAD and UNCTAD, also call for transparency in accessing land and making investments³. The UN Special Rapporteur on the right to food calls for full transparency in land leases and purchases⁴. The NGO, Grain, is making a major contribution to the drive for transparency, by regularly leaking investment contracts on their website⁵. Twenty four contracts are currently available.

Importantly, there are a few governments who have started publishing contracts or improving legislation on transparency. Liberia is leading the way. When President Ellen Johnson Sirleaf came to power in 2006, she initiated a review and renegotiation of all extractive industry concessions and contracts in the country (agriculture, mining, oil and forestry)⁶. In 2009, Liberia introduced the Liberia Extractive Industry Transparency Initiative Act (the LEITI Act), which requires all payments by individual companies and operating contracts and licenses to be published and reviewed on the LEITI website⁷. This bold step has not deterred investors.

Ghana started publishing contracts in the oil sector, and countries such as East Timor, Peru, Ecuador and Ethiopia, have started making certain contracts public⁸. A number of countries, for example, Sierra Leone, Ghana and Liberia, require large investment projects to be ratified in parliament, ensuring a layer of public scrutiny.

While certain provisions in contracts can contain sensitive commercial information that may require a level of confidentiality, this can be resolved through restricted confidentiality clauses. It does not justify keeping all information about large-scale agricultural projects outside the public domain. In fact, the scale of these projects and the extensive use of land and water resources, go beyond simple business transactions. They form the basis of the host country's economic and social development strategy, and therefore require public participation and scrutiny. If contracts are made public, there is a much greater chance that the terms of the deals will be more fair and balanced. There is less risk for corruption and bribery, and more likelihood for community support. Ensuring that foreign investment operates within a sound economic, legal and public policy framework is essential. Being open and transparent is a good starting point.

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Notes

1 Studies were undertaken by the Food and Agricultural Organisation (FAO), Foodfirst Information and Action Network (FIAN), German Agency for International Cooperation (GIZ), Grain, International Food Policy Research Institute (IFPRI), International Fund for Agricultural Development (IFAD), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Land Coalition, Land Deals Politics Initiative, Oakland Institute, Oxfam International, UN Conference on Trade and Development (UNCTAD) and the World Bank.

2 Carin Smaller and Howard Mann, *A Thirst for Distant Lands : foreign investment in agricultural land and water*, International Institute for Sustainable Development (IISD), 2009

3 *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources*, World Bank, FAO, IFAD and UNCTAD, January 2010

4 Olivier De Schutter, *Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge*, UN Special Rapporteur on the right to food, June 2009

5 http://farmlandgrab.org/home/post_special?filter=contracts

6 Peter Rosenblum and Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries*. Revenue Watch Institute, 2009

7 LEITI Secretariat, *EITI Case Study: Addressing the Roots of Liberia's Conflict Through EITI*, 2009; LEITI Act 2009:

8 op. cit Rosenblum and Maples, 2009

Foreign Investment Contracts in the Oil & Gas Sector: A Survey of Environmentally Relevant Clauses

Kyla Tienhaara

feature 5



The oil and gas industry faces increasingly strict environmental standards in developed countries. However, the majority of the world's proven oil reserves are in developing countries and economies in transition, which often lack sophisticated regimes for environmental protection. Even when legislative frameworks are well developed, there are often deficiencies in capacity and an unwillingness to monitor and enforce environmental regulation.

This article shines a light on a poorly understood domain of environmental regulation: the foreign investment contracts signed between international oil companies (IOCs) and host states, which allocate rights to explore for and exploit hydrocarbons within an area of land (or an offshore block) over a fixed period of time. In a 1994 monograph, Zhiguo Gao noted that environmental issues had “not received enough attention” in the oil and gas contracts he had reviewed.¹ His conclusion raises the question of whether environmental issues have received greater attention in more recent oil and gas contracts (i.e. those negotiated and signed in the last fifteen years). This question is difficult to answer, not least because foreign investment contracts generally are not disclosed to the public. Many governments' model agreements are publicly available, but these models may be substantially altered or ignored altogether in the negotiation of actual contracts.

In this article, sample clauses from forty-one upstream oil and gas contracts (both onshore and offshore) covering thirty-five countries and the period 1994-2008 were reviewed. Fourteen of the contracts were models.² Given the small number of contracts that were reviewed, and the great variety of clauses that were encountered, nothing can be extrapolated from this preliminary survey about the frequency with which any particular type of clause is likely to appear in oil and gas contracts. Furthermore, in any given situation, a contract should be considered within the broader context of a country's petroleum law, environmental law, and other domestic legislation. The purpose of the article is not to provide a full picture of environmental regulation of petroleum operations in individual countries, but instead to draw attention to how contracts can either bolster or undermine environmental protection efforts

Domestic environmental law

Some reference to domestic environmental legislation is clearly desirable from a public policy perspective. Domestic standards have been developed (in most cases) under a democratic system of rule, have often been designed with local environmental conditions in mind, are familiar to the agencies that are tasked with monitoring and enforcement, and are in the public domain. However, as noted previously, in many developing countries environmental regulation of the oil and gas

sector is still in its infancy and it may be inadequate in some situations. As such, reference in contracts to domestic legislation alone may be undesirable. In any event, it would appear that parties rarely adopt this form. A contract from Peru³ and one from Algeria⁴ were the only contracts in the sample that referred solely to domestic environmental legislation.

In several of the contracts in the sample, the parties instead included a reference to international industry standards and failed to mention the application of domestic environmental law. The advantage from an environmental perspective of referring to international industry standards is that in some cases, they may be higher than, or cover specific issues not addressed in, domestic legislation. Furthermore, reference to international standards allows some scope for change and evolution of the environmental management regime of an investment over time, thus providing a way around a contractual requirement for stability, as will be discussed below.

However, there are serious problems with referring only to industry standards, given their inherent ambiguity. The terminology “good oilfield practices” or “good production practices” is frequently employed in environmental standards clauses, as well as in other types of provisions discussed further below, but these phrases are seldom defined. It is not at all clear where exactly one should look for “generally accepted standards” as there are a multitude of potential sources.

Stabilization Clauses

Stabilization clauses come in various forms. In their most basic form, they “freeze” the law that applies to the investment at the time the contract is signed. A more nuanced version is often referred to as an “economic equilibrium” clause, which requires the government to restore the balance of risks and rewards established in a contract when it is upset by a new regulation or tax. A stabilization clause can be strictly circumscribed to only cover very specific issues, or the parties to the contract can explicitly “carve out” areas such as environmental protection from its application. For example, in a 1997 contract from Kazakhstan, the stabilization clause contains the caveat:

provided, however, that no amendment to this Agreement shall be required hereunder as the result of (i) changes to Laws concerning health, safety or environmental protection that cause such Laws to be consistent with international standards for health, safety or environmental legislation and are applied on a non-discriminatory basis⁵

As Lorenzo Cotula notes, this provision is weakened by its ambiguous reference to “international standards,”⁶ but it is still far preferable to the stabilization clauses found in many contracts and even in model agreements that are worded in such a broad manner that they can stifle any future regulation that might be perceived to undermine the profitability of an investment, including efforts to address corruption, to safeguard human rights (including labor rights), and to protect the environment.

Environmental Impact Assessment Clauses

Environmental Impact Assessments (“EIAs”) and corresponding management plans have become a staple requirement for investment projects in many sectors. Unfortunately, a recent survey of environmental governance in petroleum producing countries commissioned by the World Bank found that “much of the emphasis of the EIA process appears directed towards the approval of oil and gas projects, rather than to a life cycle approach for minimizing environmental and social impact.”⁷ An EIA is typically mandated to be completed after a contract with the state has been signed and most of the contracts

reviewed for this article contained some reference to the need for an EIA. However, the form of the EIA clauses varied widely across the sample from a simple note of the existence of a requirement,⁸ to detailed specifications of what the EIA should cover, who should prepare it, when it should be submitted, and so forth.⁹

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It is disturbing that many governments appear to focus solely on the potential revenue that they can obtain from petroleum production and are willing to simply give away other valuable natural resources under the terms of oil and gas contracts.

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Clauses on Access to Protected Areas

Petroleum operations are particularly contentious when they are located, even partially, within wildlife reserves, parks, or areas of cultural or biological significance. NGOs have long argued that such areas should be off limits to the extractive industries, but most governments are not ready to forgo the potential economic opportunities that the exploitation of these areas offer. This is evident in several of the contracts in the sample. For example, Article 37.6 of Madagascar's 2006 Model Offshore PSC states:

In the event that a portion of the Contract Area is located within a natural reserve area, the Operator shall deploy the necessary efforts in order to minimize the negative impacts on these natural reserves, in accordance with generally accepted environmental practices in the international petroleum industry.¹⁰

This is an incredibly weak provision. A 2004 PSC from Uganda is similarly permissive, but it also contains a bizarre caveat:

In the event of protest from responsible concerned third parties within or outside Uganda regarding the conduct of Petroleum Operations in any National Park or Game Reserve and the consequent effects upon the environment or wildlife, the Government and Licensee shall meet to determine what if any action should be taken.¹¹

Given that this clause provides nothing more than an obligation for the investor and the government to meet, it is questionable why the parties bothered to include it at all.

Clauses on Access to Water & Other Natural Resources

Petroleum operations require natural materials in their construction phase, and significant amounts of water and electricity throughout their operation. While many operations are self-sufficient in terms of energy supply, other natural resources may need to be obtained from within or outside the contract area.

From an environmental and community rights perspective, as well as from an economic-development perspective, it is disturbing that many governments appear to focus solely on the potential revenue that they can obtain from petroleum production and are willing to simply give away other valuable natural resources under the terms of oil and gas contracts. For example,

Article 27.8 of Mozambique's 2007 Model concession contract provides for the right of the investor “to drill for and have the free use of water and impound surface waters.”¹²

Some of the contracts in the sample were completely silent on the issue of access to natural resources, and a small number had more nuanced provisions than those quoted above. For example, a 1994 contract from Ethiopia states that the contractor shall “have the right, subject to the approval of the Minister, to use water in the Contract Area for operational purposes, but the Contractor shall not deprive any land, domestic settlement or livestock watering place of the water supply to which they are accustomed.”¹³ A 2008 Model PSC from Bangladesh goes a step further by requiring that the contractor pay for the natural resources, such as water, that it utilizes.¹⁴

Clauses on Gas Flaring

The World Bank estimated in 2004 that the volume of associated gas being flared and vented globally every year was about 110 billion cubic meters—enough fuel to provide the combined annual natural gas consumption of Germany and France.¹⁵ Although some short-term flaring during testing or in cases of emergencies is accepted as standard practice in the industry, the flaring of more substantial amounts of gas is only practiced in poor countries with limited infrastructure and weak regulatory institutions. Aside from being incredibly wasteful, flaring has a significant impact on local air quality and also makes an appreciable contribution to climate change.

Many oil and gas contracts, even recent models, appear to be lenient on the issue of flaring. For example, the Bangladesh 2008 Model PSC notes in Article 15.3 that:

Any Associated Natural Gas as is not used under Article 15.1 or Article 15.2 and which Contractor does not consider possible to recover economically shall be offered to Petrobangla without any payment to Contractor but at Petrobangla's cost at the well-head or field facilities in the Production Area. To the extent that Petrobangla does not so take any of such Associated Natural Gas, Contractor may flare such Associated Natural Gas provided that such flaring is included in the Development Plan submitted under Article 8.10.¹⁶

Although this clause gives priority to utilization of the resource, there is no requirement for the gas to be re-injected into the ground if it is not taken by the state-owned enterprise, and economic concerns clearly trump environmental ones. Other contracts, such as a 2000 contract from Belize¹⁷ and a 1998 contract from Angola,¹⁸ allow for flaring only if it is authorized by the government. A Ugandan contract from 2004 also follows this model, but includes the caveat that the government's

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The World Bank estimated in 2004 that the volume of associated gas being flared and vented globally every year was about 110 billion cubic meters—enough fuel to provide the combined annual natural gas consumption of Germany and France.

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consent “shall not be unreasonably withheld or delayed.”¹⁹ The most stringent clauses, found in only a few contracts in the sample, restricted flaring to cases of an emergency or for safety reasons.²⁰

Clauses on Responding to Emergencies and Accidents

In 2008, thirty-two companies in the International Association of Oil and Gas Producers reported 2,978 spills greater than one barrel in size, resulting in the release of 18,266 tonnes of oil into terrestrial and marine environments.²¹ In many of the oil and gas contracts in the sample, the parties have recognized that spills and other accidents and emergencies have the potential to occur and should be planned for. As such, as a part or separate from an EIA, an emergency response plan is often required from the contractor.

Some oil and gas contracts also cover three additional elements in respect of emergencies: notification, response, and consequences for failure to respond. In the oil and gas contracts reviewed, notification was limited to the contractor apprising the government of the situation, but not the local community or the broader public. In terms of response, the requirements were often vague (e.g., “take prudent steps”) or simply provided reference to good oilfield practices.²² However, some of the contracts in the sample did additionally stipulate that in the event that the contractor did not act promptly to respond to an emergency or accident, the government had the right to mount its own response and charge the contractor for expenses that it incurred in doing so.



Issues of liability for environmental damage can be complex, especially when multiple parties, including state-owned enterprises, are involved in petroleum production.



Clauses on Liability, Indemnity, & Insurance

Issues of liability for environmental damage can be complex, especially when multiple parties, including state-owned enterprises, are involved in petroleum production. Contracts, therefore, should have provisions that are explicit about who is to be liable for what and to whom. The issue of “who” depends somewhat on the form of contract, but generally it is the contractor or concessionaire (the IOC) who will be liable, except in cases where fault can be directly attributed to the state or state-owned enterprise. If there is more than one contractor involved in the project, then there will likely be a clause that stipulates that they are jointly and severally liable.

The issue of “what” concerns the types of harms (e.g., only death or injury or also “damage to the environment”), the period in which the harms were caused (i.e. no liability for prior environmental damage established in a baseline assessment), and the legal form of the liability (fault, strict, or absolute).²³ Finally, on the issue of to “whom” the contractor is liable, there are typically two separate issues covered in contracts: liability to the state and liability to third parties. In the latter case, the issue is not directly one of liability—contracts cannot affect the rights of third parties under national law—but rather one of indemnity. Through indemnity clauses, IOCs commit to compensate states for any costs incurred resulting from a third-party liability suit.

Most contracts in the sample made specific mention of “pollution” or “environmental damage” in liability/indemnity clauses and adopted a strict liability approach.²⁴ However, a 2002 Cambodian²⁵ contract provided only for fault liability. The most developed liability/indemnity clause in the sample was from a contract signed by Belize in 2000, which required that the contractor contribute one tenth of one percent of the value of the gross annual production to a fund managed by the government “for the sole purpose of indemnification against any or all environmental damages cause during the petroleum operations.”²⁶

An additional issue closely related to liability and indemnity is the requirement for contractors to have insurance coverage. These clauses often specify that insurance should cover “pollution” or “environmental damage.”²⁷ One potential problem with both liability/indemnity and insurance clauses is that the term “pollution” is quite narrow and does not cover all of the various environmental impacts from oil and gas operations.²⁸ Even references to “environmental damage” could be subject to interpretation if not defined in the contract.

Clauses on Decommissioning & Remediation

When an oil operation reaches the end of production, a number of costly activities must be undertaken. The extent to which decommissioning is dealt with in contracts depends somewhat on the contractual relationship between the parties and the expected life of the project. Under some arrangements, states retain ownership over production facilities and may continue operations after the termination of the contract. However, even in such instances, there may be contractual provisions covering decommissioning of installations that are not destined to be taken over by the state.

Clauses on decommissioning and remediation found in contracts in the sample were generally lacking in detail. For example, a 1997 PSC from Benin states:

At the end of the Contract, in any other situation than the abandonment case, the Contractor must take the measures according to the Good Practices of the Oil Industry to restore the environment and the sites where the Petroleum Operations have been performed to their original state on the Effective Date of the Contract, taking into account the rules of the abandonment procedure.²⁹

Although this provision appears quite strict, as it suggests that sites should be restored to their “original state,” it is weakened by the generic reference to good oilfield practices. In addition to an absence of guidelines, there are obviously strong incentives for some companies to “cut and run” or to conduct only superficial remediation to minimize costs. One method for ensuring that decommissioning and remediation are carried out to plan is to use a financial mechanism such as a performance bond or reserve fund. Tanzania is an example of a country that has set up such a regime in its 2008 Model PSC.³⁰

Conclusions

The small sample of contracts reviewed in this article indicates that a significant number of clauses covering a variety of issues—from baseline environmental assessments all the way through to environmental remediation—can be found in modern contracts. Given the monumental increase in environmental awareness and the intense scrutiny that the industry has come under in the two decades, this is unsurprising. What is remarkable is that a handful of contracts still resemble those that Gao criticized for having only a token mention of environmental protection, and that references to ambiguous terms such as “good oilfield practices” remain so pervasive.

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Notes

- 1 Zhiguo Gao, *International Petroleum Contracts: Current Trends and New Directions* 213 (1994).
- 2 From the following countries: Angola, Bangladesh, Brazil, Egypt, Equatorial Guinea, India, Liberia, Madagascar, Mozambique, Pakistan, Tanzania, Timor-Leste, Trinidad & Tobago, and Vietnam. An effort was made to find the most up-to-date model contracts, as governments periodically revise them. However, it should be noted that some of the models were outdated.
- 3 Contract for Hydrocarbon Exploration & Exploitation in the Ucayali Basin Between PeruPetro S.A. & Chevron Overseas Petroleum (Peru) Ltd. (Block 52) (Nov. 8, 1995) (Peru) (on file with the author).
- 4 Contract for the Exploration and Exploitation of Hydrocarbons Between BHP Petroleum (Exploration) Inc. and Sonatrach (Boukhechba Area) (May 31, 1997) (Alg.) (on file with the author).
- 5 Production Sharing Agreement in Respect of the North Caspian Sea (Kashagan) among Agip Caspian Sea B.V.; BG Exploration Limited; BP Kazakhstan Limited; Den Norske Stats Oljeselskap a.s.; Mobil Oil Kazakhstan Inc.; Shell Kazakhstan Development B.V.; Total Exploration Production Kazakhstan; JSC Kazakstancaspianshelf; The Republic of Kazakhstan and JSC National Oil and Gas Company Kazakoil, art 40.2 (Nov. 18, 1997) (Kaz.) (on file with the author).
- 6 Lorenzo Cotula, *Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Toward a Rethink of Stabilization Clauses*, 1 *J. World Energy L. & Bus.* 158, 174 (2008).
- 7 See, e.g., World Bank, *Environmental Governance in Oil-Producing Developing Countries 1* (Eleodoro Alba ed., 2010), http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266963339030/eifd17_environmental_governance.pdf.
- 8 Kashagan PSA supra note 5, at art. 5.2b.
- 9 Ministry of Petroleum and Natural Gas, *Model Production Sharing Contract (Seventh Offer of Blocks)*, art. 14.5 (2007) (India), <http://petroleum.nic.in/help3.pdf>
- 10 Office of National Mines and Strategic Industries, *Model Offshore Production Sharing Contract*, art. 37.6 (2006) (Madag.), <http://www.omnis-madagascar.mg/contrat/offshore%20contract.pdf> (last visited Apr 2, 2011).
- 11 Draft Production Sharing Agreement for Petroleum Exploration, Dev. and Production in the Republic of Uganda, Uganda-Heritage Oil and Gas Limited, art. 5.3 (Uganda), http://www.platformlondon.org/carbonweb/documents/uganda/leaked_Uganda_PSA_Block3A_Heritage_part2.pdf (last visited Apr 2, 2011).
- 12 Gov't of the Republic of Mozambique, *Exploration and Production Concession Contract*, art. 27.8 (2007) (Mozam.), <http://www.inp.gov.mz/content/download/192790/file/Mozambique%20Model%20EPC-Public-April%202007.pdf> (last visited Apr. 2, 2011).
- 13 Ministry of Energy, *Production Sharing Contract (2008) (Kenya)*, [http://www.nockenya.co.ke/images/File/RECENT_DRAFT_PSC_\(3\).DOC](http://www.nockenya.co.ke/images/File/RECENT_DRAFT_PSC_(3).DOC).
- 14 Bangladesh Oil, Gas, & Mineral Corp., *Model Production Sharing Contract*, art. 9.2 (2008) (Bangl.), <http://www.petrobangla.org.bd/MODEL%20PRODUCTION%20SHARING%20CONTRACT%202008-FEBRUARY.pdf>
- 15 World Bank, *Regulation of Associated Gas Flaring and Venting: A Global Overview and Lessons 1* (2004), http://www-wds.worldbank.org/external/default/WDSContentServer/1W3P/IB/2004/07/16/000012009_20040716133951/Rendered/PDF/295540Regulati1aring0no10301public1.pdf.
- 16 Bangladesh Oil, Gas, & Mineral Corp., *Model Production Sharing Contract*, art. 15.3 (2008) (Bangl.), <http://www.petrobangla.org.bd/MODEL%20PRODUCTION%20SHARING%20CONTRACT%202008-FEBRUARY.pdf>.
- 17 RSM Production Sharing Agreement for Petroleum Exploration, Development and Production Between Belize and RSM Production Corporation (Area A), at art. 14.1. (Apr. 3, 2000) (Belize) (on file with the author)
- 18 Production Sharing Agreement Between Sonangol, U.E.E., Texaco Exploration Angola Sumbe Inc., ESSO Exploration & Production Angola (Block 22) Limited & BHP Petroleum (Angola 22) Inc. (Block 22), art. 29.5 (Dec. 16, 1998) (Angl.) (on file with the author).
- 19 Draft Production Sharing Agreement for Petroleum Exploration, Development and Production in the Republic of Uganda by and Between The Government of the Republic of Uganda and Heritage Oil and Gas Limited, art. 19.3 (Jan. 27, 2007) (Uganda) http://www.platformlondon.org/carbonweb/documents/uganda/leaked_Uganda_PSA_Block3A_Heritage_part1.pdf.
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- 23 UNEP Secretariat, *Liability & Compensation Regimes Related to Environmental Damage* (2002); see also A.E. Boyle, *Globalising Environmental Liability: The Interplay of National and International Law*, 14 *J. Envtl. L.* 3, 14. (2005).
- 24 Even in the absence of explicitly listed exceptions within the liability clause, the extremely common "force majeure" clause provides a defense for non-compliance.
- 25 Agreement between the royal government of cambodia, cambodian national petroleum agency, chevron overseas petroleum (cambodia) limited, moeco cambodia co. ltd and woodside south east asia pty. ltd., art. 20.7d (aug. 15, 2002) (cambodia) (on file with the author).
- 26 RSM PSA supra note 17, at art. 27.3.
- 27 Timor-Leste Inst. for Dev. Monitoring & Analysis, *Model Production Sharing Contract Under the Petroleum Act (Timor-Leste)*, at art. 19.2. <http://www.laohamutuk.org/Oil/PetRegime/PSC%20model%20270805.pdf> (last visited Apr 2, 2011),
- 28 *Id.*
- 29 Oil Exploration and Exploitation Contract (Offshore No. 1 and Seme Block) Between The Government and Addax Petroleum – Abacan Benin Consortium, art.18.12 (February 1, 1997) (Benin), <http://www.secinfo.com/duvJ5.68m.j.htm>.
- 30 Model Production Sharing Agreement (2008) (Tanz.), <http://resources.revenuewatch.org/sites/default/files/Model%20Production%20Sharing%20Agreement%202008.pdf> (last visited Apr. 2, 2011).

news in brief

More legal woes for Canada's Feed-in Tariff program for renewable energy

Canada could soon be faced with arbitration for alleged breach of its obligations under the North American Free Trade Agreement (NAFTA). On 6 July 2011, a Texas-based company, Mesa Power Group LLC, served Canada with a Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11 in connection with the Province of Ontario's Feed-in Tariff (FIT) program.

Under Ontario's Green Energy Act of 2009, the FIT program was created to encourage the production of renewable energy. The program, through long-term fixed price contracts with the Ontario Power Authority, guarantees electrical grid access to renewable energy producers. A successful applicant under the FIT program secures a set purchase price over a twenty-year period.

Mesa, which participated in Ontario's renewable energy production program through four of its wind-farm projects in Ontario, alleges that the Ontario Power Authority made last-minute changes to the regulatory framework for awarding the Wind Power Purchase Agreement contracts under the FIT program. The new set of rules had the effect of allowing wind projects to move from one region to another and interconnect with long transmission lines, which disadvantages Mesa's wind-farm investments.

Mesa argues that the changes were made in an arbitrary and non-transparent manner, without notice and due process. The company alleges that Canada breached its obligation under Article 1105 of NAFTA by failing to accord treatment to Mesa and its wind farm investments as required by the international law standard of treatment.

Mesa also challenges the various Canadian and Ontario content requirements and "buy local" performance requirements, which were imposed as a "precondition" to obtain approval of commercial contracts under the FIT program, under Article 1106 of NAFTA, which sets rules on performance requirements.

Additionally, Mesa has brought claims under Articles 1102 and 1103 of NAFTA for providing more favorable treatment, in like circumstances, to a domestic company and to a non-NAFTA party respectively.

Mesa has claimed damages of not less than 775 million Canadian dollars in compensation.

Canada is already facing a challenge against these measures from Japan at the World Trade Organization (WTO). The European Union also recently requested consultations with Canada at the WTO, in connection with its measures related to the FIT program. Both countries allege that Ontario's requirement that projects meet local content requirements in order to qualify for the contracts under the FIT program violates international trade rules.

EU Council's Trade Policy Committee drafts negotiating directives for investment protection

The European Union's General Affairs Council has approved negotiating directives for investment protection provisions in free trade agreements with Canada, India and Singapore. The directives to the European Commission call for agreements

that provide "the highest possible level of legal protection and certainty for European investors in Canada/India/Singapore ..."

The negotiating directives, approved on 12 September 2011, come at a time of tension between the European institutions responsible for the EU's international investment policies. While the 2009 Lisbon Treaty added Foreign Direct Investment (FDI) the EU's common commercial policy, the European Parliament (elected by EU citizens), the European Council (ministers from EU Member States) and the European Commission (the EU's executive body) have offered competing visions on the future shape of the EU's international investment agreements.

As detailed by Marc Maes in the July 2011 issue of ITN, the Member States want the EU's investment agreements to remain in line with their bilateral investment treaties (BITs).¹ In contrast, the European Parliament has expressed concern with a number of the provisions that are standard in the Member States' BITs, on the grounds that they do not strike the appropriate balance between public and private interests, and give too much discretion to international arbitrators.

This has placed the European Commission, which negotiates FTAs for the EU, in a difficult situation. While it receives its negotiating directives from the European Council, the European Parliament must consent any deal it negotiates.

The General Affairs Council, which is a configuration of the European Council, calls for an approach that follows "the Member States' experience and best practice regarding their bilateral investment agreements," including "unqualified most-favoured nation treatment", "fair and equitable treatment", and "other effective protection provisions, such as 'umbrella clause'".

Notably, the directive also states that some areas of investment protection remain "mixed competence" (i.e., negotiating authority is shared between the European Commission and the Member States). These are "portfolio investments, dispute settlement, property and expropriation aspects".

While the General Affairs Council directives focus on investment protection provisions in EU FTAs that are under negotiation, the European Parliament and Council must also resolve their differences over what to do with the existing BITs of Member States. Many Member States are loath to retire or re-negotiate these treaties, but the Parliament has outlined a number of areas where they should be reformed in the public interest, in areas such as transparency and corporate social responsibility. These negotiations remain ongoing.

Australia proceeds with plain packaging legislation on tobacco products, in face of industry challenge

Australia has passed legislation on plain-packaging of tobacco products, with the law set to come into effect in January 2012. The legislation was approved by Australia's Federal Parliament with broad support in August. Under the law, cigarette packages will be stripped of their logos and other elements of branding, to be replaced by graphic health warnings.

The strict regulations on cigarette packages have drawn a strong reaction from tobacco companies, which have challenged on the law on a number of legal fronts, including international investment law.

In June 2011, the tobacco company Philip Morris served a notice of claim against Australia, a first step towards initiating investor-state arbitration under an international investment treaty. Philip Morris says it “will be seeking the loss in value of its investments in Australia that will result from plain packaging,” and that “damages may amount to billions of dollars.”

Philip Morris claims breaches of the Australia-Hong Kong bilateral investment treaty (Philip Morris’ Australian operation is owned by Hong Kong-based Philip Morris Asia Limited).

Philip Morris has also initiated an arbitration claim against Uruguay in reaction to its tobacco packaging regulations. That claim was registered with ICSID in March 2010, and the tribunal held its first session in May 2011. In its case against Uruguay, Philip Morris is alleging violation of the Switzerland-Uruguay BIT. Philip Morris has its international headquarters in Lausanne, Switzerland.

These cases have drawn a public spotlight to the international law framework of investment treaties, and in particular the system of setting disputes through investor-state arbitration.

Writing in the July 2011 issue of *Investment Treaty News*, Matthew C. Porterfield and Christopher Byrnes argue that the “tobacco industry’s aggressive use of investment rules could prove to be an effective strategy for opposing restrictions on tobacco marketing. Yet given the widespread support for tobacco regulations, it seems just as plausible that this strategy could result in a backlash against investor-state arbitration.”²

Indeed, in April 2011, the Australian government announced that it would not be including investor-state arbitration provisions in its future free trade agreements; a decision that was based in part on the threats by tobacco companies over Australia’s plans introduce plain-packaging regulations.³

Azurix petitions the USTR on enforcement of award against Argentina

A water services company announced plans in August to the petition the United States government to pressure the government of Argentina to pay a US\$235 million award.

The Texas based company, Azurix Corp., is submitting a case under Section 301 of the US Trade Act, which allows the US government to retaliate against a foreign government for actions that unreasonable restrict US commerce. A Section 301 case can be initiated by the United States Trade Representative or on the basis of petition by a firm or industry group.

If the petition is successful, this would be the first time that Section 301 has been used to seek enforcement of an investment-treaty award.

In July 2006 an ICSID tribunal unanimously found Argentina liable to the Texas-based company, Azurix Corp. However, Argentina has argued that the award must be recognized by an Argentine court before it can comply with the award – a step that Azurix, and the United States government, believe is unnecessary under the ICSID Convention.

As a remedy under Section 301, Azurix wants the US government to withhold its support for a US\$7 billion loan, which Argentina has requested from the Paris Club of creditor nations. Azurix also wants the US government to block loans from the World Bank and Inter-American Development Bank. Earlier, Azurix asked the USTR to withdraw Argentina’s benefits under the Generalized System of Preferences, which provides preferential duty-free entry for certain products from developing countries. However, the GSP program expired on December

31, 2010, and so far has not been reauthorized by the United States Congress.

Argentina currently faces 34 claims at ICSID, a number of claimants are seeking enforcement of final awards. While the government has insisted it will comply with those awards, claimants have refused to submit those awards to Argentine domestic courts, as Argentina has required.

United States brings first labour case under a trade agreement

The United States Trade Representative (USTR) announced on 9 August 2011 that it has made a formal request for the establishment of an arbitral tribunal under the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR).

The USTR asserts that Guatemala did not effectively enforce its labour laws relating to “the right of association, the right of workers to organize and bargain collectively, and acceptable conditions of work,” thus failing to meet its obligations under the CAFTA-DR.

The dispute started in April 2008, when the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and six Guatemalan worker organizations filed a petition alleging violation of CAFTA-DR obligations by Guatemala after it had apparently failed to enforce its labour laws. The U.S. government, along with the USTR and the Department of Labor and State, then launched an extensive examination of Guatemala’s compliance with its CAFTA-DR commitments. After analysis it concluded that “Guatemala appeared to be failing to meet its obligation with respect to enforcement of labor laws.”

A formal institution of the dispute process followed, with the U.S. government requesting consultations under CAFTA-DR in July 2010. After the failure of two rounds of consultations, the U.S. requested a meeting of the Free Trade Commission on 16 May 2011, in an effort to provide Guatemala another opportunity to resolve the labour rights concerns.

However, when the Commission met on 7 June 2011 there was no breakthrough in arriving at an agreement on an adequate enforcement plan. Therefore, the U.S. government has now requested for the formation of an arbitral panel. This step is being billed as a “strong message” from the Obama administration to its trading partners that it intends to “act firmly to ensure effective enforcement of labor laws.”

Notes

¹ While the EU member states insist on the status quo, the European Parliament calls for a reformed European investment policy”, By Marc Maes, 1 July 2011, <http://www.iisd.org/itn/2011/07/01/while-the-eu-member-states-insist-on-the-status-quo-the-european-parliament-calls-for-a-reformed-european-investment-policy/>

² “Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?”, By Matthew C. Porterfield and Christopher Byrnes, *Investment Treaty News*, 12 July 2011, <http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>

³ For a discussion of Australia’s decision regarding investor-state arbitration, including the role of tobacco packaging regulations, see “Australia’s rejection of Investor-State Dispute Settlement: Four potential contributing factors”, By Kyla Tienhaara and Patricia Randal, *Investment Treaty News*, 12 July 2011, <http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/>

awards & decisions

Mass claim in Argentine bond dispute is granted ICSID jurisdiction

Abaclat and Others (Case formerly known as Giovanna A Beccara and Others) and The Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. Arb/07/5 Damon Vis-Dunbar

An ICSID tribunal has accepted jurisdiction to hear a claim by tens of thousands of Italians who claim to hold securities linked to Argentine sovereign bonds.

Two members of the three-person tribunal (Professor Pierre Tercier and Professor Albert Jan van den Berg) ruled that Argentine government bonds are a protected investment under the Argentina-Italy BIT and the ICSID Convention.

Professor Georges Abi-Saab dissented from the majority decision. However, his decision had not been released by the time ITN went to print.

The dispute relates to Argentina's sovereign debt restructuring in the wake of the country's financial crisis. Argentina's deep recession reached a crisis point in 2001, when it deferred over US\$100 billion of external bond debt.

Some US\$13.5 billion worth of Argentina bonds was held by Italians, many thousands of who are seeking restitution through the World Bank's ICSID arbitration system. The original claim brought together 180,000 claimants; however, the number was brought down to 60,000 after many of the original claimants agreed to an exchange offer with Argentina.

Mass claims under ICSID

Argentina argued that mass claims are incompatible with the ICSID arbitration system; pointing out, for instance, that the tribunal could not keep track of the individual circumstances of the claimants, given their sheer volume.

However, in the opinion of Professors Tercier and Albert Jan van den Berg, the question was not whether the ICSID Convention offered consent to mass claims. As the majority explained, "Assuming that the tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could lose jurisdiction where the number of Claimants outgrows a certain threshold".

Rather, the majority considered whether ICSID arbitration procedures could be adapted to handle mass claims. It considered that question to be one of "admissibility", rather than of jurisdiction, and therefore dealt with the issue after accepting jurisdiction over the claim.

The majority acknowledged the limitations of handling such a large number of claims; the tribunal could not give claimants the same level of individual consideration as it would with single claimants; and both the claimants and Argentina's procedural rights would need to be limited (for example, Argentina could not bring detailed arguments against individual claimants).

However, the majority weighed these shortcomings against the alternative of requesting each claimant to file an individual claim, which would be "practically impossible". Moreover, the majority found the claims to be sufficiently similar to allow for a simplified process of examination.

The majority also rejected Argentina's policy-related reasons for rejecting the claim. In particular, Argentina argued that allowing the claim would complicate current efforts to modernize sovereign debt restructuring.

In the majority's view, such arguments are "inapposite",

explaining that "the real question is whether the investment at stake is protected under a BIT providing for ICSID arbitration in case of breach of such protection. If this is the case ... it would be wrong to hinder the effective exercise of such jurisdiction ... based purely on policy considerations."

Are sovereign bonds an investment?

Before addressing the question of whether mass claims are admissible, the majority had already agreed that Argentina's sovereign bonds could be considered an "investment" under the relevant BIT and the ICSID Convention.

The Argentina-Italy BIT protects a broad range of investments, including financial "obligations", which the majority decided could include government bonds.

In contrast to most BITs, the ICSID Convention is famously silent on the question of how to define the term 'investment'. Some tribunals have relied on the so-called Salini test—four criteria used by the tribunal in *Salini v. Morocco* to help define an 'investment'.

However, the majority in this case rejected the Salini test. In its view, the ICSID Convention aims to encourage investment, and gives countries the "tools" (i.e., investment treaties) "to further define what kind of investment they want to promote".

It also rebuffed Argentina's argument that the investment was not "made in Argentina". As Argentina argued, the purchase price for the Argentine security entitlements went to various intermediaries, such as Italian commercial banks, rather than into Argentine territory.

But the majority countered that, in the case investments of a purely financial nature, the actual place where funds are transferred is less important than "where and/or for the benefit of whom the funds are ultimately used."

Contract vs. Treaty claims

Argentina also argued that the dispute is essentially a contractual matter, with disputes to be settled under the terms of the bonds.

In dismissing that argument, the majority countered that, as a sovereign state, Argentina is different than private debtors; namely, it has the ability to write its own legislation to restructure its debt obligations.

In the majority's view, when Argentina implemented legislation that allowed it to avoid its debt obligations, it acted outside of the particular contractual arrangement outlined in the bond agreements.

As the majority explained, "... the present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general, encompassing but not limited to the Claimants."

Consultations and domestic litigation

The Italy-Argentina BIT calls for the disputing parties to try to settle their dispute amicably through a period of consultation. It also calls on claimants to first try to resolve complaints through the courts of the host country for 18 months, before resorting to international arbitration.

The claimants argued that these are not mandatory steps that must be followed, but rather a list of options for resolving a dispute. The tribunal disagreed, siding with Argentina. The BIT

does not allow claimants to “pick and choose” among these options; rather, it sets out a hierarchy of steps as means to settle dispute.

Nonetheless, the majority went on to admit the claim, despite the fact that the claimants did not pursue their complaint in Argentine courts.

In effect, the majority reasoned that Argentina was not deprived of a fair chance to resolve the dispute through its own courts. For a variety of reasons, the majority concluded that Argentina “was not in a position to adequately address the present dispute within the framework of its domestic legal system.” As such, it ruled that it would be unfair to bar the claim for not complying with the domestic litigation requirement.

Merits phase

In contrast with common practice, Professor Abi-Saab did not submit his dissenting opinion at the same time as the majority decision. Nonetheless, with the majority of the tribunal accepting jurisdiction, the case will proceed to a consideration of the merits.

Given the complexity of the case, the tribunal will consider the merits in two stages: a first phase to identify the core issues to be resolved, and a second phase in which it will focus on settling these issues.

The decision on jurisdiction and admissibility in *Abaclat and Others (Case formerly known as *Giovanna a Beccara and Others*) v. Argentine Republic* is available at : <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf>



Argentina argued that mass claims are incompatible with the ICSID arbitration system; pointing out, for instance, that the tribunal could not keep track of the individual circumstances of the claimants, given their sheer volume.



Tribunal confirms that Venezuela’s investment law does not open door to ICSID

Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela, (ICSID Case No. ARB/08/3)

Damon Vis-Dunbar

A tribunal hearing a dispute between Brandes Investment Partners and the government of Venezuela has declined jurisdiction on the grounds that Venezuela’s foreign investment law does not offer general consent to arbitration at the World Bank’s International Centre for Settlement of Investment Disputes (ICSID).

The 2 August 2011 decision on jurisdiction marks the third ruling by an ICSID tribunal to reach the same conclusion.

In all three cases the claimants have argued that Article 22 of Venezuela’s Law on the Promotion and Protection of Investments (LPPI) offers Venezuela’s consent to ICSID arbitration.¹

Both Brandes and Venezuela put forward a grammatical analysis of Article 22 to support their respective cases. While Brandes argued that the Article clearly offers Venezuela’s

general consent to ICSID arbitration, Venezuela countered that the Article only affirms consent where it already exists in an investment treaty or agreement.

However, these efforts to unravel the meaning of Article 22 were put aside by the tribunal. In its view, “the LPPI is confusing and imprecise”, preventing the ability to discern its meaning based on a grammatical interpretation.

Instead, the tribunal considered the context, circumstances and goals of the LPPI and its Article 22. In all three sets of analysis, it failed to identify a clear consent to ICSID arbitration.

The tribunal acknowledged that the LPPI contains language that is similar to BITs, offering, for example, entitlement to fair and equitable treatment and national treatment. But the tribunal would remark that the clarity of these provisions stood in contrast to the confusing language of Article 22.

The claimant bolstered its argument by stressing that the goal of the LPPI was to attract foreign investment, and pointed out that Venezuela’s publicized its openness to arbitration as means to entice investors (for example, it drew attention to Venezuela’s embassy websites for several countries, including the United States, which make reference to arbitration for foreign investors). The tribunal, however, failed to see consent to ICSID arbitration in these promotional texts.

The tribunal also failed to understand why Venezuela would consent unilaterally to ICSID arbitration in its domestic law at a time when it was at loggerheads politically with the United States. “This point of view is especially difficult to accept considering that many of the prospective investors would have been companies of the United States,” notes the tribunal.

The *Brandes Investment v. Venezuela* decision comes on the heels of a 30 December 2010 jurisdictional ruling in *Cemex v. Venezuela*, in which that tribunal also ruled that the LPPI’s article 22 does not provide consent to ICSID arbitration.² However, CEMEX, a company incorporated in the Netherlands, is protected under the Netherlands-Venezuela BIT, which provides consent to ICSID arbitration. The CEMEX tribunal has accepted jurisdiction on that basis.

Also in 2010, a claim by ExxonMobil against Venezuela was partially excluded on jurisdictional grounds when the tribunal similarly determined that Article 22 did not grant access to ICSID.³ However, other parts of the ExxonMobile claim, which related to events occurring after the company’s shares were transferred to a Dutch-controlled entity, were allowed to proceed under the Netherlands-Venezuela BIT.

In contrast, Brandes is registered in the United States, which does not have a BIT with Venezuela.

The tribunal in *Brandes Investment Partners v. Venezuela* was Rodrigo Oreamuno (president) Karl-Heinz Böckstiegel (claimant’s appointee) and Brigitte Stern (respondent’s appointee).

The award in *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3*, is available at: <http://italaw.com/documents/BrandesAward.PDF>

Argentina found liable in water-concession dispute, but tribunal divided on MFN provision!

Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17

Lise Johnson

In an award issued on 21 June 2011, the tribunal in *Impregilo S.p.A. v. Argentina* determined that Argentina breached the fair and equitable treatment (FET) obligation under the Argentina-Italy BIT.

Argentina has been ordered to pay Impregilo some US\$21 million plus interest as compensation.

In what seems to be a growing trend in investor-state

arbitrations, two of the three arbitrators issued separate opinions, concurring with and dissenting from various aspects of the award.

Background

Impregilo was an indirect minority shareholder in AGBA, a company that operated a water and sewerage services concession in the Province of Buenos Aires. Shortly after AGBA obtained the concession in 1999, it struggled to raise necessary financing, collect fees from customers, and meet its contractual obligations to invest in, expand and improve water and sanitation services in the concession area.

In 2006, provincial authorities terminated the contract and transferred the concession to a state-owned entity, listing a host of contract breaches by AGBA as justification for its decision. In response, Impregilo initiated an investor-state arbitration under the Argentina-Italy BIT, alleging that various actions by provincial authorities frustrating and terminating AGBA's performance of the concession breached provisions of the BIT, including the obligations on FET and expropriation.

Opinions diverge on scope of the MFN provision

Argentina mounted three jurisdictional objections. The arbitrators unanimously dismissed Argentina's arguments that the BIT does not cover derivative claims, adding Impregilo to the line of investor-state decisions allowing shareholders to bring cases based on alleged harms to the companies in which they hold interests.

The tribunal also unanimously disagreed with Argentina's contention that Impregilo's claims were merely contract violations over which the tribunal had no jurisdiction. It determined it had the power to hear allegations of contract breaches to the extent that they also amounted to breaches of the BIT.

The third objection, however, resounded with at least one of the arbitrators and, consequently, adds even more fodder to the current controversy surrounding the proper use and meaning of the most-favoured nation (MFN) provisions.

In this case, diverging opinions on the MFN provision emerged with respect to the Argentina-Italy BIT's requirement that investors pursue their claims before domestic courts for 18 months before bringing the dispute to international arbitration. Impregilo ignored that requirement. It argued that it could bypass the treaty's waiting period without consequence because the MFN provision in the Argentina-Italy BIT allowed it to rely on a "more favourable" dispute settlement provision from the Argentina-US treaty that did not similarly impose an 18-month "cooling off" period.

Two of the arbitrators, Judge Hans Danelius and Judge Charles N. Brower, joined what they characterized as the bulk of investment treaty decisions on the matter and accepted Impregilo's argument on this point.

Professor Brigitte Stern, however, disagreed and wrote a separate opinion elaborating on her reasoning.

In her dissenting opinion, Professor Stern echoed concerns raised in response to other cases such as *Siemens v. Argentina*⁴ and *RosInvestCo v. Russia*⁵ that the MFN provision is being used by investors to "pick and choose" from provisions in the host state's treaties and use the selected clauses to create agreements that in fact do not exist. Professor Stern then devoted a significant portion of her dissenting opinion to developing a legal argument for why MFN provisions should not be used to expand a tribunal's jurisdiction as Impregilo and other cases have permitted.

Tribunal critical of Argentina's conduct during its financial crisis Although Professor Stern wrote that she would not have accepted jurisdiction over the matter, she nonetheless proceeded to evaluate the merits of the claim. In doing so, she joined the other two arbitrators in determining that the government breached the FET obligation. The tribunal

explained that the government's offensive conduct was in failing to adjust the terms of the concession contract in order to accommodate for difficulties AGBA faced during Argentina's financial crisis when the government de-pegged the peso from the dollar and allowed the value of the Argentine peso to float.

Judge Brower wrote separately to explain that he viewed many more aspects of the government's conduct toward the investment as being in breach of the BIT. He also added that he believed that the government's actions had expropriated the investor's property, dissenting from the other two tribunal members' decision to reject that claim.

Raising the profile of another emerging topic and point of contention in investment law, Judge Brower's separate opinion took particular issue with what he characterized as "political" conduct by government officials. Argentinean authorities, he believed, harmed the investment in order to terminate the concession and transfer it back to state control.

In contrast, the majority ruled that even if the government had the "political" goal of transferring water and sewerage services back to public entities, that fact did not establish a breach of the BIT. The majority quoted *AES v. Hungary*⁶ in support of its stance, stating that "the fact that an issue becomes a political matter ... does not mean that the existence of a rational policy is erased." To Judge Brower, however, the political nature of the government's conduct was apparent and damning, and the line from *AES v. Hungary* inapposite.

The tribunal was united in rejecting Argentina's defense of "necessity" under both the treaty and international law. The treaty provision relied on by Argentina requires governments to grant foreign investors who suffered losses as a result of war or emergency equal treatment as domestic investors. According to the tribunal, this provision imposes a non-discrimination obligation on host governments, and is not an exception that could absolve them from liability.

Turning to the defense of "necessity" under customary international law, which the tribunal determined remained available even though no reference was made to it in the treaty, Judge Danelius and Judge Brower concluded it did not apply because Argentina's own economic policies had contributed to the economic crisis it suffered. Professor Stern also agreed that the defense did not apply, but on the basis that the wrongful conduct continued even after the crisis had dissipated.

The award, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, is available at <http://italaw.com/documents/Impregilo.ArgentinaAward.pdf>

The Concurring and Dissenting Opinion of Judge Charles N. Brower is available at: <http://italaw.com/documents/Impregilo.ArgentinaBrowerOpinion.pdf>

Concurring and Dissenting Opinion of Professor Brigitte Stern is available at: <http://italaw.com/documents/Impregilo.ArgentinaSternOpinion.pdf>

Chinese investor receives compensation for expropriation of fish meal business by Peru *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6 **Fernando Cabrera**

An ICSID tribunal has unanimously ordered Peru to pay approximately US\$ 1 million including interest to the Chinese investor Tza Yap Sum in compensation for the expropriation of his fishmeal company, TSG del Perú S.A.C.

The 6 May 2011 decision was only a partial victory for the claimant, who had sought approximately US\$25 million. The tribunal found that Peru's tax authority, SUNAT, acted arbitrarily when it asked banks in the country in January of 2005 to freeze TSG funds and hand them over to the National Bank in order to pay back taxes and fines allegedly owed by the company. SUNAT's actions effectively led to the company's collapse, which the tribunal held was an indirect expropriation under the 1994 China-Peru BIT.

Although the tribunal accepted the claim for expropriation, it disagreed with the claimant's attempt to quantify damages using the Discounted Cash Flow method. According to the tribunal, TSG lacked a sufficient history of positive results to assume it would have continued to make profits into the future. Instead, the tribunal adopted an Adjusted Book Value approach as argued by Peru, sharply reducing the amount of damages awarded to the claimant.

Background

Mr. Tza Yap Shum, a Hong Kong-based businessman, established TSG in 2001, investing approximately US\$400,000 for a 90% stake in the company. TSG began operations the following year, and according to the claimant, between 2002 and 2004 had sales of over US\$20 million per year.

TSG bought fish from Peruvian fishing vessels and had it delivered directly to processing plants on shore, where the fish was processed into fishmeal and exported to Asian markets. Given this business model, TSG never held physical inventory.

In February 2004, SUNAT launched a routine audit of TSG to verify its payments of income and sales taxes. SUNAT determined that TSG had not kept the required up-to-date inventory of its raw materials (fish, and fish meal). Under Peruvian regulations SUNAT was then allowed to estimate TSG's sales and corresponding tax bill, not based on the company's records, but by relying on assumptions and other company and third-party information.

SUNAT determined that TSG had underreported its sales of fishmeal in 2002 and 2003, and had failed to report sales of fish oil during the same years. Based on this conclusion, SUNAT informed TSG on 7 January 2005 that it owed approximately US\$ 3.3 million in back taxes and fines.

On 26 January 2005 TSG appealed the decision. TSG argued that it was a marketer, rather than a producer, and therefore did not keep an inventory. Furthermore, the company said it provided SUNAT with contracts it had with the fishing vessels and the processing plants that detailed how much fish it bought and how much fish meal was produced and exported.

Two days later SUNAT imposed precautionary measures on TSG's assets, informing banks to freeze the company's assets in order to pay the debt.

TSG filed for arbitration in September of 2006 alleging violations China-Peru BIT protections concerning fair and equitable treatment, free transfer of funds, protection of the investment, and expropriation.

Peru objected to the tribunal's jurisdiction on several grounds. In a June 2009 decision on jurisdiction, the tribunal confirmed its jurisdiction but limited it to the expropriation claim because the dispute resolution provision of the China-Peru BIT only grants consent to arbitration for claims of expropriation.

Tribunal's reasoning

The tribunal began its reasoning by acknowledging that great deference must be given to sovereign states when they exercise their regulatory and administrative powers. However such exercise of regulatory power must be carried out in accordance with reasonable legal processes and not in a confiscatory, abusive or discriminatory manner.

The tribunal noted that Article 56 of the Peruvian Tax Code lists thirteen "exceptional circumstances" under which precautionary measures are allowed. Yet the tribunal found that, in violation of its own procedures, SUNAT's audit department asked for precautionary measures without providing evidence that TSG's behavior had met any of the exceptional circumstances enumerated in the law. In doing so SUNAT acted arbitrarily in the view of the tribunal.

SUNAT's actions led to the collapse of TSG's business as the company was shut out of the Peruvian banking system. This,

according to the tribunal, resulted in the indirect expropriation of the company in violation of the China-Peru BIT.

The tribunal went on to add that TSG did not have access to adequate local legal venues to appeal SUNAT's decision. In particular, the Peruvian tax court, to which the claimant appealed, simply looked at whether SUNAT had the authority to ask for precautionary measures and not whether it had exercised this authority properly, the tribunal found.

Each party was ordered to pay their own legal costs, while the arbitration costs were split evenly.

The tribunal was made up of Hernando Otero of Colombia (claimant's appointee), Professor Juan Fernández-Armesto (respondent's appointee), and tribunal president Judd Kessler, chosen by ICSID after the parties failed to agree on a third member.

The award *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, is available in Spanish at: <http://italaw.com/documents/TzaYapShumAward.pdf>suffered from this action.

“

In her dissenting opinion, Professor Stern echoed concerns that the MFN provision is being used by investors to 'pick and choose' from provisions in the host state's treaties.

”

Moldova on the hook for charges levied in free economic zone

Yury Bogdanov v. Republic of Moldova, SCC Arbitration No. V (114/2009)

Damon Vis-Dunbar

The government of Moldova breached the Russia-Moldova BIT when it levied new customs-related fees on a company operating in a free economic zone (FEZ), according to a March 2010 award submitted under the auspices of the Stockholm Chamber of Commerce.

The Russian claimant, Yury Bogdanov, owned a chemical company, Grand Torg LLC, which was registered in a FEZ, where Moldovan law guaranteed that the customs regime applied to the company would not change for a period of ten years. Mr. Bogdanov complained that the introduction of new custom fees broke that stability law, and in turn violated Moldova's investment treaty obligations.

In reply, Moldova countered that the charges were administrative, and should not be considered as customs duties.

However, the sole arbitrator, Bo G.H. Nilsson, a Swedish arbitration specialist, rejected that argument, concluding that the charges were of a considerable scale, and were "quite obviously designed to fulfill the purposes typical for customs duties ..."

The tribunal also found Moldova's actions to be discriminatory, on the grounds that the fees appeared to only apply to Mr. Bogdanov's company (Moldova offered no evidence to demonstrate that other companies were similarly charged). Mr. Bogdanov was awarded 475,386 Moldovan Leu (approx. US\$ 41,000). His original plea for damages was 15% higher, but Moldova argued that any additional income earned by the claimant would have been taxed. Concluding that "the parties have accordingly each been partly successful in the arbitration, but Mr. Bogdanov ... more

successful,” the arbitrator ordered Moldova to pay two thirds of the arbitration costs, and Mr. Bogdanov one third.

As first reported in Investment Treaty News, the same claimant initiated four separate arbitrations against Moldova in 2004-2005.⁷ As far as ITN is aware, only one of the awards in those cases has been made public: a dispute related to a paint-manufacturing company, named Agurdino, which was purchased under a privatization scheme. In that case, the sole arbitrator, Prof. Giuditta Cordero Moss, found Moldova in breach of the fair and equitable treatment standard of the Russia-Moldova BIT.

Notably, the Moldovan government did not participate in the Agurdino arbitration. However, the independent reporting service Investment Arbitration Reporter has reported that Moldova later complied with the 70,000 euro award.⁸ The same news service also reports that Moldova has complied with the most recent arbitration over the fees levied on Grand Torg.

The award *Yury Bogdanov v. Republic of Moldova*, SCC Arbitration No. V (114/2009) is available at: <http://italaw.com/documents/Bogdanovv.Moldova2010Award.pdf>

Tribunal accepts jurisdiction over contract claims against Ecuador, but treaty-based jurisdiction yet to be determined *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6 **Vyoma Jha**

In a 30 June 2011 decision an ICSID tribunal ruled that it has the competence to hear the contract claims brought by Perenco against Ecuador. On the point of jurisdiction over the treaty claims, however, the tribunal deferred its decision to the merits phase of the proceeding. Perenco alleges that a series of legislative measures enacted by Ecuador breached obligations under the France-Ecuador BIT, as well as contractual obligations under two ‘Participation Contracts’ that it entered into for the exploration and exploitation of oil reserves in certain designated areas.

Notably, the tribunal declined jurisdiction with respect to the second respondent, Ecuador’s state oil company, Petroecuador, on the grounds that it was not an independent party to the contracts. It was of the view that Petroecuador was an agent of the State, which administered and supervised contract performance on behalf of Ecuador without receiving any economic benefit.

Background

The dispute arose in 2006 out of Ecuador’s “Law 42”, which obliged contractors with oil participation contracts, such as Perenco, to grant Ecuador a share of their “extraordinary income” from oil sales. Later, a 2007 Decree further increased Ecuador’s participation on unforeseen surpluses from 50% to 99%. Perenco filed a request for arbitration against Ecuador and Petroecuador with the ICSID on 20 April 2008.

In 2009, Ecuador and Petroecuador started coercive measures to collect the outstanding Law 42 payments from Perenco. Following an application by Perenco, the tribunal ordered Ecuador to refrain from collecting the windfall levies, but the order was promptly ignored by Ecuador

Treaty-based jurisdiction is complicated by question of nationality

Ecuador objected to the tribunal’s jurisdiction under the France-Ecuador BIT on the grounds that Perenco was a company incorporated in the Bahamas and not controlled by French nationals.

Perenco, on the other hand, asserted that a chain of corporate ownership led Perenco’s ultimate parent company to being controlled by the late Hubert Perrodo, a French national. It argued that the shares of Perenco International Limited belong to the heirs of the late Mr. Perrodo and therefore are “indirectly” controlled by French nationals.

Interestingly, the tribunal noted that “[i]n this case it is the investment rather than a French investor that has brought the claim and it has sought to adduce evidence of how it is controlled by four non-parties to the arbitration who are nationals of France”.⁹

The tribunal deferred its decision on the nationality of Perenco, following the submission of any travaux préparatoires of the BIT from France. It also directed the claimant to file further evidence in support of its argument that the shares in Perenco’s ultimate parent company form a part of the estate of the late Mr. Perrodo under French Law.

Contract claims advance despite Ecuador’s objections
The second contentious issue related to the tribunal’s competence over the claimant’s contract claims. According to the arbitration provisions of the ‘Participation Contracts’, only technical and/or economic matters could be brought before an ICSID tribunal.

Ecuador contended that Perenco’s claims were primarily of a “legal” nature and failed to constitute “disagreements on technical matters involving economic aspects, or vice-versa”. However, the tribunal had “no doubt” in deciding that the dispute concerning participation percentages of oil revenues qualifies as an “economic dispute relating to the Participation Contract”. Thus, Perenco’s contract claims were held to fall within the jurisdiction of the ICSID and competence of the tribunal.

Finally, the tribunal decided that the claimant’s request to enjoin Ecuador from applying “Law 42” was “premature” as it did not belong to the jurisdictional phase. It, thus, refrained from deciding what remedies might be available should it find that Ecuador breached its treaty obligations. The determination of the proceeding’s costs, like the decision on the tribunal’s competence over the treaty claims, was deferred to a later stage of the arbitration.

The tribunal was made up of Judge Peter Tomka (President), Mr. Neil Kaplan (appointed by Perenco Ecuador Ltd.) and Mr. J. Christopher Thomas (appointed by the Respondents).

The award on jurisdiction in *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (Petroecuador) is available at: <http://www.italaw.com/documents/PerencoJurisdiction.pdf>

Notes

¹ Article 22 reads: “Disputes arising between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement for the promotion and protection of investments, or disputes to which are applicable the provisions of the Multilateral Investment Guarantee Agency (MIGA), or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), shall be submitted to international arbitration, according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of using, if appropriate, the dispute resolution means provided for under the Venezuelan legislation in effect, when applicable.”

² CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15

³ Mobil v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27

⁴ Siemens AG v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004.

⁵ RosInvestCo v. Russian Federation, SCC Arbitration V (079/2005), Award, 12 Sept. 2010.

⁶ AES Summit Generation Ltd. v. Hungary, ICSID Case No. ARB/07/22, para. 10.3.23.

⁷ “Russian investor pursues multiple treaty arbitrations against Moldova in Stockholm”, by Damon Vis-Dunbar and Luke Eric Peterson, Investment Treaty News, 17 February 2006

⁸ “Moldova loses another treaty arbitration with Russian investor, but shows signs of cooperation with the arbitration system”, by Jarrod Hepburn, Investment Arbitration Reporter, Vol. 4, No. 7 May 20, 2011

⁹ Paragraph 97 of the Decision

resources and events

International Investment Arbitration and Public Policy website launched

A website launched in late September, called International Investment Arbitration and Public Policy (IIAPP), offers a searchable database of materials in known arbitrations under investment treaties. Developed by a research team under the coordination of Professor Gus Van Harten of Osgoode Hall Law School, the website allows users to identify cases that engage policy areas such as agriculture, environmental protection, health, industrial policy, public contracting, and taxation. It also includes information on the appointment records of arbitrators, as well as general information on the system of international investment arbitration. The website serves as an open access research tool on investment arbitration and its implications for public policy. Professor Van Harten, the author of "Investment Treaty Arbitration and Public Law", also intends the website to highlight the case for more openness, independence, and public accountability in the international investment-law system. The IIAPP website can be accessed at www.iiapp.org.

World Investment Report 2011

United Nations Conference on Trade and Development, 2011

The United Nations Conference on Trade and Development's (UNCTAD) has released its 2011 edition of its flagship World Investment Report (WIR). The report finds that global foreign direct investment (FDI) inflows rose 5 per cent to US\$1.244 trillion in 2010. However, such flows were still some 15 per cent below their pre-crisis average and nearly 37 per cent below their peak in 2007. With respect to policy developments, the WIR finds that one-hundred-and-seventy-eight international investment treaties were signed in 2010, including 54 new bilateral investment treaties, to reach a total of almost 6,100 agreements. Twenty of the 54 BITs signed in 2010 were between developing countries and/or transition economies, as were four of the 11 other IIAs, a trend possibly related to developing countries' growing role as outward investors. There were at least 25 new treaty-based investor-state arbitrations initiated in 2010 – the lowest number filed annually since 2001. This brought the total of known cases filed to 390 by the end of the year. In 2010, the total number of countries involved in investment treaty arbitrations grew to 83: fifty-one developing countries, 17 developed countries and 15 economies in transition. The report is available at: <http://www.unctad.org/Templates/WebFlyer.aspx?intItemID=6018&lang=1>

International Investment Law and Sustainable Development: Key cases from 2000–2010

International Institute for Sustainable Development, 2011

This book summarizes and analyzes select decisions issued between 2000 and 2010 by arbitral tribunals in investor–state arbitrations. In contrast to other books on bilateral investment treaties (BITs) and other investment agreements, it examines the decisions with the aim of highlighting how they may impact sustainable development. Through such issues as jurisdiction, the interpretation of states' substantive treaty obligations, and the use and availability of defences, the book highlights how the decisions affect the scope of the treaties and may impact the will and ability of governments to advance their domestic goals and policies. The book also contains two organizational charts: one listing the issues addressed in each of the roughly 20 cases included in the book, and one grouping the cases by their relevant common issues. The book is available at: http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf

The ICSID Caseload – Statistics, Issue 2011-2

ICSID Secretariat, 2011

This new issue of the ICSID Caseload – Statistics provides an updated profile of the ICSID caseload, historically and for the Centre's fiscal year 2011. It is based on cases registered or administered by ICSID as of June 30, 2011. As in the previous issue, this document examines: the number of cases registered under the ICSID Convention and Additional Facility Rules; the

number of other cases administered by the ICSID Secretariat; the basis of consent to ICSID jurisdiction invoked in registered arbitration and conciliation cases; the geographic distribution of ICSID cases by the State party to the dispute; the economic sectors involved in ICSID disputes; the outcomes in ICSID arbitration and conciliation proceedings, (including further information on disputes decided by arbitral tribunals); the nationality and geographic origins of arbitrators, conciliators and ad hoc committee members appointed in ICSID proceedings, and outcomes in annulment proceedings under the ICSID Convention. The document is available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>

Events 2011

October 3-7

UNCITRAL WORKING GROUP II, 2000 TO PRESENT: ARBITRATION AND CONCILIATION, 54TH SESSION, New York, <http://www.uncitral.org/uncitral/en/index.html>

October 11

ALTERNATIVES TO LITIGATION IN A CIVIL SOCIETY, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION AND THE AMERICAN ARBITRATION ASSOCIATION, Dublin, Ireland, <http://www.aaauonline.org/courseSection.aspx?course=297>

October 17-19

THE FIFTH ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, Kampala, Uganda, investmentlaw@iisd.org

October 3-7

UNCITRAL WORKING GROUP II, 2000 TO PRESENT: ARBITRATION AND CONCILIATION, 54TH SESSION, Vienna, <http://www.uncitral.org/uncitral/en/index.html>

October 17-19

THE FIFTH ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, Kampala, Uganda, investmentlaw@iisd.org

October 26-27

SIXTH COLUMBIA INTERNATIONAL INVESTMENT CONFERENCE: THE RESOURCE BOOM AND FDI IN AFRICA, Faculty House, Columbia University, New York, <http://www.vcc.columbia.edu/content/sixth-columbia-international-investment-conference-resource-boom-and-fdi-africa>

November 4-6

2011 FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION, London, United Kingdom, www.fdimoot.org/2011/

November 8

SIXTH ANNUAL LECTURE ON INTERNATIONAL COMMERCIAL ARBITRATION, Washington D.C., United States, <http://www.wcl.american.edu/arbitration/annuallecture.cfm>

November 16

SALIENT ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION, Washington D.C., United States, www.wcl.american.edu/arbitration

28-31 March 2012

ASIL 106TH ANNUAL MEETING - CONFRONTING COMPLEXITY, AMERICAN SOCIETY OF INTERNATIONAL LAW, Washington, D.C., United States, <http://www.asil.org/annual-meeting.cfm>



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