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Investment Treaties and Investor Corruption:
An Emerging Defense for Host States?
by Jason Yackee

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Investment Treaties and Investor Corruption:
An Emerging Defense for Host States?

Jason Yackee

feature 1

Bilateral investment treaties (BITs) are famously asymmetric. They grant investors rights but not obligations, while imposing upon states obligations unaccompanied by rights. Recent cases suggest, however, that BIT tribunals are poised to recognize a defense to state liability that, in effect, imposes upon investors the obligation to avoid involvement in public corruption in the course of making a treaty-protected investment. Despite these suggestive jurisprudential trends, however, the specific contours of the emerging corruption defense are uncertain, and in a recent article I suggest model investment treaty text for states that wish to secure reliable access to it.[1]

The outcome of the well-known *Siemens, A.G.* affair illustrates the potential benefits of a corruption defense to host states.[2] The German multinational had won a US$200 million ICSID award against Argentina for Argentina's unlawful expropriation of a Siemens contract with the state, in violation of the Argentina-Germany BIT. Argentina initiated a long-shot annulment petition. While the petition was pending, it came to light that Siemens executives had systematically encouraged the bribing of public officials worldwide on a massive scale, including in Argentina. Siemens soon found itself engulfed in a series of embarrassing bribery investigations, and eventually admitted its guilt in settlement agreements with U.S. and German anti-corruption authorities. In response to these revelations, Argentina took the procedurally rare move of asking ICSID to "revise" the underlying award. The request to open revision proceedings encouraged Siemens to settle—but for a heavy price. The company abandoned its award in exchange for Argentina's consent to discontinue the annulment and revision proceedings. The relevance (or irrelevance) of Siemens' corruption was never authoritatively settled.

What would have happened had Argentina raised (and proved) the corruption during the original proceedings? We can get some rough sense of what might have been by turning to arbitral jurisprudence addressing the relevance of public corruption to private contract disputes. In the private context, corruption most typically arises where a tribunal is asked to enforce a contract between a foreign investor and a local intermediary who has been engaged to facilitate the investor's bids or applications for state business, ostensibly as a "consultant."

The seminal decision is a 1963 ad hoc award by Judge Lagergren, the distinguished Swedish lawyer and judge. The claimant, a politically well-connected Argentine, was demanding payment from a foreign investor in the Argentine power sector on a commission contract under which the claimant was allegedly guaranteed a large percentage of the value of any state contracts eventually awarded to the investor. The parties freely admitted that the purpose of the contract was to bribe Argentine officials.

Neither party challenged Lagergren's authority to decide the merits of the dispute. Yet Lagergren took it upon himself to examine his jurisdiction on his own motion, on the ground that the contract was "condemned by public decency and morality." He found that relevant domestic law condemned obligations that were against "good morals," and asserted that it could not "be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned

by courts or arbitrators." Furthermore, "[s]uch corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations." Whether from the perspective of "good government or that of commercial ethics," it was "impossible" for Judge Lagergren to "close [his] eyes . . . to the destructive effect[s]" of such corruption on "industrial progress." That meant that he was obligated to decline jurisdiction. As he explained, "[p]arties who ally themselves in an enterprise" involving "gross violations of good morals and international public policy … must realise that they have forfeited any right to ask for assistance of the machinery of justice…in settling their disputes."

Judge Lagergren's award has elicited some criticism over the years, primarily concerning his alleged misapplication of the principle of the separability of arbitration clauses. Commentators suggest that he erred in appearing to dispose of the case on jurisdictional grounds, as separability means that a defect in the underlying contract should not be held to nullify an arbitration clause contained therein. That doctrinal controversy aside, numerous private awards now reflect Lagergren's core position that tribunals should not involve themselves in settling disputes over the performance of obligations involving contracts the object of which is public corruption.[3]

That line of arbitral jurisprudence has recently entered into the stream of contract-based ICSID awards. In *World Duty Free Co. Ltd. v. Republic of Kenya*,[4] Kenya was alleged to have unlawfully expropriated the claimant's investment. There was no relevant BIT, and the investment contract selected Kenyan and English law. In the course of proceedings, the investor described in detail how he had obtained the contract by bribing Kenya's then-President. Kenya seized upon the admission to argue that the case should be dismissed. The tribunal cited Lagergren's award as well as other sources to affirm that bribery clearly violated "international public policy" as well as Kenyan and English law. The implication for the investor was that it was "not legally entitled to maintain any of its pleaded claims . . . on the ground of ex turpi non oritur action," as all of the pleaded claims "sound[ed] or depend[ed] upon" the tainted concession agreement.

World Duty Free illustrates the remarkable extent to which anti-corruption ideals have become embedded within the normative regime of international legal practice. While

Lagergren had boldly asserted an international public policy against enforcing contracts for corruption many years before, the case for any such public policy *actually* existing was, at the time, incredibly thin. Today, thanks to a long line of subsequent private arbitral jurisprudence, to the treatification of anti-corruption principles (e.g. the OECD Anti-Bribery Convention) and to the global diffusion of U.S.-style domestic laws criminalizing foreign corrupt practices, it hardly seems controversial at all to assert that international public policy now indeed condemns corruption, even to the point of allowing a host state—Kenya—to escape liability for expropriating a contract not for corruption itself, but obtained *through* corruption.

> Virtually no BIT's specifically mention corruption, so one issue is how to import anti-corruption principles into the BIT regime.

What this international public policy means for investor claims arising under BITs is somewhat less clear. After all, in a BIT claim, the investor is seeking to realize his rights under an international *treaty*, itself hardly the product of corruption. The corrupt act complained of in *Siemens* is legally distant, in some sense, from the rights that Siemens was trying to enforce. Virtually no BITs specifically mention corruption, so one issue is how to import anti-corruption principles into the BIT regime. One obvious pathway is the notion of international public policy already mentioned, which BIT arbitrators may have an obligation to support by virtue of the international nature of the disputes they resolve, and of the arbitral institutions under which they serve. Another is the trend toward imputing into BITs an obligation for the investor to act in "good faith" toward the host state, as articulated in the recent award in *Plama Consortium Ltd. v. Republic of Bulgaria*.[5] Or, perhaps even more promising, anti-corruption principles can be imported through the provisions contained in some BITs that limit the treaty's protections to investments made "in accordance" with domestic laws.[6] Since virtually all domestic legal systems declare public corruption illegal, any corruptly acquired investment would seem necessarily to have been made other than "in accordance" with domestic law. And yet, important and unsettled questions remain about the appropriate application of "in accordance" provisions, such as whether an investment's illegality should be treated as a matter of "admissibility" or "jurisdiction." Perhaps more importantly, many BITs *don't* include "in accordance" provisions, and in those cases the impact of domestic illegality (just like the impact of violations of international public policy) on the investor's access to BIT protections is even more uncertain.

Of particular concern to those who would like to see the BIT regime severely sanction corrupt investor behavior is the possibility that BIT tribunals will treat investor corruption not as a jurisdictional or preliminary issue (or an issue going to the scope of the state's consent to arbitration), but rather as an issue that should be "balanced" at the merits stage.[7] Under such an approach, the investor's blame for corrupting a state official would be balanced against the state's own involvement in the scheme, perhaps allowing the investor some measure of recovery despite the corrupt origins of his investment.

I've argued elsewhere that states should include an article in their BITs clarifying many of these questions. Specifically, I suggested an approach that would require BIT tribunals to treat allegations of corruption as a preliminary issue; if proven, the investor would lose access to the BIT's dispute-settlement procedures, leaving no opportunity for "balancing" at the merits stage. In a sense, this approach lets state actors get away with accepting bribes, and it has been criticized as unfair and unwise.[8]

But the alternative—allowing tribunals to weigh and balance state and investor fault in a corrupt transaction—places BIT tribunals in a dangerous position. Domestic political regimes, especially after political transitions, may depend for their domestic political support in part on their efforts to "clean house," that is, to expose and remedy the malfeasance of the prior regime. Those efforts should be supported to the extent that they may help to start a virtuous circle of self-reinforcing anti-bribery norms within the political system. For an ICSID tribunal to hold that a prior regime's involvement in corruption means that a corruptly-obtained concession can still benefit from BIT protections risks interfering with those efforts to move to a political equilibrium characterized by less frequent corruption. It may also exacerbate public dissatisfaction with the international investment law system by further inflaming popular misperceptions that the system is "biased" against the well-meaning policy decisions of developing-country governments. In contrast, a clean-hands approach, which has clear analogues in domestic contract law, allows tribunals to strongly signal the BIT system's support for the state's own anti-bribery efforts.

In conclusion, even in the absence of corruption-specific BIT language, the fact of an investor's involvement in public corruption related to its investment is likely to be of increasingly legal relevance to the investor's ability to fully access BIT protections. But even if a "corruption defense" is viable as a matter of what might be called "international common law," it is a defense whose details remain contested and uncertain. States that wish to secure their reliable and effective access to a corruption defense would be wise to consider amending their investment treaties to include their own preferred version of it.

Author

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Notes

1 Jason Webb Yackee, Essay: Investment Treaties and Investor Corruption: An Emerging Defense for Host States? 52 Va. J. Int'l L. 723 (2012).

2 Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/08, Award (Feb. 6, 2007).

3 For an overview, see Abdulhay Sayed, Corruption In International Trade And Commercial Arbitration (2004).

4 ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), available at http://italaw.com/documents/WDFv.KenyaAward.pdf.

5 ICSID Case No. ARB/03/24, Award (Aug.27, 2008), available at http://italaw.com/documents/PlamaBulgariaAward.pdf.

6 For an overview of "in accordance" provisions, see Stephan Schill's interesting recent overview, Illegal Investments in Investment Treaty Arbitration, 11 LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 281 (2012).

7 Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award (Aug.16, 2007) (Cremades, dissenting) (presenting an argument for balancing investor and state involvement in illegality).

8 See the debate between myself and Professors Bjorklund and Wong on the blog Opinio Juris (May 31, 2012).

Dealing With the Increasing Complexity of Investment-Related Treaties: A Framework and Some Policy Guidelines

Joost Pauwelyn

feature 2

Bilateral investment treaties (BITs) used to be boilerplate: taken out of a drawer before official visits; signed with pomp and circumstance but not much attention to precise wording. Today, the diversity and ramifications of investment-related treaties are staggering. For one thing, the boom in arbitration cases made everyone realize these treaties matter. Variation, precision and extensive footnotes and explanatory protocols are commonplace. They often incorporate or respond to past arbitration awards, building a useful bridge between litigation and negotiation.

Another contributing factor is the increasing overlap between investment treaties and trade agreements. That each country often has dozens of each does not make it any easier. Switzerland, for example, is a party to the International Centre for Settlement of Investment Disputes (ICSID), the World Trade Organization (WTO) and the Energy Charter Treaty (ECT), has 26 free trade agreements—not counting the European Free Trade Association (EFTA) and the bilateral agreements with the EU—and is a party to 124 BITs. Some FTAs are concluded by Switzerland alone, most on behalf of EFTA.

Some FTAs include an investment chapter, others do not. Some FTAs have an additional GATS-like services chapter—singling out access and non-discrimination for FDI in services (not manufacturing)—others do not, or liberalize "establishment" for both services *and* goods. Some BITs, in turn, liberalize and protect investment (without making the goods v. services distinction), others say nothing on access and only protect sunk investments. Some treaties provide for product or sector specific carve-outs, grandfathering of certain measures or general exceptions, others do not or do so differently. Some treaties (or chapters within treaties) provide only for state-to-state dispute settlement, others include a standing offer for arbitration with private investors. A third type provides for private standing but subjects it to consent by the respondent state on a case-by-case basis.

The Most Favoured Nation (MFN) provision may streamline some of this diversity but its coverage and reach remain highly contested: Does MFN in a BIT extend to benefits granted to other countries in the WTO or an FTA? Conversely, does MFN in GATS or an FTA automatically incorporate substantive or dispute settlement advantages given to another country in a BIT?

These mind-boggling questions of diversity and overlap must not be exaggerated. Large areas of convergence remain and overlaps operate at the edges and have so far not played a major role in dispute settlement. That said, overlaps and conflicts are better avoided or regulated through careful drafting and negotiation of treaties. Protracted, costly and unpredictable litigation is clearly second-best.

Table 1 below offers a practical way to think about these overlaps, asking two basic questions:

(1) What is the business or economic activity at issue: *goods or services* (or both)?

(2) What is the problem or governmental restriction complained about: is a country making it more difficult to *trade* goods or services; or is a country restricting access or not protecting foreign *investment* (or both)?

Table 1: A Practical Guide to Finding the Applicable Agreement(s)

		GOVERNMENTAL RESTRICTION			
		TRADE		INVESTMENT	
		Country restricts **ACCESS** of goods or services (imports or exports)		Country restricts **ACCESS** of investments or investors	Country fails to **PROTECT** investments/ investors
BUSINESS ACTIVITY		no local investment	with local investment		
	GOODS industry, agriculture	- GATT - FTAs - GPA	- TRIMS - GATT - FTAs - GPA	- (Some) FTAs - (Few) BITs	- BITs - (Few) FTAs - TRIPS
	SERVICES financial, tourism, engineering, telecom etc.	- GATS - (Most) FTAs - GPA	- GATS - (Most) FTAs - GPA	- GATS Modes 3 & 4 - (Most) FTAs - (Few) BITs	- BITs - (Few) FTAs - TRIPS

GATT	General Agreement on Tariffs and Trade (and possibly other trade in goods related agreements in Annex 1A to the WTO Agreement)
FTAs	Free Trade Agreements
GPA	Government Procurement Agreement (plurilateral agreement binding on a sub-set of WTO members)
TRIMs	(WTO) Agreement on Trade-Related Investment Measures
GATS	General Agreement on Trade in Services
BITs	Bilateral Investment Treaties
TRIPS	(WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights

For a businessperson or economist these distinctions—goods v. services; trade v. investment; access v. protection—may make little sense or be hard to make. For legal purposes they are crucial as they direct to different levels of protection and obligation.

> With sufficient resources and creativity, investors and traders can forum shop or cross-reference between treaties to obtain the maximum level of access and protection, coupled to the most desirable remedies.

For business, the end result is that international protection of traders and investors is scattered across a diversity of agreements. Those able to exploit this diversity can benefit. Others may get lost. With sufficient resources and creativity, investors and traders can forum shop or cross-reference between treaties to obtain the maximum level of access and protection, coupled to the most desirable remedies. Looked at from the perspective of a regulating state, hands are tied and flexibilities negotiated in an ever growing set of treaties. *Cui bono?* Here as well, resourceful countries may be able to deal with it and even turn it to their advantage. They can use complexity as a device to minimize their commitments in negotiations; in litigation, they can use jurisdictional objections or cross-refer to carve-outs, conflict clauses or exceptions in other, overlapping treaties to avoid or limit responsibility or minimize damages or other remedies. In contrast, countries with fewer resources can be misled or make scheduling mistakes which may end up costing dearly.

Overlaps and complexity are on the rise and here to stay. For governments, the challenge is how to deal with it. Below are some policy guidelines focused on the negotiation stage that may alleviate problems of overlap:

- Better to integrate commitments into a single treaty, rather than to conclude a BIT and an FTA with one and the same country.

- Regional or plurilateral treaties instead of bilateral agreements avoid some level of overlap.

- Negotiate explicit carve-out or priority provisions to clarify the scope of each agreement, and which agreement prevails in the event of conflict (this is often done for the WTO-FTA overlap; less so for the BIT-FTA/WTO overlap). Such overlap clauses should address also overlaps between dispute settlement provisions.

- Be aware of formalistic distinctions engrained in the minds of negotiators (e.g. services v. goods; trade v. investment; access or establishment v. protection). Clarify the dividing lines, avoid sharp distinctions that make little economic sense and double-check that these distinctions do not inadvertently cover (or not cover) industries or problems of interest.

- Realize that a broad consent to arbitration clause (e.g. “any dispute with respect to investment”) or broad umbrella clause (e.g. “any commitments entered into in relation to investment”) may cover claims in outside agreements (such as GATS or FTAs).

- MFN can also trigger unexpected consequences: an MFN clause in a BIT may not only apply to benefits granted in other BITs but also in other investment-related treaties such as GATS, TRIPS or FTAs. Similarly, when concluding a BIT, the benefits therein may have to be extended to other countries pursuant to MFN clauses in BITs, the WTO or FTAs. Carefully wording the MFN clause is a must. Carve-outs or exceptions may be called for (we find them in the WTO but not as much in FTAs and even less so in BITs).

- Where levels of commitment and flexibility vary, breach of one treaty may possibly be justified under another treaty (say, BIT breach justified with reference to an FTA or the WTO).

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- In any event, realize that what you agree to in one treaty may bleed over into another, albeit through the softer process of interpretation of one treaty with reference to another, or the process of cross-fertilization of jurisprudence developing under different treaties.

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Towards a New Generation of Investment Policies: UNCTAD's Investment Policy Framework for Sustainable Development

Elisabeth Tuerk and Faraz Rojid

feature 3

The birth of the framework

On 12 June 2012, the United Nations Conference on Trade and Development (UNCTAD) launched its Investment Policy Framework for Sustainable Development (IPFSD or the framework).

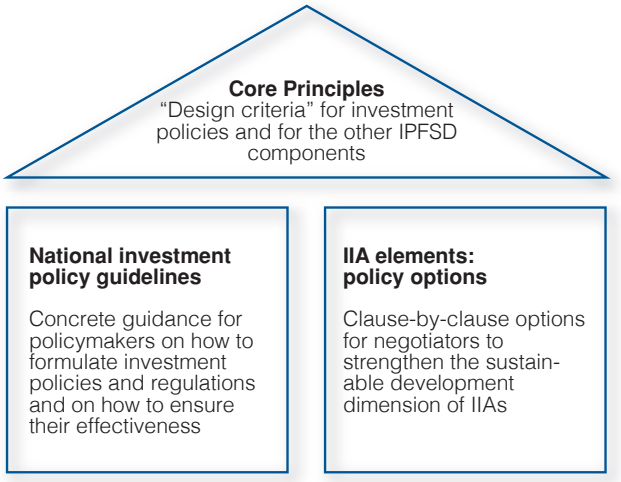
IPFSD comes at a time when the international investment regime is in a state of "transition"[1] and when an increasing number of governments are reviewing their investment-related regulatory frameworks, both at the national and international levels. With respect to international investment policies, this evolution has been fuelled by a surge of academic and policy debates discussing—and sometimes questioning—the sustainable development orientation of the 3,000-plus international investment agreements (IIAs).[2] The IPFSD is UNCTAD's response to these debates and concerns.

> "IPFSD comes at a time when investment policy making is in a state of flux."

What is the framework?

The framework, which also constitutes the main substantive theme of the 2012 World Investment Report (WIR), consists of a comprehensive guide for national and international investment policy making. Its eleven core principles first set the stage and are then converted into guidelines for national investment policies and policy options for IIAs (see Figure 1).

Figure 1. Structure and components of the IPFSD



The framework provides policymakers with concrete options for placing inclusive growth and sustainable development at the heart of efforts to attract and benefit from foreign investment. In so doing, the framework aims at creating synergies between investment policies and wider economic development goals; promoting the integration of investment policies into development strategies; fostering responsible investment and incorporating principles of corporate social responsibility (CSR); and ensuring policy effectiveness in the design and implementation of investment policies.

IPFSD reflects the notion that investment policies are made with a view of attracting foreign capital, but adds to that a broader and more intricate development policy agenda of factoring in sustainable development and inclusive growth into national investment regulations and international investment negotiations.

The timeliness of the framework

IPFSD comes at a time when investment policymaking is in a state of flux. Nationally, policymaking is moving from an era of liberalization to an era of regulation.[3] At the international level, there have been growing concerns that IIAs can interfere with countries' sustainable development strategies and prevent them from implementing policies that address the environmental and social impact of investments. Critics have argued that this is the result of investor-State dispute settlement (ISDS) mechanisms found in IIAs, which allow investors to sue host States, and are sometimes used in areas that involve crucial public policy measures. ISDS cases launched by Philip Morris against Australia and Uruguay regarding their

tobacco control measures or by Vattenfall against Germany for its nuclear power phase-out plan are examples in point.[4]

As a response, some countries, such as Bolivia, Ecuador and Venezuela, withdrew from the International Centre for Settlement of Investment Disputes (ICSID);[5] Australia issued a trade policy statement announcing that it would stop including ISDS clauses in its future IIAs; and others responded by drafting new IIAs that include mechanisms that retain their right to regulate investment in the public interest (e.g., regarding the protection of the environment and public health and safety), or which otherwise aim to reduce the risk of exposure to litigation by foreign investors. Along these lines, sustainable development elements are gaining prominence in international investment policies.[6]

As the development community is looking for a new development paradigm and seeking ways and means to factor sustainable development and inclusive growth into national investment regulations and international negotiations, the IPFSD becomes the ultimate tool to consult and use.

The framework's policy options for IIAs

With respect to international investment policymaking, the IPFSD identifies three main challenges and provides respective responses (see Figure 2).

Figure 2. International investment policy challenges

Strengthening the development dimension of IIAS	• Safeguarding policy space for sustainable development needs • Making investment promotion provisions more concrete and consistent with sustainable development objectives
Balancing rights and obligations of States and investors	• Reflecting investor responsibilities in IIAs • Learning from and building on corporate social responsibility (CSR) principles
Managing the systemic complexity of the IIA regime	• Dealing with gaps, overlaps and inconsistencies in IIA coverage and content and resolving institutional and dispute settlement issues • Ensuring effective interaction and coherence with other public policies (e.g. climate change, labour) and systems (e.g. trading, financial)

It then provides three comprehensive tables, setting out 115 plus explicit policy options among which governments can choose those that best suit their countries' levels of development and respective policy objectives. Among others, the three tables include: proposed adjustments of existing IIA provisions to make them more sustainable development-friendly through formulations that safeguard policy space and limit State liability; the addition of new provisions in IIAs, for instance, to balance investor rights and responsibilities and to promote responsible investment; and the introduction of Special and Differential Treatment (SDT) clauses for the less developed Party to calibrate the level of obligations to the country's level of development.

Among the 115 plus options, IPFSD also identifies those options that could be particularly supportive of sustainable development. These include:

- a carefully crafted scope-and-definition clause that excludes portfolio, short-term or speculative investments from treaty coverage;
- the formulation of the fair and equitable treatment (FET) clause as an exhaustive list of State obligations (e.g. not to (i) deny justice in judicial or administrative procedures, (ii) treat investors in a manifestly arbitrary manner, (iii) flagrantly violate due process);
- the clarification (to the extent possible) of the distinction between legitimate regulatory activity and regulatory takings that give rise to compensation (indirect expropriations);
- the limitation of the Full Protection and Security (FPS) clause to establish that "physical" security and protection will only commensurate with the country's level of development;
- the limitation of the scope of the transfer-of-funds clause by providing an exhaustive list of covered payments/transfers, the inclusion of exceptions that are triggered in the event that there are serious balance-of-payment difficulties, and the stipulation that the transfer right of the investor is contingent on the latter's compliance with the fiscal and other transfer-related obligations of the host country;
- the inclusion of carefully crafted exceptions to protect human rights, health, core labour standards and the environment, along with a check-and-balance system that makes sure there is enough policy space whilst avoiding abuse; and
- the option of "no ISDS mechanisms" clauses, or clauses designed to make ISDS the last resort (e.g. after exhaustion of local remedies and the use of Alternative Dispute Resolution mechanisms by the investors).

The framework also proposes the establishment of an institutional set-up that will be responsible to ensure that the IIA is adaptable to changing

development contexts and major unanticipated developments (for example, by using *adhoc* committees to assess the effectiveness of the agreement and to further improve its implementation through amendments or interpretations).

Through all of these, the framework operates lucidly, putting particular emphasis on the relationship between foreign investment and sustainable development, advocating a balanced approach between the pursuit of purely economic growth objectives by means of investment liberalization and promotion, on the one hand, and the need to protect people and the environment on the other.

Modus operandi of the framework

The framework has been well received by investment and development stakeholders, including at the highest level of policymaking, in the academic circle and by investment experts and civil society organizations. For example, UNCTAD's IIA Conference and the Ministerial Round Table (MRT) at UNCTAD's biennial 2012 World Investment Forum (WIF)[7] both discussed an advanced version of the framework. Ministers, for example, advocated a new generation of investment policies and called for the development of a set of core principles for national and international investment policies. IIA experts also agreed that IIAs should cater to broader objectives such as sustainable development, human rights and other important public concerns.

Since then, IPFSD, as part of the WIR 2012, has been launched in more than 44 countries, including during a joint UNCTAD-IISD discussion event for investment and development stakeholders.[8]

Among others, IPFSD's attractiveness for a broad range of stakeholders may lie in its special way of operating. For instance, the framework is not a model treaty, but rather a platform where a wide variety of options are offered. Policy makers can choose the ones that they consider best suited to their country's special development needs. Secondly, many of the policy options suggested draw upon innovative State practices; for instance, fifteen of the 47 IIAs signed in 2011 already include elements similar to the sustainable development enhancing features suggested in the IPFSD.[9]

Third, the IPFSD is a "living document" designed to be further developed through an inclusive dialog and dynamic investment policymaking. For that purpose, UNCTAD created a discussion platform that provides investment stakeholders and the international development community (e.g. policymakers, investors, business associations, labour unions, civil society organizations and other relevant interest groups) an opportunity to consult, discuss and share experiences and views with each other. This platform is also the essence of the new Investment Policy Hub[10], which gives the framework a "living document" flavor through an online discussion forum.

In the future, the framework will also be used as the basis of UNCTAD's technical assistance activities on IIAs. First experiences were already gained this summer when UNCTAD contributed to a training convened by IISD and the Southern African Development Community (SADC) for the drafting of a SADC Model BIT template.[11]

Through all of this, UNCTAD hopes that the framework will be used as a key point of reference for policymakers in formulating national investment policies and in negotiating or reviewing IIAs. As such, the framework can operate as a point of convergence for international cooperation on investment issues with a view to fostering sustainable development and inclusive growth.

Author

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Notes

1 Jose E. Alvarez, Karl P. Sauvant, Kamil Girard Ahmed, and Gabriela P. Vizcaino, *The Evolving International Investment Regime: Expectations, Realities, Options,* Oxford University Press, Published to Oxford Scholarship Online: May 2011; Print ISBN-13: 9780199793624. See also Chapter III of WIR 2012, 2011 and 2010 (http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf, http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf and http://unctad.org/en/Docs/wir2010_en.pdf respectively).

2 See Chapter III of WIR 2012, WIR 2011 and WIR 2010 (n2).

3 See Chapter III of WIR 2012 (n2).

4 See Latest Developments in Investor-State Dispute Settlement, IIA Issues Note No. 1, April 2012, http://www.unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf.
and Chapter III of WIR 2012 (n2).

5 See Ripinsky, S, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve,* ITN, April 13, 2012. Accessed online at http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/

6 See further Chapter III of the World Investment Report 2012 (n2), at page 87.

7 The World Investment Forum 2012 was part of the UNCTAD XIII Conference, held in Doha, Qatar in April 2012. Find more information here: http://unctad-worldinvestmentforum.org/

8 Visit the Investment Policy Hub (http://unctad.org/ipfsd) for a video of the discussion.

9 See Chapter III, WIR 2012, at page 90.

10 Please visit http://ipfsd.unctad.org

11 See the Events Calendar at http://unctad.org/ipfsd for a list of upcoming technical assistance activities.

feature 4

The SADC MODEL BIT Template: Investment for Sustainable Development

Howard Mann

The South African Development Community (SADC) Model Bilateral Investment Treaty Template and Commentary was completed in June 2012 by Member States of the Community.[1] Its completion marks the end of an 18 month process of consultations and drafting among government representatives and is intended as a guide for member states in future investment treaty negotiations.

In undertaking this process, the SADC Member States completed the challenge of drafting a new model for bilateral investment treaties for regional governments to use and adapt according to their needs. By making the documents public, they have also decided to make the template a tool available for other African and non-African governments alike to consider as what UNCTAD calls a "new generation" of investment policies begins to take root.[2]

The template fits squarely in this next generation model. Whereas other contemporaneous documents provide guidance in the form of analysis and general recommendations, the SADC template provides guidance in the form of specific textual language along with a commentary explaining the choices made.

This brief note discusses the orientation of the template, the drafting process, the key features, and some brief conclusions.

Orientation

The preamble reflects the orientation of the template: to relate FDI to sustainable development through the fuller text of the model. This is further seen in the Objectives, Article 1: *The Main objective of this Agreement is to encourage and increase investments … that support the sustainable development of each Party, and in particular the Host State where an investment is to be located.*

This orientation is maintained throughout the text and was used as a benchmark when examining other draft provisions for the text. It was thus not simply a question of inserting the words sustainable development, but also of seeking throughout the process what this meant in practical terms for drafting various articles. The result is a concrete draft text for an investment treaty that incorporates sustainable development thinking from the beginning to the end of the text.

The drafting process

The drafting process began with a meeting of Member States in April 2011 that concluded with a recommendation to develop the model BIT template. Two drafting committee meetings were held in 2011 and 2012, with a total of nine member states participating.[3] Drafts were routinely circulated to all member states for review and comments.

The process was therefore inclusive and transparent, facilitated but not run by the SADC secretariat. This is further evidenced in the fact that in some instances differences of view maintained by the Member States were reflected in the final text, by the inclusion of options with commentary for each option. In other words, where there was consensus, this is clear in a single option being put forward. Where the differences remained, this was reflected in the final text. The recommended draft articles as well as the commentary were all equally subject to full review in the drafting committee meetings.

At the same time, it was recognized in the process that the model template is not a legally binding document for Member States, but a guide and tool to be used and adapted as needed. This allowed a comprehensive approach to be articulated that Member States (or indeed other governments) can draw upon in whole or in part, depending on individual needs in a negotiation. This approach also meant that each Member State did not have to endorse every draft article in order for the text to be completed.

Key features

The template is divided into six parts:

1. Common provisions
2. Investor rights post-establishment
3. Rights and Obligations of investors and State Parties
4. General provisions
5. Dispute settlement
6. Final provisions

Within these parts, key issues are fully developed. For example, the issues relating to the establishment of investments are dealt with in Part 1, where a position against the inclusion of investment liberalization provisions is taken. This is then related to the rejection of a provision prohibiting performance requirements by host states. In place of such a provision, the text actually makes it clear that any performance requirements imposed or undertaken by a foreign investor or its investment shall not be considered a breach of the Agreement as long as this was done before the investment was authorized and acted upon by the investor. Requirements imposed afterwards are subject to the other provisions of the model.

Part 2 itemizes the standard list of investor protections. Special attention is paid to the issue of fair and equitable treatment (Art. 5), which continues to grow in controversy among developing countries. Here, a recommendation is made to avoid such a provision. A narrowly constructed version of a fair and equitable treatment clause is provided as an alternative option. In addition, however, the template sets out an entirely different approach based on the recognition of administrative law approaches to fair

administrative treatment and due process of law instead of the international law language of fair and equitable treatment. The intent here is to begin to construct an alternative to the continuously controversial and enduringly unclear FET provisions, which is based more clearly on known and less vague standards.

As an example of how sustainable development approaches are reflected in different parts of the template, one can look at the right of investors to engage foreign personnel. This right is made clear, but is also subject to a requirement to balance this with domestic programs to train local employees wherever feasible. This reflects the development goals associated with FDI of skills development and transfer as well as higher value-added employment.

The obligations of investors in Part 3 include anti-corruption, compliance with domestic law, environmental assessment and management, human rights, social and economic development issues, corporate governance, and so on. The question of enforcement of these obligations is addressed in three ways:

1. The obligations can be made part of domestic law if they are not already so, and therefore enforced through domestic courts.

2. Depending on the specific obligations, a breach may vitiate the jurisdiction of an investor-state tribunal if one is established (for example a breach of the anti-corruption obligation) or enable a state to take counterclaims for breaches related to the conduct of the investor.

3. The template calls for the investor to accept the possibility of civil liability in its home state for decisions and acts taken by the investor that impact the conduct of the investment and may lead to damage in the host state. This is not a standard of liability, but simply a requirement to wave the use of such doctrines as *forum non conveniens* in order to allow such a case to be heard on the merits in the home state.

Part 3 also address the state right to regulate and the right to pursue development goals, thus balancing the investor rights expressly with the state rights commonly recognized by international law.

Part 3 also follows the growth of the Extractive Industries Transparency Initiative (EITI) by calling for transparency in contracts and revenues flows between the government and investor. This is seen as an increasingly important element in avoiding corruption and promoting more sustainable conduct and relationships.

Part 5 on dispute settlement again reflects the growing concern among developing countries over the growth of the investor-state arbitration industry. It recommends against the inclusion of investor-state arbitration in future treaties, and ties this to a limited MFN provision that, if included, ensures against future tribunals importing investor-state rights through the MFN provision.

However, the text also recognizes that some states may nonetheless choose to include investor-state arbitration for different reasons. Thus, it builds a carefully constructed process that circumscribes investor-state arbitration rights to alleged breaches of the treaty and not other permits or authorizations, as set out in the United States' model BIT of 2012. It also expressly recommends against the inclusion of an umbrella clause and the transfer through this provision of domestic law issues into international law issues. And finally it recommends the inclusion of a provision that requires treaty arbitration tribunals to recognize and give primacy to dispute settlement mechanisms identified in any investment contracts for any matters related to the alleged breach of such contracts, even if restated as a breach of the treaty. An exhaustion of local remedies rule is also put in place, subject to a tribunal being able to assess whether the claims relating to the underlying measure can be addressed in a domestic court.

Finally the template calls for full transparency in investor-state processes if one is included.

In sum, the template rejects the old style approach of 8 page treaties popular in the 1990s and into the 2000s. It puts in place a comprehensive approach that reflects the relationship between investment and sustainable development, and allocates rights and obligations in accordance with this relationship.

The template also rejects the view that because something was done before it must be done the same way again. Hence, for example, investor-state, investment liberalization, the promotion of social and economic development, investor liability, FET, MFN, all get new or different treatment, or are recommended against. The template thus demonstrates a new approach not just in principle, but through concrete language and recommendations that are clearly set out.

Conclusions

The template is not without its limitations. For example, not every issue is fully 'resolved'. Indeed, seeking to do so was beyond the mandate of the drafting committee. And it is not drafted as nor intended to be a legally binding document on Member States. Still, it is a tool that provides a coherent option to SADC Member States in any future negotiations, and by extension to other governments who wish to access the template and assess its value as a guide in their own contexts.

Author

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Notes

1 The model is available here: http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf

2 United Nations Commission for Trade and Development, *Investment Policy Framework for Sustainable Development*, June 2012.

3 Angola, Botswana, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa and Zimbabwe.

Inching Towards Consensus: An Update on the UNCITRAL Transparency Negotiations

Lise Johnson

feature 5

From October 1-5, 2012, a working group of the United Nations Commission on International Trade Law (UNCITRAL) met in Vienna to continue work on how to ensure transparency in treaty-based investor-state arbitration. It was the working group's fifth week-long meeting on the topic, but will not be the last. Although some issues were settled, many very significant ones remain contentious, and will be picked up again by the working group when it meets in February 2013.

UNCITRAL arbitration rules are among the least transparent rules applied to treaty-based investor-state arbitrations. In contrast to rules developed by the World Bank's International Center for Settlement of Investment Disputes, for example, which require disclosure of the existence of an investor-state arbitration, permit either disputing party to unilaterally disclose awards, and even require publication of aspects of awards, UNCITRAL arbitration rules enable disputes to be kept entirely out of the public view from their inception to conclusion. There is no requirement that the existence of disputes be made public; and before an award can be disclosed, all disputing parties—states and investors—must agree.

Recognizing this lack of transparency as a problem that needed to be remedied, in 2008, UNCITRAL decided to dedicate attention to the issue, and directed its Working Group on Arbitration and Conciliation, Working Group II, to develop a legal standard that would ensure transparency in treaty-based investor-state arbitration.

Working Group II began work on that task in October 2010, and has now adopted various elements of new arbitration rules for which there was "consensus" —a measurement of agreement among delegations that lies somewhere between a simple majority and unanimity. The features of the rules on which consensus has been reached include provisions mandating disclosure of the existence of the arbitration and identification of the parties to it; key documents submitted to the tribunal during the arbitration, including briefs or memorials by the disputing parties, witness statements, expert reports, and transcripts of hearings, if they are prepared; and orders, decisions and awards issued by the tribunal. Consensus was also reached on certain aspects of the draft proposed rules setting requirements and procedures for non-parties to the dispute—i.e., potential amicus curiae and the non-disputing state party to the treaty—to provide input to the tribunal through the submission of briefs.

There remain, however, a number of areas on which consensus has not yet been reached. For instance, the Working Group has not settled on whether, if the non-disputing state party to the treaty seeks to make a submission on the interpretation of the treaty, the tribunal *must* accept that submission, or whether the tribunal will be able to use its discretion to determine how to treat the proposed input. And, although there was overwhelming support for a rule that would require open hearings, several delegations maintained that the rule should stay as it currently is in UNCITRAL arbitrations, whereby either disputing party can require the hearings to be closed if it wishes. In light of these delegations' stance, there was no formal declaration of "consensus" on that issue of open hearings.

Some other issues that are currently open are especially key for assessing the success or failure of these rules in achieving their mission of ensuring transparency in investor-state arbitration. For one, although there is apparent unanimous support among the Working Group for the notion that draft rules mandating transparency must also include some exceptions for confidential or otherwise protected information, the Working Group has not yet agreed on how to answer a number of questions regarding the exact scope of what can and cannot be shielded from disclosure.

One proposal made in this recent October 2012 session on the issue of the exceptions was particularly controversial. A delegation suggested widening the exceptions much broader than previously contemplated by the Working Group by inserting a new "self-judging" exception pursuant to which a disputing party could withhold information "it considers would impede law enforcement, or would be contrary to the public interest, or its essential security interest." Although some countries supported this proposal, a larger number strongly opposed it, arguing that such an insertion would swallow the rules on transparency and would be contrary to the mandate given to the Working Group to ensure transparency in investor-state arbitration. The Working Group will return to the issue in February.

A second crucial open issue concerns the scope of application. Delegations are divided on whether and how to allow the new rules on transparency to apply to disputes arising under the thousands of investment treaties that currently exist, and upon which the vast bulk of investment disputes can be expected to be based for years to come. Many are proposing a "bright line" approach that would draft the new rules on transparency so as to *carve out* existing treaties from their scope unless and until state parties to the governing treaty take some additional affirmative step, such as entering into a potential *new treaty* that would expressly permit (or require) application of the transparency rules.

Others, however, have pointed out that if and when new amendments to the UNCITRAL arbitration rules are adopted, they could apply to existing treaties under normal rules of treaty interpretation. According to these delegations, the "bright line" rule would preclude application of the new rules on transparency to existing treaties even where international law would otherwise permit it, and would be inconsistent with the mandate to the Working Group. The countries taking this stance and asking to allow potential application to existing treaties include the governments of Argentina, Australia, Canada, Mexico, Norway, South Africa and the United States. Countries opposing it and arguing for the "bright line" rule have not similarly made their positions publicly known outside the Working Group.

Overall, although Working Group II has undoubtedly made progress on its mandate, the issues that remain to be resolved are central to the ultimate impact and effectiveness of the new transparency rules, and are areas where considerable divisions among delegations remain.

Author

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More information on transparency in the UNCITRAL arbitration rules is available here: http://www.iisd.org/investment/dispute/arbitration_rules.aspx

news in brief

South Africa begins withdrawing from EU-member BITs

South Africa has terminated its bilateral investment treaty with Belgium and Luxembourg, and intends to phase out other treaties with European countries.

In a September 7th letter to Belgium's Ambassador in Pretoria, South Africa's Minister of International Relations denunciated the treaty, in accordance with the treaty's termination clauses (most termination clauses in BITs allow either contracting party to give a written notice of termination after a specific number of years).

The treaty's sunset clause guarantees that existing investments will continue to be covered by the treaty for another ten years.

ITN understands that at least six more letters will be sent to European countries. In total, South Africa has 13 treaties with EU member states.

South Africa's weighs risks and benefits of BITs

In recent years South Africa has critically reviewed its investment treaty practices. That scrutiny came in the wake of a 2007 claim by several Italian citizens and a Luxembourg corporation filed a claim under the Belgium-Luxembourg BIT. The claimants charged that the 2004 Mineral and Petroleum Resources Development Act (MPRDA)—part of South Africa's efforts to increase participation by historically disadvantaged South Africans in the mining industry—amounted to the expropriation their mineral rights.

While the case was settled in 2010, it stirred the South African government to reconsider its investment treaty policies. A report issued by the Department of Trade and Industry (DTI) was particularly critical of South Africa's investment treaties.

"Existing international investment agreements are based on a 50-year-old model that remains focused on the interests of investors from developed countries. Major issues of concern for developing countries are not being addressed in the BIT negotiating processes," wrote the DTI.[1]

More recently, South African Trade Minister Rob Davies has said that the South African Cabinet was largely supportive of the DTI's conclusions.

"Cabinet understood that the relationship between BITs and FDI was ambiguous at best, and that BITs pose risks and limitations on the ability of the government to pursue its Constitution-based transformation agenda," said Davies at an UNCTAD event in Geneva on 24 September 2012.

Davies has stated that the Cabinet ordered that South Africa's first-generation treaties—agreed to shortly after the 1994 transition to democracy—should be "reviewed with a view to termination."

China and Canada conclude BIT negotiations

China and Canada have concluded negotiations over a bilateral investment treaty (termed a foreign investment promotion and protection agreement in Canada) after 18 years and 22 rounds of formal negotiations.

The treaty, published in late September, must still be ratified by both parties. It is China's most comprehensive investment treaty to date, but also features notable deviations from Canada normal practice in recent years.

Canada's relatively robust transparency provisions for dispute settlement have been watered down. While Canada's recent investment treaties require the publication of a range written materials related to arbitration proceedings—with legitimately confidential text redacted—the Canada-China agreement only demands the publication of final awards. Other documents—such as notices of dispute and pleadings—will be made public at the discretion of the disputing state. The disputing host state would also have to approve public hearings.

A non-disputing party (amicus curiae) may be allowed to submit written submissions at the tribunal's discretion if it "has a significant interest in the arbitration."

Canada's recent treaties have also provided national treatment for the establishment of investment—i.e., allowing the foreign investor the same rights to set up an investment as domestic investors. The treaty with China, however, only provides Most-Favoured Nation treatment with respect to establishment.

Notably, the treaty does not place further restrictions on performance requirements, as has been the case in previous agreements with Canada. The treaty only reaffirms the state parties' obligations under the WTO Agreement on Trade-Related Investment Measures.

The provisions on capital flows allow the state parties to restrict transfers in circumstances of serious balance of payment difficulties, so long as a number of conditions are met. These include that they are of limited duration, and applied equitably without discrimination.

Foreign direct investment between the China and Canada are modest, but have climbed steadily

over in recent years. The stock of Canadian Direct Investment in China was valued at nearly C$4.5 billion at the end of 2011. The stock of FDI into Canada from China was C$10.9 billion at the end of 2011.

The treaty is available here: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=en&view=d

ICSID secretariat publishes background paper on annulment

The ICSID secretariat has published a background paper on annulment procedures in response to a letter from the Philippine Office of the Solicitor General. The letter expressed concern over an ICSID *ad hoc* committee's decision to annul a 2007 award that favoured the Philippines (Fraport AG v. the Philippines).

Characterizing the annulment decision as "seriously flawed" and taken in excess of the *ad hoc* Committee's authority under the ICSID Convention, the Solicitor General urged the ICSID Administrative Council to issue guidelines on annulment for use by *ad hoc* Committees in order to ensure fair and effective annulment proceedings.

The ICSID paper is intended to assist State-parties to the ICSID Convention in deciding whether to look into the matter raised by the Philippines.

The Solicitor General cites statistics claiming that 11 out of 41 annulment applications have resulted in annulment and that eight out of the 11 annulments were rendered in the past 10 years.

The background paper, in addition to providing a substantial review of the annulment mechanism and past annulment decisions, emphasized the necessity of placing the numbers into proper perspective. The paper explains that throughout its 47-year history, ICSID has:

> [r]egistered 344 cases and issued 150 awards. Of these, 6 awards have been annulled in full and another 6 awards have been partially annulled. In other words, only 4 percent of all ICSID awards have led to full annulment and 4 percent have led to partial annulment.

The 2007 award dismissed Fraport's claims in connection with its investment in the Ninoy Aquino International Airport Terminal 3 Project after the tribunal concluded that Fraport had made its investments illegally, and thus was not entitled to protection under the Germany–Philippines BIT.

The award was subsequently annulled by an *ad hoc* Committee on the ground that there had been a serious departure from a fundamental rule of procedure.

Experts file amicus briefs in support of BP Group PLC

Arbitration experts from the United States have filed amicus briefs in support of a petition for review filed by BG Group PLC (BG) with the US Supreme Court.

The arbitrators critique a January 2012 decision by a US Court of Appeals for the DC Circuit. That decision set aside an UNCITRAL award following the court's determination that BG had failed to seek relief in the local Argentinean courts as a precondition to international arbitration under the Argentina-UK BIT.

The amicus fear that the appellate court's decision would adversely impact on the attractiveness of the United States as a seat of international arbitration. One brief authored by the American Arbitration Association characterizes the decision as "a dramatic and unprecedented instance of … judicial intrusion."

Another brief prepared by George Bermann and a team from law firm Hughes Hubbard & Reed finds fault with what the appellate court called a "temporal limitation" (i.e., by requiring that an investor initially seek recourse, for eighteen months, in domestic court as a pre-condition to arbitration) before the UNCITRAL rules are "triggered." The UNCITRAL rules allow arbitrators the authority to rule on objections to their own jurisdiction, counter the amicus.

The Bergmann-Hughes Hubbard brief says the appellate court decision "shows why threshold and merits questions alike are better dealt with by arbitrators," and urges the Supreme Court to seize the opportunity "to clarify the confused state of United States law" concerning the difference between substantive and procedural arbitrability.

The vacated UNCITRAL award obligated Argentina to pay BG more than US$185 Million in damages after the tribunal had found that Argentina had breached the fair and equitable treatment standard. More information on the appellate court's decision can be found here http://www.iisd.org/itn/2012/04/13/awards-and-decisions-7/

Notes

1 "South African trade department critical of approach taken to BIT-making", Damon Vis-Dunbar, Investment Treaty News, 15 July 2009, http://www.iisd.org/itn/2009/07/15/south-african-trade-department-critical-of-approach-taken-to-bit-making/

awards & decisions

Majority declines jurisdiction in claim against Argentina over domestic litigation requirement

Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1

Damon Vis-Dunbar

A claim against Argentina by a subsidiary of the German automotive firm Daimler A.G. has failed on its merits because the claimant did not first bring the dispute to court in Argentina.

The split decision is another reminder of the divisions among arbitrators on the scope of the Most Favoured Nation (MFN) provision and its relation to dispute resolution.

Daimler Financial Services' (DFS) claim is one of the many springing from Argentina's policies during its financial crisis in 2001-2002. Among other things, Argentina allowed US dollar denominated debt obligations to be settled in Pesos—a policy change that proved damaging to DFS's Argentine subsidiary, DCS Argentina, which provided loans denominated in US dollars.

18-month domestic court requirement

Like a number of Argentine BITs—and those of other South American countries—the Argentina-Germany treaty states that disputes shall be referred to the courts of the host state; and if within an 18-month period the dispute has been not been resolved, it may then proceed to international arbitration.

In its 22 August 2012 decision, the majority concluded that the treaty is stringent in demanding that disputing parties obey the domestic court requirement. Quoting the like-minded *Wintershall* tribunal, "the word 'shall' in treaty terminology means that what is provided for is legally binding."

Nor did the majority accept—as other tribunals have done—that the requirement is a procedural matter, which the tribunal may exercise its discretion to accept or discard, as opposed to a requirement that underpins the tribunal's jurisdiction.

The majority also considered whether the MFN provisions allowed the claimants to access dispute resolution clauses in other Argentine BITs, such as the treaty with Chile, which do not contain domestic court requirements. Here the tribunal determined that the claimant would first need to fulfill the domestic court requirement before the tribunal would have jurisdiction to consider the MFN provision.

However, the tribunal noted the exception: jurisdiction could exist if there is evidence that Germany and Argentina intended for the MFN provisions to apply to the BIT's dispute settlement provisions.

Proactive consent

The majority looked for "affirmative evidence" of state consent. As the tribunal explained: "What is not permissible is to presume a state's consent by reason of the state's failure to proactively disavow the tribunals' jurisdiction. Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence."

State parties' intentions

Given that the BIT's MFN provisions do not state whether they extend to dispute settlement provisions, the majority considered the scope and meaning of the term "treatment" at the time of the BIT's negotiation in 1991. The majority concluded that treatment was generally considered to concern the direct treatment experienced by the investor in the host country, "not the conduct any international arbitration arising out of that treatment."

Also important to the tribunal was the MFN provision's reference to treatment by the host state "in its territory." Whereas international arbitration "almost without exception takes place outside the territory of the Host State and which per definition proceeds independently of any state control," stated the majority.

Moreover, the majority doubted whether a requirement to litigate in domestic courts was necessarily less favourable than international arbitration. Using these proceedings as an example— the case began in 2004—the tribunal noted that "the average time required to resolve disputes via international arbitration may equal or exceed that of domestic court processes."

Similarly, the majority remarked that the Argentina-Chili BIT—the so-called "comparator" BIT—demands that parties choose between either domestic litigation or international arbitration through its fork-in-the-road clause. In contrast, the Argentina-Germany BIT allows claimants to pursue international arbitration in the case that domestic courts fail the resolve the dispute.

For these and other reasons, two members of the three-person tribunal, Pierre-Marie Dupuy (president) and Domingo Bello Janeiro (respondent's appointee) failed to see evidence that Argentina and Germany intended for the MFN clause to include the BIT's dispute settlement provisions.

Judge Brower's dissent

Charles N. Brower, the claimant's appointee, found flaws with many aspects of the majority's conclusions on the MFN provisions relationship to the 18-month domestic court requirement. The majority's discussion "is not simply unconvincing; it is profoundly wrong," stated Brower in his dissenting opinion. "Regrettably, the type and quality of arguments raised by the Award leave no room for agreement with my Tribunal colleagues."

Brower rejected the majority's approach of seeking "affirmative evidence," which he found overly restrictive and without basis in the relevant BIT or ICSID Convention. "The Award does not cite a single source of public international law that embraces the principle that 'affirmative evidence' is required in interpreting dispute resolution or other investment treaty clauses," wrote Brower.

Disagreement also emerged on how to interpret the case law on MFN provisions and dispute settlement. The majority described a divided field, stating that "at least nine (tribunals) have found that a particular BIT's MFN clause (includes dispute settlement), while another ten have reached the opposite result."

Brower, however, countered that "this conclusion lumps together cases concerning such diverse applications of the MFN clause that the Award's attempt at presenting a 'divided field' is meaningless." Brower instead zeroed in on those tribunals that have considered the question in disputes involving Argentine BITs, and concludes that of 11 known cases, 9 have ruled that the MFN clause encompasses dispute settlement. The field is "far from being 'dramatically split'" stated Brower.

Domingo Bello Janeiro explains change of mind

In siding with the Dupuy, Janeiro departed from his earlier position in the 2004 *Siemens A.G. v. Argentina* decision on jurisdiction. In that decision, the tribunal—which also included Judge Brower—unanimously agreed that the MFN provision of the Argentina-Germany BIT extends to dispute settlement.

In a separate opinion, Janeiro explained his change of mind, noting at the onset that arbitrators have the freedom to modify their positions. Janeiro noted that three factors have been particularly influential.

First, the case law has become more varied, with cases emerging that are critical of the position taken by the Siemens tribunal. Janeiro notes the *Wintershall* tribunal, which took a unanimous decision to decline jurisdiction in a case under the Argentina-Germany BIT, as especially convincing.

Second, a number of states, including Argentina, have since sought to clarify that they did not intend for MFN provisions to encompass dispute settlement.

Third, more sophisticated analysis has emerged since *Siemens*. The "*Siemens* tribunal did not conduct an analysis of several of the points now covered extensively and very carefully by this award ..." stated Janeiro.

Other jurisdictional issues

While the MFN and dispute settlement question preoccupied the tribunal, it also dealt with four other objections to jurisdiction, all of which were dismissed.

First, Argentina argued that the dispute was contractual in nature, and should be dealt with according to the forum selection clauses of the relevant contracts. The tribunal concluded, however, that DFS's claim was not over contracts with its customers, but over Argentina's alleged violations of the Argentina-Germany BIT.

Second, Argentina charged that the claimant, as a shareholder of DCS Argentina, was ineligible to bring an "indirect" claim against Argentina. However, the tribunal noted that the BIT's coverage of investments includes "shares or stock in a company or any other form of participation in a company."

Third, Argentina argued that the regulation of its currency in response to a national emergency "is a matter falling within its exclusive sovereignty under international law." In response, the tribunal acknowledged Argentina's "right to regulate its economy as it sees fit," but noted that general sovereignty was not at issue in the dispute. Rather, the question was whether that regulation contravenes commitments made in the Argentina-Germany BIT.

Finally, Argentina argued that DFS was not the proper claimant, given that it sold its shares in DCS Argentina to its parent company (DaimlerChrysler AG). Here the tribunal decided that neither international law nor German law (which governs the share price agreement) prevented DFS from filing its claim. Under German law, the tribunal concluded that the right to bring a claim is not automatically transferred along with the shares, but must be explicitly stated in the agreement. The tribunal also decided that ICSID claims do not require "continuous ownership"; rather, what matters is that the claimant suffered damages at the time the host government allegedly breached the BIT.

Costs

The tribunal ordered the parties to split the costs of the arbitration, and bear their own legal costs, noting that each presented sound legal arguments during the course of the proceedings.

The award is available here: http://www.italaw.com/sites/default/files/case-documents/ita1082.pdf

The dissenting opinion of Charles N. Brower is available here: http://www.italaw.com/sites/default/files/case-documents/ita1083.pdf

Domingo Bello Janeiro's separate opinion is available here: http://www.italaw.com/sites/default/files/case-documents/ita1084.pdf

Tribunal qualifies Russia's actions towards Yukos as expropriatory *Quasar de Valores SICAV S.A., Orgor de Velores SICAV S.A., GBI 9000 SICAV S.A., ALOS 34 S.L. v The Russian Federation, SCC*
Larisa Babiy

An SCC tribunal added another piece to the Yukos saga, deciding over the claims of its minority shareholders, brought under the Spain-USSR BIT.
The claimants alleged that Russia dispossessed Yukos of its assets and expropriated them by means of several abuses of executive and judicial power. Russia, instead, considered its actions towards Yukos a legitimate application of its tax laws.

In its 20 July 2012 award, the tribunal primarily observed that its mandate was limited to establishing whether Russia committed an expropriation and whether any adequate compensation was paid to the investors. The BIT, in fact, did not demand a determination on the lawful or unlawful character of the expropriation.

The tribunal took note of two decisions rendered in the wake of Yukos' liquidation: the *RosInvest* award and the *Yukos v Russia* judgment of the European Court of Human Rights. The panel underlined that it was not bound by these decisions. Nevertheless, it stated that it would "pay respectful heed" to the analysis and conclusions reached in the two proceedings, considering that both sides of the present dispute made submissions as to their relevance for the case.

Third party funding did not constitute abuse of process

Russia asserted that the claimants engaged in an abuse of process after they disclosed that the costs of the proceedings were entirely borne by Group Menatep, Yukos' majority shareholder and party in another arbitration against Russia. Russia argued that the claimants were not the true party in interest in the proceedings, and were "nothing more than willing shills in Group Menatep's lifetime litigation."

The tribunal found this objection unpersuasive. It considered that the claimants purchased shares in Yukos and were thus entitled to act under the BIT. It concluded that they had towards Menatep "nothing more than a moral debt of gratitude" and no legal obligation to share the profits of the dispute.

Russia's collection of taxes from Yukos was part of an expropriatory pattern

In 2003 the Ministry of Taxation began a series of audits into Yukos' tax strategy. A first regular audit revealed no irregularity. Nevertheless, seven months later, an extraordinary re-audit found vast tax liabilities. Yukos' tax benefits were then revoked and additional taxes, associated with the income of its affiliated companies, were attributed to it. Yukos was also denied the VAT refunds to which the same trading companies were entitled.

The claimants complained that Russia's tax claims had no basis in law. Russia, however, countered that Yukos' tax optimization strategy, based on the use of intermediary affiliates established in domestic low-tax jurisdictions, was illegitimate. Russia affirmed that the company breached a rule of good faith, engaging in sham transactions and reaching tax benefits disproportionate to the investments it made in the domestic tax heavens.

The tribunal was not persuaded by Russia's arguments. It acknowledged that the existence of low-tax regions in Russia raised a number of policy issues, but stated that corrections to a legal regime should be introduced by way of legislative amendment, and not by "ad hoc administrative determinations."

The tribunal was equally unwilling to consider that Yukos engaged in sham transactions, finding nothing "surreptitious" or "disguised" in its operations. The tax authorities' approach in attributing the affiliates' actions to Yukos was dismissed as "rather cavalier" and "reaching for the nearest available general legal text for the sake of appearance."

Russia intentionally prevented Yukos from discharging its tax debts

The claimants contended that Russia made it impossible for Yukos to discharge its alleged tax liabilities. They argued that Russia failed to consider any proposal for alternative means of payment and instead chose to seize Yuganskneftegaz (YNG), Yukos' most valuable asset. For the claimants, Russia's true desire was to obtain control over YNG, and not to collect Yukos' taxes.

Russia asserted that the seizure did not affect the capability of Yukos to fulfill its tax obligations. The asset freeze did not encompass the company's subsidiaries and did not affect its principal activity. Yukos simply did not want to pay.

The tribunal observed that a seizure, by itself, is not an internationally wrongful act. However, it considered that its timing and the scope substantially hampered Yukos from paying its debts. Moreover, the failure to respond to the company's multiple settlement offers shed significant doubts on Russia's good faith.

Yukos' alleged tax delinquency was a pretext for transferring its assets to Rosneft

As a result of the asset freeze, Yukos defaulted on a significant loan issued by a foreign consortium; consequently, the consortium filed a bankruptcy petition before the Russian Courts. After the petition was accepted, Rosneft, a state-owned company, purchased the loan and replaced the consortium in the bankruptcy proceedings. Yukos' restructuring proposals were rejected and the company was liquidated.

The claimants maintained that Russia manipulated the liquidation auctions. The price was set lower than the one established by the court-appointed expert. The auction was publicly announced in an unusually short time. Finally, the sole bidder and winner of the auction was BFG, an unknown company, which a few days later and before the purchase price was due, was acquired by Rosneft.

Russia objected that the auction was consistent with Russian law and with international practice, but the panel concluded that it was only part of the same scheme of confiscation.

The tribunal finally ruled that Russia's goal was indeed to expropriate Yukos and considered that the claimants were entitled to an adequate compensation.

Russia has to "pay for what it took"

In assessing the amount of compensation the arbitrators expressed doubts on the date chosen by the claimants for determining Yukos' last meaningful share price. However, since Russia failed to present any alternative to it, the tribunal followed claimants' approach and ordered the Federation to "simply pay for what it took," amounting to US$2 million plus interest in damages for the claimants. The total valuation of Yukos in November 2007 was pegged at US$62.1 billion.

Meanwhile, Russia continues to defend itself in three separate cases brought by the majority shareholders of Yukos, and which are being heard by the same tribunal.

The tribunal was composed by Jan Paulsson (chair), Toby Landau (Russia's nominee) and Charles Brower (claimants' nominee).

Macedonia liable for damages for breach of the FET standard *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/07/5*
Patricia Ngochua

An ICSID tribunal ordered the Republic of Macedonia to pay the Swiss investor Swisslion DOO Skopje 350,000 euros in damages after concluding that the government's actions amounted to a "composite" violation of fair and equitable treatment (FET) under the Swiss-Macedonia BIT.

In its 6 July 2012 award, the tribunal dismissed a series of other claims, including claims relating to expropriation and denial of justice. The claimant had been seeking some 21 million euros in damages.
The dispute arose out of a 2006 share sale agreement between Swisslion and Macedonia which gave the Swiss investor a controlling stake in Agroplod AD Resen, a food production company.

The Macedonia Ministry of Economy had concluded that Swisslion breached the agreement, in part by failing to inject sufficient working capital into Agroplod. As a result, the Ministry commenced legal proceedings in 2008 to terminate the agreement.

The Skopje Basic Court ultimately sided with the Ministry, terminating the share sale agreement and ordering the transfer of Swisslion's Agroplod shares to the Ministry without compensation.

A 'composite act' in breach of the FET standard

In examining whether the government of Macedonia violated the obligation to grant Swisslion fair and equitable treatment, the tribunal refrained from discussing in detail its approach to interpreting the standard. The tribunal deemed "it unnecessary to engage in an extensive discussion of the fair and equitable treatment standard," stating that the "standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is mean to guarantee justice to foreign investors."

Based on this approach it concluded that Macedonia had breached the FET standard, pointing to acts and omissions taken by the Ministry and other state organs prior to the court's determination. The tribunal observed that there was a "series of measures that collectively amounted to a composite act in breach of the FET standard."

In particular, the tribunal frowned on the Ministry's lack of timely response to Swisslion's requests for confirmation that its investments were in compliance with the share sale agreement; certain obstructionist actions taken by the Macedonia Securities and Exchange Commission; and the publication by the Ministry of the Interior of a criminal investigation against Swisslion without a subsequent notice of the prosecutor's decision to drop the investigation.

The tribunal emphasized that while the Ministry and the court were within their rights to determine Swisslion's contractual non-compliance, a state has "a duty to deal fairly with the investor by engaging with it, in particular to advise it of any concerns it may have had the investment might not be in compliance with the investor's contractual obligations."

No judicial expropriation

The tribunal rejected Swisslion's claim that the Skopje Basic Court had unlawfully expropriated its shares in Agroplod without compensation, emphasizing that a predicate for judicial expropriation is an "unlawful activity of the court itself." In the tribunal's view, the actions of the Skopje Basic Court's actions did not breach the Swiss-Macedonia BIT and therefore were not unlawful.

As for whether the court's decision to not order the Ministry to pay Swisslion compensation for the confiscation of its Agroplod shares amounted to an expropriation, the tribunal noted that Swisslion was unable to prove a clear right to recover the purchase price of the shares after it made no attempt to claim compensation during the court proceedings.

No violation of the umbrella clause and no analysis of 'impairment through unreasonable measures'

In its findings of fact, the tribunal noted that ambiguities in Swisslion's business plan for Agroplod and the share sale agreement "could give rise to differing good faith interpretations" by the contracting parties. As such, the tribunal rejected Swisslion's claim that Macedonia breached the Swiss-Macedonia BIT's umbrella clause. That clause requires that either contracting party "shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."

The tribunal also dismissed Swisslion's claim, based on the Switzerland-Macedonia BIT's non-impairment obligation, that Macedonia impaired its investments by "unreasonable measures" after concluding that these were better addressed within the context of the breach of the FET standard.

The tribunal was comprised of H.E. Judge Gilbert Guillaume (President), Daniel M. Price (Claimant's Nominee) and J. Christopher Thomas, Q.C. (Respondent's Nominee).

The award is available at: http://italaw.com/cases/documents/1517

Tribunal defers to Guatemalan judiciary, finds investor's claims over electricity tariffs not a matter for international law *Iberdrola Energia S.A. v. The Republic of Guatemala, ICSID Case No. ARB/09/5*
Fernando Cabrera

An ICSID tribunal has rejected a Spanish investor's claims against Guatemala on the merits in a dispute over setting electricity tariffs.

In a decision handed down on 17 August 2012, the tribunal described the investor's claims as presenting a mere dissatisfaction with the decisions of local courts and not a violation of international law.

Background

In 1998 the Spanish-owned energy company Iberdrola led a consortium that won a public tender to purchase a majority stake in Guatemala's recently privatized state electricity utility, EEGSA, for US$520 million. Under the terms of the agreement and relevant Guatemalan law, electricity rates were to be set every five years based on an estimate of what an efficiently run company would need to make a reasonable return on its investment.

The dispute arose during the process of setting tariffs for the 2008-2013 period. Following Guatemalan law EEGSA hired a consultant from a list pre-qualified by Guatemala's National Electricity Commission (CNEE) to determine the new tariffs. In April 2008 a tariff report was submitted to CNEE, but the commission rejected it as deficient and asked for changes.

After some back and forth the two sides were unable to reach an agreement and the CNEE then called for an expert committee to determine if the amended report conformed to the law. The three-member expert committee eventually ruled that EESGSA's report did not conform to the law, and ordered revisions to the report.

However, CNEE quickly disbanded the commission arguing that under Guatemalan law its role was simply to rule on whether the tariff report confirmed to the law. With EEGSA's tariff study rejected, CNEE then adopted its own consultant's study to set the tariff rates.

Iberdrola challenged both the disbanding of the commission and the adoption of tariffs from CNEE's consultant through administrative and judicial processes in Guatemala. Ultimately Guatemalan courts determined that the expert committee only had jurisdiction to decide whether EEGSA's consultant's report conformed to the law, and that the CNEE was within its rights to disband the commission and adopt its own consultant's report.

Claims

After failing in local courts, Iberdrola registered its dispute with ICSID on 17 April 2009. The company's principal claim was that Guatemala's actions amounted to an expropriation of its investment in violation of the Guatemala-Spain bilateral investment treaty. The company also alleged violations of Guatemala's duties under the BIT to provide just and equitable treatment, full protection and security, and not to interfere with its investment by arbitrary measures. In its reply brief the company also added a denial of justice claim.

Guatemala objected to the tribunal's jurisdiction, alleging that the dispute was a contractual one involving Guatemalan law and did not amount to a treaty violation.

Jurisdiction

The tribunal upheld Guatemala's objections to jurisdiction on most claims, concluding that the company was merely appealing decisions that went against it in local courts.

"Beyond labeling the conduct of CNEE as treaty violations, the claimant did not present a dispute under the treaty and international law, but instead a technical, financial and legal debate over the provisions of the law of the respondent state," said the tribunal.

"A tribunal constituted under the Treaty, cannot determine it has competence to judge, according to international law, the interpretation that a State has made of its internal regulations simply because the investor does not agree with it or considers it arbitrary or in violation of the Treaty," it added.

Denial of justice claim

The tribunal upheld its jurisdiction to consider the denial of justice claim, stating: "In the case of a claim for denial of justice, the question is different. Even if only issues of domestic law are raised an international claim can arise if in this domestic arena justice has been denied."

Based on previous cases the tribunal concluded there were three situations that could lead to a denial of justice: (1) unjustified refusal by a court to hear a matter within its competence or another state action having the effect of preventing access to justice, (ii) a improper delay in the administration of justice, and (iii) decisions or actions of state bodies that are clearly arbitrary, unfair, idiosyncratic or late.

In Iberdrola's case, the tribunal found that the CNEE's decisions and the Guatemalan judiciary's subsequent upholding of the same did not fall into any of these categories; hence a denial of justice had not occurred.

Costs

Given the claimant lost on all counts, the tribunal held Iberdrola should pay all of its own costs and all of the costs of Guatemala.

The award is available here: http://www.italaw.com/sites/default/files/case-documents/ita1081.pdf

resources and events

Resources

International Arbitration Case Law

This website is a private, not-for-profit academic endeavour, in partnership with the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London. Its objective is to summarize, edit, and coordinate the publication of decisions rendered by arbitral tribunals, international tribunals and national courts in matters of international arbitration and related legal issues. At the early stage of this project the main focus will be on international investment arbitration. This academic project also seeks to eliminate language barriers and to facilitate access to the content of decisions of national and international tribunals in various languages.www.internationalarbitrationcaselaw.com

How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties

Federico Lavopa, Lucas E. Barreiros, María Victoria Bruno, Society of International Economic Law (SIEL), 3rd Biennial Global Conference, 9 July 2012

The backlash against the expansive interpretation of key disciplines of international investment law by arbitral tribunals has prompted a host of strategies, implemented mostly by developing countries, aimed at walking away from the system. These range from denouncing the ICSID Convention and withdrawing consent to the exercise of jurisdiction by other arbitral bodies to denouncing the Bilateral Investment Treaties to which they are parties. The purported objective of these initiatives is to reduce the legal exposure of these countries to international claims before arbitral tribunals, either by depriving foreign investors of a forum in which to pursue their claims or by completely extinguishing their rights under the treaties. This paper focuses on these strategies and argues that none of them produce the desired results, at least in the short term. It notes that BITs include self-defense mechanisms – particularly, most favored nation (MFN) obligations, tacit renewal and "survival clauses" – that either delay or turn impossible the realization of these exit strategies. Against this backdrop, the paper proposes that developing States may be better off by implementing a strategy of renegotiation of their BITs. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102683

The Global Governance of Capital Flows: New Opportunities, Enduring Challenges

Kevin Gallagher, Political Economy Research Institute, University of Massachusetts Amherst, May 2012

International capital mobility has long been associated with financial and banking crises. The Articles of Agreement of the International Monetary Fund contain multi-lateral rules to govern global capital flows. For some countries, especially those in the developing world, the IMF Articles of Agreement remain the core framework under which they have autonomy to regulate cross-border capital flows. For others, these rules have been partly superseded by more recent trade and other economic integration agreements. Thus what used to be a regime of 'cooperative decentralization' has become a patchwork of overlapping and inconsistent governance structures that pose significant challenges to nations attempting to regulate global capital flows for stability and growth. This paper traces the history of governing global capital flows and presents a framework for understanding three distinct eras in the modern governance of global capital. The framework emphasizes how power, interests, ideas, and institutions interact to shape each era in different combinations to yield different outcomes. From this perspective, there are many challenges ahead for effectively governing global capital flows. Available at: http://www.peri.umass.edu/236/hash/5177c19e45bd73aaf9ae065db58a72cb/publication/512/

Farm Land and Water: China invests abroad

Carin Smaller, Wei Qiu, Yalan Liu, International Institute for Sustainable Development, 2012

China is actively investing in agriculture abroad and is now the world's third largest source of foreign investment stocks in agriculture, behind only the U.S. and Canada. While China has a strong domestic agricultural base, there are a few products that China does not produce in sufficient quantities, and which are needed for the food processing, manufacturing and energy sectors. This paper explores how China secures those agricultural products through trade and investment. Importantly, the policy is shifting from a strategy based on dependence on global trade to a strategy based on foreign direct investment, including through acquiring large tracts of farmland with associated water resources. The authors found reports of 86 Chinese agriculture projects covering 9 million hectares of land in developing countries. They were able to confirm the existence of 55 projects covering 4.9 million hectares. Available at: http://www.iisd.org/publications/pub.aspx?pno=1687

Events 2012

20 October – 7 November
REGIONAL COURSE ON KEY ISSUES ON THE INTERNATIONAL ECONOMIC AGENDA FOR WESTERN ASIA, UNCTAD, Sultanate of Oman, http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=77

October 29-31
SIXTH ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, IISD, Port-of-spain, http://www.iisd.org/investment/dci/

November 2-4
NINTH ANNUAL SEMINAR ON INTERNATIONAL COMMERCIAL ARBITRATION: HOW TO HANDLE A BIT ARBITRATION, American University, Washington College of Law, Washington, http://www.wcl.american.edu/arbitration/seminar.cfm

November 14-15
SEVENTH COLUMBIA INTERNATIONAL INVESTMENT CONFERENCE, Columbia University, New York, http://www.vcc.columbia.edu/content/seventh-columbia-international-investment-conference

November 19-23
WORKSHOP ON INTERNATIONAL INVESTMENT POLICIES, INVESTMENT PROMOTION STRATEGIES AND SUSTAINABLE DEVELOPMENT FOR AFRICAN IDB MEMBER COUNTRIES, UNCTAD, Casablanca, http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=157

26 November – 7 December
TRAINING COURSE: INTERNATIONAL INVESTMENT AGREEMENTS AND INVESTOR-STATE ARBITRATION, International Law Institute, Washington, http://www.ili.org/training/ili-brochure/upcoming-programs-and-events/282-2012-international-investment-agreements-and-investor-state-arbitration.html

December 3-9
TRAINING COURSE ON THE NEW GENERATION OF INVESTMENT POLICIES: MANAGING INVESTMENT DISPUTES FOR LATIN AMERICAN COUNTRIES, UNCTAD, Quito, http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=163

December 10-11
MAURITIUS INTERNATIONAL ARBITRATION CONFERENCE 2012, MAURITIUS BOARD OF INVESTMENT, Port Louis, http://www.miac.mu/

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