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feature 1

Mission Creep: International Investment Agreements and Sovereign Debt Restructuring

Kevin P. Gallagher

As members of the Eurozone are now acutely aware, the lack of a sovereign debt restructuring regime is one of the most glaring gaps in the international financial architecture. That said, this summer's decision by a tribunal of the International Centre for Settlement of Investment Disputes (ICSID), which grants a bilateral investment treaty (BIT) jurisdiction over Argentina's restructuring of its sovereign debt in the wake of its 2001 financial crisis, shows that a de-facto regime may be arising whereby international investment agreements (IIAs) can serve as a way for disgruntled investors to circumvent debt restructuring. This amounts to mission creep on the part of IIAs. Creeping into such territory is too much to take on for the world of IIAs. Sovereign debt restructuring should be left to national governments and international financial and monetary authorities.

This short article discusses how sovereign debt restructuring is seen as grounds for private bondholders to file arbitral claims under IIAs; that safeguards under IIAs are limited, particularly in US IIAs, meaning that it is not clear which measures provide governments with policy space to effectively restructure debt in times of crises; and if claims against sovereign debt restructuring become more widespread they could threaten the already fragile regime for financial crisis recovery. Finally, technical options for reforming treaties to delegate debt restructuring to the proper regimes are outlined.

Background: Debt, the SDRM and CACs

Though it increasingly has a bad name in the current crisis, debt is an important component of economic growth and development. But if it is not managed properly debt can become unsustainable and force nations to default or restructure their loans. At the turn of the century, the International Monetary Fund (IMF) proposed a global mechanism for working out debt problems, but it was rejected by the US government and the global business community. In its place are collective action clauses that have not become widespread and face a number of obstacles to becoming adequate.

If managed appropriately, government borrowing can be an essential ingredient for economic development, and has been for centuries. However, as we are witnessing in Europe, even when nations manage to keep its debt to GDP ratio in good shape, they can still spiral into a debt crisis—simply defined as when a nation cannot (or is no longer willing) to service its debt. Contagion from other crises or herd-like bouts expressing a lack of investor confidence could prevent creditors from rolling over or increasing loans. Moreover, debt is sometimes denominated in a foreign currency, so when interest rates rise or the value of nation's currency falls (on its own or relative to its neighbors) the cost of debt service can skyrocket.

Even nations with low budget deficits can quickly be affected as governments borrow to bailout frivolous banks or stimulate an economy during a recession, but then experience slow growth and low tax revenue thereafter. These tensions are exacerbated with developing nations that are overly exposed to international financial markets. Any number of the factors discussed above could cause massive inflows of debt and large swings in outflows that can cause financial instability

Coordinated global bailouts have been part of the traditional response to prevent and mitigate debt crises, but receive a great deal of criticism because of their costliness and lack of effectiveness. Europe allocated $1tn in May of 2010, over $100bn in July 2011, and proposes yet another $109bn in its October 2011 package. These bailouts go from the pockets of taxpayers to private creditors. The record on the effectiveness of bailouts is limited at best, with many nations taking years to recover, if at all. Moreover, bailouts can encourage moral hazard where nations and investors will engage in more risky behavior because they think they will be bailed out in the end (Eichengreen, 2003).

Sovereign debt restructuring (SDR) is increasingly seen as an alternative to bailouts. However, the international community views the SDR regime to be greatly lacking. When a sovereign government is no longer willing or able to pay its debts, sovereign restructurings occur during what amounts to a formal change to debt contracts negotiated between creditors and debtors. SDRs (or "workouts") often take the form of reducing the face value of the debt, "swaps" where new bonds with lower interest rates and longer maturities are exchanged for the defaulted bonds, and so forth. Such workouts are usually highly discounted and result in a loss for bondholders. Losses or discounts are commonly referred to as "haircuts".

In the early 2000s the IMF proposed a "Sovereign Debt Restructuring Mechanism" (SDRM). The SDRM sought to provide a fair forum for negotiation between bondholders and governments; a standstill clause whereby bondholders can't yank their money out of a debtor nation in a herd; a facility to provide short-term financing and to prioritise a debtor nations' debt schedule; and clauses that limit the ability of disgruntled minority bondholders to file lawsuits against debtor nations. The SDRM was swiftly rejected by the US government and the business community.

Instead, the US proposed normalizing the use of collective action clauses (CACs). CACs have the following features: a collective representation component where a bondholders' meeting can take place where they exchange views and discuss the default/restructuring; a majority restructuring component that enables a 75% "supermajority" of bondholders to bind all holders within the same bond issue to the terms of restructuring; and a minimum enforcement component whereby a minimum of 25% of the bondholders must agree that litigation can be taken.

Unfortunately, the majority of the bonds in the Eurozone do not have CACs and even if they did, a restructuring would not be burden free. The International Swaps and Derivatives Association can rule out a CAC and pay out insurance to bondholders instead. CACs also do not apply across bond issuances and thus it may be hard to get agreement on a whole swath of debt that a nation in trouble would like to swap. And it may be the case that CACs are no cover for IIAs.

Hello Argentina: IIAs and Sovereign Debt Restructuring

Readers of this publication know that an increasing number of the more than 2,000 trade and investment treaties that govern international investment flows cover "any type of asset." What may be news to some is that a recent ICSID panel has seen Argentina's restructuring of debt in the wake of its 2001 financial crisis as falling under the jurisdiction of the Italy-Argentina BIT. Indeed, sovereign debt is "any kind of asset" and thus a BIT may be a place where investors can seek to recover the full value of their bonds.

When Argentina restructured its debt in 2005 close to 180,000 Argentine bondholders filed a claim under the Italy-Argentina BIT for approximately $4.3bn. Some of those investors settled in a 2010 restructuring and now there are believed to still be approximately 60,000 Italian bondholders seeking upwards of $2 billion from Argentina at ICSID. This September, a majority of a private World Bank tribunal decided that Argentina's bond restructuring indeed does fall under the jurisdiction of these treaties. The case will therefore continue, despite a scathing dissent from a third member of the tribunal (IAR, 2011). The bondholders seeking their investments through the trade treaty are among the few remaining holdouts.

Box 1 outlines where IIAs can tangle with sovereign debt restructuring. And it is not clear that the small number of safeguard measures in place can assure that a nation can have a debt workout without also getting snared in an ICSID process.

> **Box 1: IIAs and Sovereign Debt Restructuring**
>
> **Jurisdiction:** If IIAs are deemed to cover "any kind of asset" then it can be argued that sovereign debt falls under the jurisdiction of the treaty.
> **Expropriation:** SDR could be seen as an indirect expropriation because a restructuring reduces the value of the sovereign bond.
>
> **Fair and Equitable Treatment (FET):** Insofar as FET is seen as protecting investors' legitimate expectations, a bond swap that was not expected during the initial investment period could be seen as a violation of that standard.
>
> **National Treatment:** In some financial circumstances, it may be important to treat domestic bondholders differently than foreigners. This could be seen to violate National treatment, however.

The safeguards and exceptions in many IIAs are not adequate enough to provide cover for nations to restructure their debt. For most cases the only possible safeguard are "essential security" provisions. A handful of the United States' treaties have an annex that discusses sovereign debt restructuring that is very limited.

It may be possible that a nation can claim that actions taken during a financial crisis are measures needed to protect the 'essential security' of the nation. Language like Article 18 of the United States Model BIT is found in many treaties:

> ... to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests (USTR, 2004).

The article does not mention economic crises per se, but "all tribunals that have considered the matter thus far have interpreted the rules broadly enough to include such crises" (Salacuse, 2010: 345). However, tribunals differ greatly over how grave the difficulties may be. In Argentina, again, tribunals came to opposite conclusions, and only one of three tribunals ruled that Argentina could not be held liable for actions it took to halt its crisis. A key matter is whether or not a measure by a nation to stem a crisis can be seen as "self-judging". In other words, can the host nation using the control be the judge of whether or not the measure taken was necessary to protect its security. The language quoted above in the 2004 Model BIT, which says "that it considers" is now seen as to mean that a measure is self judging (because of the "it"), but Argentina's BITs with the United States and others did not include as precise language at the time (Salacuse, 2010).

Some of the recent IIAs negotiated by the United States clearly define sovereign bonds as covered investments and provide explicit guidelines for the interaction between

SDR and certain IIAs. The US is usually reluctant to negotiate such guidelines, as it sees CACs as sufficiently safeguarding sovereign debt restructuring. However, when negotiating partners insist, the US is sometimes willing to compromise with an annex.

What is found in the US-Uruguay BIT, and in FTAs with Central America, Chile, Peru, and Colombia is a special annex on sovereign debt restructuring. Though the specific text varies across the treaties with such an annex, they usually prohibit claims against 'negotiated debt restructuring', unless an investor holds that a restructuring violates national treatment (NT) or (MFN). Such treaties usually define "negotiated restructuring," as a restructuring where 75% of the bondholders have consented to a change in payment terms. If an investor does file a claim in the event of a restructuring that is not a "negotiated" one, s/he must honor a 'cooling off' period usually lasting 270 days before a claim may be filed. There is no cooling off period for a non-negotiated or negotiated restructuring that violates NT or MFN.

These annexes are not standard in US treaties after NAFTA (NAFTA excludes sovereign debt from the definition of investment altogether). Indeed, the US-Australia, US-South Korea, US-Morocco, US-Oman, US-Panama and US-Singapore agreements included bonds and debt as covered investments but do not include annexes for sovereign debt restructuring.

The Dominican Republic-Central America Free Trade Agreement resembles the Chile FTA much more closely. Like the above agreements, bonds and other debt instruments are considered covered investments under the agreement. Annex 10-A then specifies very clearly that sovereign debt restructuring is subject only to Articles 10.3 (National Treatment) and 10.4 (MFN). The additional cooling off period does not seem to apply and there is no mention of "negotiated restructuring" as a prerequisite.

These annexes can be seen as a step in the right direction given that parties to the agreement recognize that restructuring is a special case, yet they remain far from adequate for at least four reasons. First, CACs will not alleviate the possibility that nations will seek claims for restructuring. As indicated earlier, vulture funds and other holdouts can acquire a supermajority within a bond issuance and neutralize the bond issue and a 25 percent minority can still agree to litigate and arbitrate. Second, the definition of investment and umbrella clauses allow for investor-state arbitration under treaty obligations regardless if such obligations are also covered by domestic law. Third, most restructurings are multi-issue restructurings and suffer from the aggregation problem described above. Again, collective action clauses only apply within a bond issue, not across multiple issues that are often bundled together in a restructuring.

Fourth and very importantly, economists and international financial institutions have repeatedly held that, in contradiction with the national treatment principle, domestic bondholders and financial institutions sometimes needed to be treated differently during a crisis. Prioritizing domestic debt may be in order so as to revive a domestic financial system, provide liquidity and manage risk during a recovery (Gelpern and Setser, 2004, 796).

Reforming the Mission

This short note has outlined how some IIAs have provisions that may prevent the ability of financial and monetary authorities to effectively manage debt crises. Argentina is thus far the only country subject to claims, but the numerous investment treaties negotiated since the Argentine crisis of 2001 and the fragility of the global financial system unfortunately mean that similar cases may arise in the future.

The following are three non-exclusive policy remedies that would enable IIAs to grant nations the policy space to conduct effective SDRs in the future:

- **Exclude sovereign debt from IIAs.** The exclusion of sovereign debt from "covered" investments under future treaties would relegate sovereign debt arbitration to national courts and to international financial bodies. Some IIAs already exclude sovereign debt, such as NAFTA and others. Argentina's new model BIT is reported to be moving in this direction as well.

- **Clarify that mitigating financial crises is "essential security".** Clarify that the Essential Security exceptions cover financial crises and that sovereign debt restructuring taken by host nations is 'self-judging' and of 'necessity'.

- **State-to-state dispute resolution for SDR and crisis related instances** may be more prudent than investor-state arbitration given that governments need to weigh a host of issues in such circumstances. States attempt to examine the economy-wide or public welfare effects of crises whereas individual firms rationally look out for their own bottom line. Investor-state tips the cost-benefit upside down, giving power to the "losers" even when the gains to the "winners" (the larger public and the future of a nation) of an orderly restructuring may far outweigh the costs to the losers.

Author

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References

Eichengreen, Barry (2003), "Restructuring Sovereign Debt," *Journal of Economic Perspectives* vol. 17(4), pages 75-98.

Gelpern, Ann and Brad Setser, (2004), "Domestic and External Debt: The Doomed Quest for Equal Treatment," *Georgetown Journal of International Law, v35, n4, 795-814.*

Investment Arbitration Reporter (IAR), "Argentine sovereign bond arbitration at ICSID" Vol. 4, No. 16, November 3, 2011.

Salacuse J (2010). *The Law of Investment Treaties.* Oxford. Oxford University Press.

United States Trade Representative (2004), US-Model BIT, Washington.

UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador's Proposal

Silvia Karina Fiezzoni

feature 2

Five years ago, some Latin American countries started a critical movement against the International Centre for Settlement of Investment Disputes (ICSID), the World Bank institution for arbitrating disputes between foreign investors and host states. They perceived that ICSID arbitration proceedings had become problematic due to a lack of transparency and a failure to address the broader needs of society. Concerns also related to the lack of precedent, which has led to inconsistent decisions among tribunals on central questions of international investment law. Thus, in an effort to limit and/or exclude the jurisdiction of ICSID,[1] a group of Latin American countries led by Ecuador have called for an alternate arbitration centre under the rubric of the Union of South American Nations (UNASUR).

UNASUR, whose constitutive treaty entered into force on 11 March 2011, is the first regional organization to comprise most South American countries. Brazil, which ratified the UNASUR treaty in July 2011,[2] is the most successful country in Latin America at attracting flows of FDI. Notably, Brazil is not a signatory to the ICSID Convention nor has it ratified any bilateral investment treaties. Thus, the inclusion of Brazil into UNASUR and the political willingness of all the UNASUR member countries to create a regional arbitration centre within UNASUR represent an important development in international arbitration law.

To understand the wariness that some Latin American countries have taken towards ICSID, and the drive to establish a regional alternative, it is relevant to consider that 9 of the 12 UNASUR countries have faced 111 cases before ICSID, which represent 31% of the total ICSID caseload.[3]

The following article presents the state-of-play of UNASUR, and outlines the most salient features of Ecuador's proposal to constitute a UNASUR arbitration centre.

The present situation of UNASUR and the proposal to constitute its arbitration centre

On 23 May 2008, the Constitutive Treaty of UNASUR" [4] was signed by Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela. This furthered the goal of greater economic integration in South America.[5]

In June 2009, at the Thirty-ninth Session of the General Assembly of the Organization of American States, Ecuador's Foreign Minister, Fander Falconí, proposed that UNASUR create an arbitration centre as an alternative to ICSID.[6] In December 2010 in Guyana, the foreign ministers of the UNASUR member countries unanimously decided that Ecuador should chair the working group of the proposed arbitration centre's dispute settlement system. At the same meeting, Ecuador submitted a proposal for a set of rules for the centre.[7] The UNASUR Commission of the Dispute Settlement System is currently fine-tuning the proposal, before it is be submitted to the UNASUR member countries for their consideration.[8]

The most important features of Ecuador´s proposal

The Ecuadorian proposal for a UNASUR system of dispute resolution is contained in three documents: 1. A set of proposed rules for an arbitration centre; 2. A code of conduct for UNASUR arbitrators and mediators and; 3. A proposed counselling centre for settling investment disputes. In this article only the operating rules of UNASUR arbitration centre are explained.

The proposed rules allow for state-to-state and investor-state dispute settlement when provided for in a contractual provisions or an international instrument. The jurisdiction of the centre precludes disputes concerning health, taxation, and energy, among others, unless expressly stated otherwise in the relevant treaty or contract. Moreover, in no circumstances shall an arbitral tribunal have jurisdiction to resolve disputes concerning the legitimacy of the internal laws (nor their economic effects) of the UNASUR member countries.[9] Although the jurisdiction of the proposed UNASUR arbitration centre is not only confined to investment disputes, the stipulation mentioned above considerably reduces some matters that are connected with investment and commerce. Furthermore, member countries can demand, as a precondition to arbitration, the exhaustion of domestic judicial and administrative remedies. This precondition might force the injured party to wait years to access UNASUR arbitration. Thus, it would be necessary to state a reasonable limit of time for the conclusion of the domestic proceedings to give certainty and security to the disputing parties.

Ecuador's proposed rules have a number of interesting characteristics, such as:

1. The parties must endeavour to resolve any dispute by consultations (with a maximum duration of 6 months from the date of filing the request, unless the parties agree to continue with them) and/or meditation prior to arbitration (without specific limit of duration).

2. The process of electing and challenging arbitrators responds to the criticisms made against ICSID in these areas. Under ICSID rules, the President of the World Bank is in charge of appointing an arbitrator should a party fail to elect its own, and to designate the presiding arbitrator if there is no agreement by the parties. This rule has been criticized by some Latin American countries on the grounds that it compromises the impartiality of the proceedings and could generate conflicts of interests. By contrast, in the UNASUR proceedings, the UNASUR Directorate General shall designate the arbitrators by sortition, where a party does not select its own, or the

parties do not agree on a presiding arbitrator. With regards to the independence of arbitrators, ICSID provides that an arbitrator shall disclose any interest, relation or issue that may affect his or her independence in the proceedings. The proposed UNASUR Code of Conduct for Arbitrators and Mediators goes a step further, and includes an examination of the likelihood of an arbitrator having a state of mind or prejudgment that favors one side in the dispute.

3. In order to avoid inconsistent decisions and awards, the arbitral tribunal shall consolidate two or more proceedings in which a common question of fact or law on the same measure or decision is discussed. Moreover, the proposed rules establish an appeal mechanism to permit the revision of questions of law with a system of precedent by an appellate tribunal. This is intended to provide consistent and coherent jurisprudence, creating predictability for investors and states, which is currently missing from ICSID proceedings.

4. In relation to transparency, the rules state that all arbitration proceedings should be made public (this includes documents, records, evidence, hearings and awards) except for those relating to defense and security of states and in special cases which the parties may determine by mutual agreement. This proposed regulation is consistent with the NAFTA arbitration rules.

5. The proposed rules specify that the only basis for denying recognition and enforcement of the award would be when, in accordance with the host state's constitution or its laws, the subject of the dispute is not arbitrable or it is contrary to public policy. This rule is similar to the 1958 New York Convention and most other international arbitration rules. It differs, however, from the ICSID rules, where States are prevented from invoking public policy against the enforcement of an ICSID award (Article 53 of ICSID Convention). Although this is a typical feature that distinguishes ICSID arbitration from other arbitration centres, it should be noted that this does not mean that investors can obtain enforcement of the award automatically under the ICSID system, as there is an obstacle reserved in the immunity rules. Under Article 55 of the ICSID Convention, after an investor obtains an award against a state, the investor must initiate a formal process of enforcement which is dependent on the domestic legislation of the country where the enforcement takes place.

6. The UNASUR arbitration centre will have different stages of implementation. Initially it will be reserved for countries that are part of UNASUR. A second stage will open the centre's services to Central America and Caribbean countries, and in the final stage it will be open to any country wishing to use it. This gradual process of implementation will facilitate a steady development of the centre.

It is important to note that Ecuador's proposal improves the transparency and consistency of decisions by the establishment of an appeal mechanism with a system of precedent. It addresses most of the concerns raised over ICSID by Latin American countries. It is also notable for the influence of the WTO's dispute settlement system regarding the consultation stage, appellate tribunal and award compliance.

Chance of success

As Martín Doe Rodríguez, Counsellor of the Permanent Court of Arbitration at The Hague, mentions, Ecuador´s proposal has every chance of success because there is a common political will to establish an arbitration centre by UNASUR member countries.[10]

However, ensuring in practice the independence and impartiality of the arbitrators as well as their high academic and professional qualifications will be essential to the success of the proposed centre. Moreover it will be important to relax the limitations on the arbitration centre's scope of jurisdiction and state a reasonable limit of time for the requirement to exhaust domestic judicial remedies

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Notes

1 Marry H. Mourra, Concluding Note, In: M. H. Mourra, Ed., Latin American Investment Treaty Arbitration. The Controversies and Conflicts, Kluwer Law International BV, 1st Edition, The Netherlands, 2008, p. 196.

2 Ministério das Relações Exteriores, Brasil ratificó creación de UNASUR, 16 July 2011. http://www.itamaraty.gov.br/sala-de-imprensa/selecao-diaria-de-noticias/midia-internacional/italia/agencia-ansa/2011/07/16/brasil-ratifico-creacion-de-unasur

3 International Center for Settlement of Investment Dis-putes, "Search ICSID Cases," 2011. http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases

4 UNASUR, Tratado Constitutivo de la Unión de las Naciones Suramericanas. http://www.pptunasur.com/downloads/tratado-constitutivo-UNASUR.pdf

5 CSID Lawyers, Union of South American Nation – UNASUR. .http://www.icsidlawyers.com/UNASURArbitration

6 Katia F. Gómez, Latin America and ICSID: David versus Goliath?, Research Paper, University of Zaragoza, Zaragoza, 2010, pp. 40-41. http://aragosaurus.academia.edu/katiafachgomez/Papers/858321/Latin_America_and_ICSID_David_versus_Goliath

7 El ciudadano.gov.ec., Sistema de Solución de Controversias inicia su proceso, 3 December 2011. http://www.elciudadano.gov.ec/index.php?option=com_content&view=article&id=19256:sistema-de-solucion-de-controversias-inicia-su-proceso&catid=1:actualidad&Itemid=42

8 Noticiero Legal, Comision de UNASUR alista Centro de Arbitraje Regional, 20 June 2011. http://www.noticierolegal.com/index.php?option=com_content&view=article&id=8180:comision-de-unasur-alista-centro-de-arbitraje-regional&catid=35:unasur&Itemid=38

9 This would, for example, exclude the Argentine Economic Emergency Law, enacted in the midst of Argentina's financial crisis, and which led to numerous ICSID claims against Argentina

10 Andina, Expertos aseguran que corte de arbitraje desde la UNASUR es viable, 6 October 2011. http://www.andina.com.pe/Espanol/noticia-expertos-aseguran-corte-arbitraje-desde-unasur-es-viable-380915.aspx

feature 3

Investment Developments in the Trans-Pacific Partnership Agreement

Jane Kelsey

Advocates for the Trans-Pacific Partnership Agreement (TPPA) describe it as a "new generation agreement for the 21st century" that will go further behind the border than any previous free trade agreement (FTA). This signals significant changes in the investment regime found in the current generation of FTAs and bilateral investment treaties (BITs).

Precisely what those changes will be is a matter for speculation. The draft text and background papers remain secret, reversing the trend to disclose documents and working texts during negotiations on the World Trade Organization (WTO) Doha round, Anti-Counterfeiting Trade Agreement and Free Trade Area of the Americas. Indeed, the nine participating countries have agreed that no background documents will be released until four years after the agreement comes into force or the negotiations collapse.

In what is more an investment than a trade agreement, the investment chapter itself seems reasonably predictable. So as to provide the reference point for a paper on investment presented to the "stakeholder" forum at the February 2011 negotiating round in Santiago, Chile, a composite square bracketed text was prepared using the investment chapters in the existing FTAs between countries involved in the TPPA negotiations.

Since then some novelties in the proposed agreement have become clearer, thanks largely to leaked texts. It seems that the "21st century" nature of the TPPA rests in the complex interplay of rules and obligations on investment, financial services, transfers, transparency, regulatory coherence, competition, state-owned enterprises, government procurement, intellectual property, most-favoured-nation treatment, sectoral disciplines, supply chains, and more.

These negotiations date back to the four-country Trans-Pacific Strategic Economic Partnership Agreement among Chile, Singapore, Brunei and New Zealand in 2006, known colloquially as the "P4". Financial services and investment were held over for several years. President George W. Bush brought the United States into those talks in 2008, as the global financial crisis was unfolding. Three rounds of negotiations produced draft texts based on the US FTA template.

The Trans-Pacific Partnership negotiations were born when the United States, and later Australia, Peru, Vietnam and Malaysia announced they would "accede" to the P4. After some delay, the Obama administration confirmed US participation. In reality, the TPPA is the US + 8. That is not simply because the US is economically dominant in an agreement that has limited commercial value as a traditional FTA, given the extensive web of existing agreements among the parties, or because the US Congress has an effective veto over trade deals. The underlying game plan, confirmed at the November 2011 APEC meeting in Honolulu, is for the TPPA to serve as the economic limb of the US geopolitical strategy for "America's Pacific Century," alongside a stronger military presence, as a counterforce to China in the Asia Pacific.

Nine full rounds of negotiations have been held since March 2010. The original deadline for completing negotiations was November 2011 at the APEC leaders' meeting in Honolulu. Although the joint communiqué released by the parties at APEC set no new deadline, the unofficial target is a consensus legal text when the APEC Trade Ministers meet in Russia in mid-2012 and completion of schedules by the end of that year. Japan, Canada and Mexico, who indicated their wish to join the negotiations, are on a parallel track while they convince all parties they will meet the "gold standard" set for the deal.

What are the likely implications for investment law? The draft investment chapter is largely completed. It generally follows the 2004 US model BIT, with a few significant square brackets.

A number of issues have arisen. There are apparently no special flexibilities for developing countries. The insistence that commitments on market access, national treatment and MFN for investors and investments are made using negative lists is already proving a problem for Malaysia and Vietnam. This is in contrast to the WTO approach for trade in services, for example, which only liberalizes sectors that are listed positively in a schedule of commitments. Further, those exclusions provide no protection against expropriation or minimum standard of treatment claims or from transparency, domestic regulation or competition disciplines. The US-driven State-owned Enterprises (SOE) text is designed to open new opportunities and protections for foreign firms, especially in developing countries. The development implications would be hugely significant if more low-income APEC members were to join and far exceed the investment obligations those countries rejected at the WTO.

Investor-state dispute settlement (ISDS) is also controversial. Australia excluded ISDS from the 2004 Australia US FTA. Its resolve has strengthened following recent moves by American tobacco giant Philip Morris International (PMI) to challenge Australia's plain packaging tobacco laws using an Australia-Hong Kong BIT. Australia now has officially stated that it will no longer agree to any investor-state dispute settlement provisions in its FTAs. An agreement that excludes Australia or the "developed" country parties would be hard to sell to the others. Peru's newly elected left-leaning government is under pressure to demand a similar carve out after the Renco Group lodged a case under the Peru-US FTA relating to its failure to remediate a highly-polluting metal smelter in La Oroya, Peru. Differential treatment in ISDS could also open the door to demands for exceptionalism in other parts of the TPPA, undermining the "gold standard" ambitions. Requiring exhaustion of domestic remedies, not found in current US FTAs, could ease some concerns, but would not solve the problem given the potential for BIT-shopping. A country could also face parallel cases involving investment arbitration under a non-TPPA BIT and domestic litigation under the TPPA. Australia, for example, currently faces that situation with PMI suing under the Australia-Hong Kong BIT and British American Tobacco in its domestic courts.

The controversy over dispute settlement spills over to moves to contain the expropriation and minimum standard of treatment/fair and equitable treatment provisions. There are significant differences in the interpretive annexes on expropriation in the various parties' FTAs. The US version requires indirect expropriation claims to be considered on a case-by-case, fact-based inquiry. The first factor is the economic impact of the state's action on the investor, although adverse impact is not determinative in itself. Other factors are the extent to which the

action interferes with distinct, investment-backed expectations and the character of the government action. The ASEAN Comprehensive Investment Agreement and the Australia-New Zealand-ASEAN FTA, to which six of the nine negotiating countries are parties, is tighter. An inquiry's case-by-case assessment must consider whether the action breaches the government's prior binding written commitment to the investor, as well as considering the government's objective and applying a proportionality test in relation to the public purpose.

Both versions have language that carves out non-discriminatory regulatory actions that are directed to "legitimate public welfare objectives" from the scope of indirect expropriation. The indicative non-exhaustive list refers to public health, public safety and environment, not financial or economic instability. However, US FTAs and several others that TPPA parties have signed qualify this carve-out presumption by the vague words "Except in rare circumstances."

Parties' FTAs also vary significantly with respect to the minimum standard of treatment/fair and equitable treatment and the relation of the standard to customary international law. The United States, for example, ties the minimum standard of treatment provision to the customary international law standard in order to constrain broad interpretations (although the international law standard still leaves scope for expansive arbitral interpretations). It is known that some countries have pushed for broader exceptions in the TPPA, but without leaks it is impossible to know if the US has been prepared to adjust its model terms.

A further tension involves the standard obligation in US FTAs to ensure unrestricted transfers and payments, even in balance of payments emergencies. The revival of capital controls, including among a number of APEC countries and countenanced by the International Monetary Fund, shows the danger of locking in a declining orthodoxy. Irrespective of whether the controversial prudential exception is revised, it does not normally apply to transfers. The general obligation and lack of balance of payments exception have been raised in the negotiations, but the result is unknown.

Repeated leaks do show that foreign investors in technology-related industries and services, as well as intellectual property rights holders, would gain directly enforceable rights if US proposals for much stronger patents and copyright provisions succeed. There is strong push back from a number of countries.

The agreement is expected to allow investors to use the most advantageous term in either the TPPA or a bilateral agreement between the parties. The outcomes on the above issues will therefore matter most to countries that do not yet have far-reaching obligations with their negotiating partners. For example, the relevance of the TPPA investment chapter will be particularly far-reaching for New Zealand and Malaysia, which do not have an investment treaty or an FTA with the US, and Australia which has excluded investor-state dispute settlement in its FTA with the US.

What new investor rights and protections might emerge in other parts of the TPPA? The leaked texts on transparency and regulatory coherence suggest there will be complementary avenues for foreign commercial interests to demand privileged input into behind the border regulatory decisions.

The leaked and highly disputed transparency text on healthcare technologies proposes mechanisms for producers of pharmaceuticals and medical devices to influence the domestic policy-making processes. A broader transparency chapter is expected to require disclosure of criteria and data, opportunities for prior comment by affected interests and regulators' responses to those comments, explanations for final decisions, and access to review or appeal procedures. This is likely to empower only interested commercial actors, with no equivalent access rights to public interest groups that might hold contrary views.

The regulatory coherence chapter draws heavily on work in APEC and the OECD. All parties will be required to adopt a central process, preferably a body, to coordinate the development of "covered regulatory measures," as yet undefined. One "overarching characteristic" is to advance disciplines in the transparency chapter; another is to promote "systemic regulatory reform". In pursuit of good regulatory practices states are expected to conduct Regulatory Impact Assessments whose content includes assessments of net benefits and distributional impacts and consideration of less burdensome alternatives, providing ammunition for challenges based on "necessity" and "proportionality" tests in other chapters. These processes are to interact with substantive disciplines, such as sectoral chapters on telecommunications, financial services or express delivery, or procedural rules governing technical barriers to trade, SOEs or competition.

The Regulatory Coherence chapter relates to the internal regulatory decisions and choices of the state, not convergence across the parties, although statements from the United States have tended to blend the two. At the TPPA level, the parties agree to promote successful collaboration between themselves and their respective "stakeholders." That will be overseen by a Committee on Regulatory Coherence which must establish mechanisms to ensure meaningful opportunities for "interested persons" to provide views on approaches to enhance regulatory coherence through the agreement. In reality, it is likely that only those entities with the financial and organisational resources, knowledge, connections and permission to participate will have a seat at that table, providing a vehicle for major corporations and lobby groups to press their case for future deregulation.

If agreed to, this combination of guaranteed opportunities to provide input and receive detailed information within a legal framework of strongly pro-market regulatory disciplines would provide structured opportunities for large corporations to influence regulatory decisions at the national level and mechanisms to advance deregulation at the TPPA level. By taking rules on "transparency" and "regulatory coherence" to new levels of international commitment the TPPA would likely strengthen the hand of investors in challenging states' domestic regulation, especially on grounds of indirect expropriation or breaches of minimum standards of treatment and fair and equitable treatment.

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Further Information

Jane Kelsey (ed) *No Ordinary Deal. Unmasking the Trans-Pacific Partnership Free Trade Agreement*, Bridget Williams Books, Wellington NZ, Allen & Unwin, Sydney Australia, 2010

For various documents and analyses referred to above see: http://web.me.com/jane_kelsey/Jane/TPPA.html; http://www.citizen.org/Page.aspx?pid=3129; and http://aftinet.org.au/cms/trans-pacific-partnership-agreement/trans-pacific-partnership-agreement

feature 4

The Netherlands: A Gateway to 'Treaty Shopping' for Investment Protection

Roeline Knottnerus & Roos van Os

It is an established fact that many transnational companies choose the jurisdiction of the Netherlands as a base for their global trade and investment operations, at least partly because of the country's favourable tax regime that facilitates corporate tax avoidance strategies.[1] A new report by the Centre for Research on Multinational Corporations (SOMO) entitled "Dutch Bilateral Investment Treaties – A gateway to 'treaty shopping' for investment protection by multinational companies"[2] highlights the until now unexplored role that Dutch investment protection policies play in the establishment decisions of multinational corporations and investigates the risks associated with the far-reaching investment protections offered under Dutch bilateral investment treaties (BITs). The report finds that a majority of companies availing themselves of the generous investment protections offered by Dutch BITs are so-called 'mailbox companies' with no employees on their payroll and no real economic activity in the Netherlands.

Going Dutch on investment protection

The Netherlands maintains one of the most generous networks of BITs in the world. Characteristic of Dutch BITs, some 95 of which are currently in force, is the use of overly wide legal phrasing and definitions. Dutch BITs ignore recent and growing insights that far-reaching investment protection invites 'treaty shopping,' – i.e. routing investments through third countries to acquire the protection of investment treaties that investors would not, otherwise, have in their home state jurisdiction. Where other countries have begun reviewing and updating their BITs, the Netherlands continues to pride themselves on their generous investment protections, which are vaguely phrased and ill-defined. The Netherlands even strongly advocates in the EU that their standards become the yardstick for the European Union's future common investment policy. The Dutch government holds that its establishment incentives help enhance its business climate and attract foreign investors which provide a substantial impetus for economic growth and employment in the Netherlands.

However, SOMO's new report raises concerns over the fact that Dutch corporate tax and investment policy has contributed to attracting some 20,000 mailbox companies. While these shell companies have primarily incorporated in the Netherlands to take advantage of tax avoidance opportunities, many have also taken advantage of the broad investment protections offered by Dutch BITs to sue not only third countries, but on occasion even their own home countries under the investor-to-state dispute settlement clauses. This perverse use of the Dutch BIT network is not considered a problem by the Dutch government. Indeed, in a 2011 parliamentary debate on BITs and free trade agreements, the Dutch trade secretary, Mr. Henk Bleker, confirmed that the provisions of the Dutch BITs are meant to apply to each and every investor registered in the Netherlands, including mere mailbox companies.[3]

Dutch arbitration cases reviewed

We researched the 41 known investment arbitration cases launched under Dutch BITs. Reflecting the extensive Dutch BIT network, the 41 cases account for a full 10 percent of the roughly 400 known investment cases world-wide. Such cases are mostly conducted behind closed doors. Information on rulings is only rarely made public, and cases may exist which have never come to public light.[4]

Our research shows that the majority (29) of the investors that have sought arbitration under a Dutch investment treaty are foreign (i.e. the ultimate or controlling parent is not based in the Netherlands), while 25 of these claimants are indeed shell companies that appear to have set up shop in the jurisdiction of the Netherlands with the sole objective of availing themselves of the generous Dutch tax breaks and investment protections. The Dutch BIT definitions set very limited requirements for 'nationals' and 'investors.' This makes setting up 'special purpose vehicles' by third parties with the express purpose of using Dutch BIT protections to sue sovereign states a walk in the park. According to SOMO's research, the investor-to-state dispute settlement mechanisms incorporated in Dutch BITs have already led to claims of over US$100 billion from multinational corporations suing host country governments for alleged damages to the profitability of their investments. Awards can run into hundreds of millions of dollars and thus seriously impact public budgets.

> "A majority of companies availing themselves of the generous investment protections offered by Dutch BITs are so-called 'mailbox companies' with no employees on their payroll and no real economic activity in the Netherlands."

A high-risk game

SOMO notes that such crippling awards magnify the looming threat of companies contesting new legislation – even when clearly brought in for legitimate public policy purposes – and risks leading to what is known as 'regulatory chill.' Developing countries with their more limited budgets are particularly vulnerable, but, in the face of the growing power of transnational corporations, even developed nations cannot continue to consider themselves immune. Indeed, developed countries, including the Netherlands and other EU member states, are increasingly destinations for outward investment from emerging economies such as India, China and Brazil. While the Netherlands continues to beat the drum for 'high levels of investment protection' through broad and vaguely defined investor guarantees, there seems to be little to no awareness that these provisions can also be turned against the country itself. That the Netherlands has so far not been at the receiving end of an investment arbitration case does not guarantee that the country will be spared such claims in the future.

Imbalances ignored

Since the 1990s, a growing perception of the imbalances in international investment law between the interests of investment and investors on the one hand and the regulatory power of host states and non-economic (public) policy objectives on the other, has prompted the development of a new generation of investment protection agreements. These BITs tend to address a range of issues beyond strictly economic concerns, to include, among others, the protection of health, safety, the environment and the promotion of internationally recognised labour rights. They include much narrower and precise definitions of investment, in order to prevent abusive practices in which assets are covered that are not intended by the parties involved, as well as more transparent investor-to-state dispute settlement procedures. This new approach gained momentum when major capital-exporting countries such as the United States and Canada began being sued by foreign investors under their own investment agreements. The risks associated with BIT protection and investment claims have prompted South Africa to review all its BITs, while Brazil, the largest recipient of foreign direct investment in South America, has never entered into a BIT.

The increased attention to the risks associated with BITs that safeguard investment protections but fail to mention the responsibility of governments to also protect the public interest has largely bypassed the Netherlands. The country further rejects all responsibility for the adverse impacts of the treaty shopping practices facilitated by its broad-based BITs approach.

Although the Netherlands adopted a new Model BIT in 2004, the template does not include any attempts at narrowing down the definition of investment, but continues to rely on a broad and asset-based criterion. Nor does the model demand substantial presence of investors in the country in order to qualify for investment protection. There is little to no mention of investor obligations and the wording on sustainable development and social and environmental protections is confined to the preamble, which is non-binding. The Dutch model BIT thus protects investments irrespective of whether they are significant, lasting, contribute to the host country's economic development or are made in accordance with the host country's laws. With only a handful of exceptions, virtually all BITs concluded by the Netherlands follow this broad-based approach.

In the EU, where the 2009 Lisbon Treaty requires the development of a common European investment policy, the Netherlands has proved itself averse to any rebalancing of investor rights and obligations. At the European level, as an active member of the so-called Friends of Investment group, the Netherlands has helped push through mandates for the negotiation by the European Commission of investment chapters in EU FTAs that continue to uphold the 'highest possible level of investment protection' [5] – ignoring the wish of the European Parliament which has requested that new EU investment agreements also address investor obligations, such as compliance with human rights and anti-corruption standards.

> "In the EU, the Netherlands has proved itself averse to any rebalancing of investor rights and obligations."

Tribunals: 'tied to treaties'

Some arbitration tribunals have shown concern over treaty shopping and the dangers that investment claims can pose to public policy space.[6] At the same time, however, they have conceded that while BITs are being used in a way that may be perceived as morally doubtful, they also consider themselves bound by the wide definitions that the signatories to BITs have agreed to.

In the case of *Saluka Investment BV v. the Czech Republic* the tribunal expressed "some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty." The tribunal worried that "Such a possibility lends itself to abuses of the arbitral procedure, and to practices of 'treaty shopping' which can share many of the disadvantages of the widely criticized practice of 'forum shopping'."[7] Nonetheless, the tribunal remained of the opinion that the provisions of the treaty should guide its decision, and that it could not impose a narrower definition of "investor" than that which the state parties to the agreement had concluded.[8]

In *Mobil v. Venezuela* – a dispute that centred on the nationalisation of oil and gas projects by the state of Venezuela – the tribunal noted that Mobil restructured its investments through the Netherlands with the sole purpose of gaining access to ICSID arbitration[9] to contest Venezuela's new energy policy through the Netherlands-Venezuela BIT.[10] The tribunal concluded that this was "a perfectly legitimate goal as far as it concerned future disputes."[11] However, the tribunal took exception to this approach with regard to pre-existing disputes, stating that "to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute […] an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs."[12]

Push for policy change

The analysis of the Dutch BIT cases underlines that a rebalancing of the investment protection framework is urgently required. Based on the findings from our research, we would recommend, among other things, a substantial narrowing of legal phrasing and definitions. We would like to see enhanced recognition, not only in the Netherlands, but among all EU member states, that investor-state dispute settlement based on broad-based BIT definitions can pose a danger to policy space and the safeguarding of public goods and interests, and that this constitutes a risk no longer limited to developing countries, but, increasingly for the developed world.

Concretely, this would require the Netherlands to narrow the definitions of "investor" and "investment" used its BIT texts. Legal wording that extends protections to indirectly controlled investors and speculative forms of investment should be avoided. In recognition of the problems associated with treaty shopping, Dutch BITs would benefit from the incorporation of a denial of benefits clause, which allows contracting parties to deny treaty protection to companies that are controlled by investors of an entity that is not party to the treaty, and that have no substantial business activity in the territory of the party under whose laws they are constituted.

Meanwhile, signatories to Dutch BITs need to be aware that investors from around the globe can sue them through Dutch BITs. Even if a state has not negotiated an investment treaty with, say, the United States, a US investors can still sue them by structuring their investment through a country that does. It also means that if a state has negotiated treaties that safeguard policy space and public interests alongside a Dutch treaty, investors, by channelling the investment through the Netherlands, can sue the state under that BIT instead of the BITs concluded with their 'actual' home state.

Our report hopes to provide policy-makers in the Netherlands and the EU with new insights into why it is imperative that they review their investment protection frameworks – not just from a moral responsibility towards the host countries that are destinations for their outward investors, but also from a more self-interested perspective. For the Netherlands, the economic gains from the presence of mailbox companies are very limited, while allowing such companies to benefit from Dutch treaties could stress relations with host states sued by these companies. In addition, developed countries like the Netherlands would be highly unwise to assume that they will never have to face financially debilitating arbitration cases, even if they have to date never been at the receiving end of an investment claim. They are vulnerable under the BITs clauses they themselves have negotiated in a different time, but which, in our rapidly changing global context, lay them open to investment claims from emerging economic powers such as China and India that are increasingly engaging in outward investment.

Indeed, sometimes the threat comes from even closer to home. Perhaps the case of Swedish energy giant Vattenfall, which is threatening to file a billion-euro law suit with ICSID against the German government over its political decision to withdraw from nuclear energy,[13] will open policymakers' eyes. Meanwhile, we hope to provide additional ammunition to help fuel the pressing debate of what should become the norm for the EU's future common investment policy.

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Notes

1 F. Weyzig and M. van Dijk, The Global Problem of Tax Havens: The Case of the Netherlands, SOMO, January 2007. At: http://somo.nl/publications-en/Publication_3464/

2 R. van Os and R. Knottnerus, 'Dutch Bilateral Investment Treaties – A gateway to 'treaty shopping' for investment protection by multinational companies', October 2011. Available at: http://somo.nl/publications-en/Publication_3708

3 Verslag van een algemeen overleg. Vastgesteld 24 mei 201: <https://zoek.officielebekendmakingen.nl/kst-2150102062.html?zoekcriteria=%3Fzkt%3DEenvoudig%26vrt%3D171&resultIndex=10&sorttype=1&sortorder=4> Accessed 24 June 2011.

4 As the number of investment protection agreements began to increase, so did the number of arbitrations. According to UNCTAD figures, the number of investor-to-state disputes grew from 6 known cases in 1995 to 390 by the end of 2010. UNCTAD, Latest Developments in investor-state dispute settlement (2011) IIA Issue Note, No. 1.

5 See the text of the negotiating mandates Text of the Mandates approved by the General Affairs Council for investment protection chapters in free trade agreements of the EU with Canada, India and Singapore, www. http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html

6 It must be noted that tribunals differ widely in their opinions. Based on their case rulings, perceptions are that even though on occasion they may take a more progressive stance, on the whole they tend to look for the most expansive interpretations of BIT provisions.

7 Saluka Investments B.V. v. the Czech Republic, UNCITRAL Partial Award, 17 March 2006, paras. 240-241

8 Ibid.

9 ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention) with over one hundred and forty member States. ICSID is considered to be the leading international arbitration institution devoted to investor-State dispute settlement.

10 Mobil Corporation, Venezuela Holdings B.V.; Mobil Cerro Negro Holdings, Ltd.; Mobil Venezolana de Petróleos Holdings, Inc.; Mobil Cerro Negro, Ltd.; and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, Decision on Jurisdiction, 10 June 2010, ICSID Case No. ARB/07/27, para. 190.

11 Para 204 and see also M. Skinner, C.A. Miles and S. Luttrell, "Access and advantage in investor-state arbitration: The law and practice of treaty shopping" (2010) 3 JWELB 260

12 Para 205

13 'Vattenfall vs. Germany - Nuclear Phase-Out Faces Billion-Euro Lawsuit', Der Spiegel Online, 2 November 2011. At: http://www.spiegel.de/international/germany/0,1518,795466,00.html (accessed: 23 November 2011).

news in brief

Philip Morris files for arbitration over intellectual property dispute with Australia

The tobacco company Philip Morris filed for arbitration on 21 November 2011, claiming the government of Australia's regulations on cigarette branding breach the Hong Kong-Australia bilateral investment treaty.

The announcement arrived on the same day that the Australian Parliament passed legislation that bans most branding from tobacco products. Under the new law, packages are stripped of logos and branding images, although the brand name of the tobacco product can remain. The law is due to come into effect in December 2012.

Australia is the first country in the world to implement such strict branding restrictions on tobacco products, although other countries are considering similar laws.

Philip Morris put the Australian government on alert in July 2011 when it filed a notice of claim, setting in motion a three-month period before it could initiate arbitration proceedings. In its notice of claim, recently made public under an access-to-information request, Philip Morris argues that the Australia's plain packaging legislation amounts to an expropriation of its investment in Australia.

"The intellectual property plays a critical part in distinguishing Philip Morris' products from competitors' products … Without branding, PML's products are not readily distinguishable to the consumer from the products of competitors; consequently, competition will be based primarily on price," states Philip Morris.

The tobacco company notes that the Hong Kong-Australia BIT "encompasses a broad range of investments," including "rights with respect to copyright, patents, trade marks, trade names, industrial designs, trade secrets, know how and goodwill …"

Philip Morris also claims that the tobacco packaging restrictions run afoul with the World Trade Organization's agreement on intellectual property. However, in contrast to the protections provided in the Hong Kong-Australia BIT, which allow Philip Morris to sue the government of Australia directly, international trade law only permits disputes to be settled between governments.

In its claim, Philip Morris seeks a repeal of the legislation, and says monetary damages could amount to billions of dollars.

Notably, the Australian government announced in April 2011 that it will no longer include provisions that permit investors to sue governments through international arbitration in its future international trade agreements, a policy move that may have been prompted in part by tobacco company threats.

The Australian government argues the lawsuit by Philip Morris, and the grumblings of other tobacco companies, are a sign that the plain-packaging legislation is effective. "Plain packaging means that the glamour is gone from smoking and cigarettes are now exposed for what they are: killer products that destroy thousands of Australian families," said the Australian Health Minister, Nicola Louise Roxon.

Philip Morris, however, counters that the law will probably be ineffective: "the likely reduction of price and relative desirability of cheap illicit tobacco products mean the measure may be counter-productive," says the company.

Philip Morris has also initiated an arbitration claim against Uruguay in reaction to that country's tobacco packaging regulations. In its case against Uruguay, Philip Morris is alleging violation of the Switzerland-Uruguay BIT.

Divisions continue to slow progress in UNCITRAL transparency negotiations

Work continues on efforts to make the arbitration rules developed by the United Nations Commission on International Trade Law (UNCITRAL) more conducive of transparency.

The working group responsible for addressing transparency in the rules convened for the third time in Vienna in October 2011. The group considered various draft rules that reflected proposals made during the previous two sessions, and concentrated on identifying which of those options UNCITRAL member states could not support.

Broadly, discussions of the options covered two different, but related areas: the issue of applicability (when the rules will apply) and the issue of content (what the rules will require).

This work traces back several years. In 2008, the Commission formally "agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution."[1] It then entrusted a working group with the task of developing a legal standard consistent with the Commission's decision on transparency.

The working group, which is comprised of country members and other state and non-state observers, officially began work on its mandate in October 2010, and has had three one-week sessions dedicated to the topic. Helping maintain momentum and focus on the working group's efforts, in June 2011 the Commission "reiterated its commitment" to the importance of ensuring transparency in investor-State arbitration.[2]

Applicability of the rules on transparency

The topic of applicability is especially important for the practical impact the new rules will have (or, perhaps, will not have) on increasing transparency of investor-state arbitrations.

Significantly, a few delegations at this third session expressed their desire to prevent the new UNCITRAL rules from applying to future disputes arising under existing treaties. Given that there are roughly 3000 investment treaties in existence, and that the bulk of them refer to UNCITRAL arbitration rules as an option, such an approach would have the effect of preventing any real change from the old UNCITRAL rules, making the revised rules significantly less relevant.

Several delegations, however, opposed inserting a provision in the rules that would limit their application to only future treaties. Under this approach, the issue of whether the rules would apply to disputes arising under existing treaties would be left to a matter of treaty interpretation.

Ultimately, the working group was not able to resolve this issue of applicability to existing and/or future treaties during the October 2011 session.

Another issue of applicability that delegates continued to debate was whether, for future investment treaties, treaty parties would have to explicitly "opt into" the new rules on transparency in order for them to apply, or whether a general reference to the UNCITRAL arbitration rules would suffice to trigger their application. Like the issue of the rules' applicability to existing and future treaties, the approach adopted will have significant consequences for the rules' relevance and their potential to increase transparency of investor-state arbitrations. However, delegations were unable to find consensus on which approach to adopt.

The rules' content

On the issue of content, there seemed to be less disagreement overall. Many delegations advocated increased openness regarding various aspects of investor-state arbitrations.

Support coalesced in particular around automatic disclosure of the existence of the dispute (i.e., the fact that an arbitration had been commenced, the identities of the parties, the economic sector involved, and the treaty on which the claims were based); publication of a number of documents submitted to arbitral tribunals; awards and decisions issued by the tribunals; and participation of *amici curiae*.

One main issue of content that remains to be resolved relates to the exceptions to the rules. Delegations generally supported the principle that the rules on transparency should not require disclosure of "confidential" and "sensitive" information. Delegations, however, have not yet agreed on how to define those terms, nor have they agreed on whether disclosure of information can be restricted for additional reasons. A few delegations, for instance, would like to allow tribunals to restrict public access in order to protect the "integrity of the proceedings."

Yet, several delegates in the working group expressed their concern that this "integrity of the process" carve-out and other exceptions may inappropriately weaken or swallow the underlying rules on transparency.

The scope of the exceptions will likely join issues of applicability as key items of discussion during the next working group meeting, which is scheduled to be held in February 2012.

Korean protests erupt over investor-state arbitration provisions in US-South Korea FTA

The South Korean-United States free trade agreement (KORUS FTA), which Korean lawmakers ratified on 22 November 2011, has sparked protests in South Korea over the deal's investor-state arbitration provision.

First negotiated in 2007, the agreement has long been controversial in South Korea, drawing vehement opposition from farmers who fear cheap agricultural imports from the United States.

More recently, however, critics have focused on a provision that allows US investors to bring the government of South Korea to international arbitration for alleged breaches of the FTA's investment standards (or, vice versa, claims by Korean investors against the United States).

These investor-state clauses are common in bilateral investment agreements, including those negotiated previously by South Korea. Yet the provision has come under sharp criticism by opposition lawmakers and civil society groups who fear it will give US investors a strong hand to challenge South Korea's social and environmental policies.

Dozens of Korean judges have also spoken out against the investor-state dispute resolution provisions. "After reviewing discussions about the FTA, I concluded that the deal is likely to have many clauses disadvantageous to Korea and infringe on the nation's judicial sovereignty," said Judge Kim Ha-neul at Incheon District Court, as reported in the Korean Times.

President Lee Myung-bak's offered to renegotiate the investor-state dispute resolution provision within three months of the KORUS FTA coming into effect. But that failed to calm protesters, who continued to demonstrate in the days following the agreement's ratification.

The agreement was ratified following a surprise vote by the ruling Grand National party.

The KORUS FTA was ratified by the United States in October. This is the largest trade and investment deal for the US since the North American Free Trade Agreement, and second largest for South Korea after the a 2009 FTA with the European Union

Vattenfall reportedly considers arbitration over German phase-out of nuclear

The Swedish energy firm Vattenfall is considering a claim against Germany under the Energy Charter Treaty (ECT) in response to Germany's decision to abandon nuclear energy, according to reports in the German press.

Germany announced in May 2011 that it will phase-out its nuclear power plants by 2022. Six plants shutdown in 2011 and the remaining nine will be closed over the next 10 years.

The decision came in the wake of Japan's Fukushima Daiichi nuclear disaster, although nuclear energy has been long been a topic of political debate in Germany.

Vattenfall says it stands to lose €700 million from investments made in nuclear power plants, which were based on the understanding that the life-spans of the plants would be extended.

While German nuclear power companies are challenging the decision through legal forums in Germany, Vattenfall could try to access international arbitration through the ECT – a multilateral agreement that governs investment in the energy sector. The ECT provides rights and guarantees to investors which are similar to those found in bilateral investment treaties.

The company has already made use of the ECT to challenge the German government. In April 2009 Vattenfall brought a claim against German to challenge environmental restrictions imposed by the City of Hamburg on a coal-fired power plant. Vattenfall had sought approximately €1.4 billion in damages. This dispute was settled by agreement on 11 March 2011, in which Vattenfall appears to have obtained, among other things, a modified water use permit and a release from previously imposed requirements to build and operate a discharge cooler at the Moorburg power plant.

Foreign investors sue government of Spain over hikes to solar energy tariffs

A group of 14 foreign investors have served the Spanish government with a notice of arbitration in reaction to cuts in solar tariffs.

The notice, served on November 17, was delivered days before Spain's Socialist Party, which enacted the tariff hikes, was toppled in elections. The conservative opposition People's party, led by Mariano Rajoy, took the majority.

The claimants complain that they counted on feed-in-tariff laws, which guaranteed above-market rates for renewable energy fed to the grid, when they made their investments. However, tariffs were cut in 2010, on the grounds that they were too expensive. Under the new legislation, producers of solar-generated electricity can sell a certain amount of electricity at higher rates, after which it must be sold at market rates.

"Spain induced our clients to invest billions of euros in the PV sector and, once it received the benefit of that investment, simply reneged on its end of the deal," said a lawyer for the investors.

The claim comes under the Energy Charter Treaty (ECT). This only the second publicly disclosed ECT claim against a western European government. As mentioned above, in 2009, the German European utility Vattenfall filed a claim against the government of Germany, after the construction of a power plant was blocked over environmental concerns. The governments of the former Soviet Union and Eastern Europe have received the bulk of investor claims under the ECT.

Notes

1 Report of the United Nations Commission on International Trade Law, Forty-first session, 16 June -3 July 2008, para. 314.

2 Report of the United Nations Commission on International Trade Law, Forty-fourth session, 27 June -8 July 2011, para. 200.

awards & decisions

Arbitrator sharply critical of majority decision in Italian bondholder claim against Argentina *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic, ICSID Case No. ARB/07/5*
Damon Vis-Dunbar

Professor Georges Abi-Saab has delivered a sharply worded dissent against a decision that granted jurisdiction to an ICSID case involving tens of thousands of Italians who claim to hold securities linked to Argentine sovereign bonds.

In his 28 October 2011 opinion, Professor Abi-Saab challenges the decision by Professor Pierre Tercier and Professor Albert Jan van den Berg to accept Argentine government bonds as a protected investment under the Argentina-Italy BIT and the ICSID Convention. He also counters that an ICSID tribunal cannot accept jurisdiction over mass claims, in the absence of consent by the state party.

While framing his dissent around these two main points of contention, Professor Saab finds fault with many aspects of the majority's decision.

"One of the basic reasons of my unease with this excessively long award, is its style of turning around the main issues and drowning them into an ocean of minutia and elaborated details, rather than confronting them thoroughly," writes Professor Abi-Saab.

Do sovereign bonds qualify as an investment?

A key question for the tribunal in this case was whether sovereign bond instruments qualify as an investment under the ICSID Convention. The question is complicated by the fact that the ICSID Convention does not provide its own definition of investment, leading some tribunals, including the majority in this case, to rely on the definitions provided in BITs.

Professor Abi-Saab makes the case for excluding sovereign bond instruments as a protected investment. In his opinion, the lack of an explicit definition for investment in the ICSID Convention does not mean the term is open to any definition that states provide for in their treaties.

Building on this foundation, Professor Abi-Saab considers the types of investments contemplated by the ICSID Convention, and concludes that it is investment that "contributes to the economic development of the host country, i.e. to the expansion of its productive capacity…"

Professor Abi-Saab goes on to say that foreign direct investment is "'the ideal type' of investment for ICSID purposes." While not stating that all portfolio-style financial investments are outside ICSID's protective rubric, he posits that neither are they necessarily covered.

Particularly problematic in the case of the sovereign bond securities in this dispute, according to Professor Abi-Saab, is their lack of a territorial link to Argentina. Professor Abi-Saab points out that the securities were sold in financial markets outside of Argentina, denominated in foreign currencies, channeled through intermediaries in other countries, and subject to laws outside of Argentina. No longer based in Argentinean territory, Professor Abi-Saab says the securities cannot be considered protected investments under the Argentina-Italy BIT or the ICSID Convention.

Professor Abi-Saab charges that the present case is "the first one to come before an ICSID tribunal in which the alleged investment is totally free-standing and unhinged, without any anchorage, however remote, into an underlying economic project, enterprise or activity in the territory of the host State. None of the logical short-cuts put forward by the majority award to palliate this absence, holds water."

Collective mass claims

In its defense, Argentina argued that mass claims are incompatible with the ICSID arbitration system. However, the majority played down the differences entailed by having thousands of claimants. "Assuming that the tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could lose jurisdiction where the number of Claimants outgrows a certain threshold," wrote the majority.

Professor Abi-Saab challenges that opinion. To his mind, there are fundamental differences between a bilateral action and a class action (or representative proceeding), and those differences call for special consent by the state party's to the treaty.

In support of his position, Professor Abi-Saab notes that representative proceedings had for the most part not been introduced in domestic or international jurisdictions at the time the ICSID Convention was drafted. He also points out that nearly all mass claims adjudicated at the international level have been based on special consent between the parties, and with rules of procedure designed to accommodate these proceedings.

This, writes Professor Abi-Saab, is "in stark contradiction with the findings of the majority award in the present case."

Professor Abi-Saab also takes issue with the majority's opinion that the ICSID rules could accommodate mass claims without an "amendment" to the rules, but could be achieved by an "adaptation" of the rules and "filling in gaps."

This is an "extraordinary" and "baffling" distinction, according to Professor Abi-Saab. He counters that "no amount of sophistry and playing of words or newspeak can conceal the fact that the proposed adaptations 'diverge from the usual ICSID proceedings …" and therefore lies beyond the tribunal's jurisdiction.

Domestic litigation required

Professor Abi-Saab also criticizes the majority's decision to allow the claimants to avoid a requirement in the Argentina-Italy BIT that the disputing parties first try to resolve complaints through consultation and the courts of the host country for 18 months, before resorting to arbitration.

The majority had ruled that it would be "unfair" to deny the claim based on the failure to take the dispute in Argentine courts. This is in part because the majority felt Argentina "was not in a position to adequately address the present dispute within the framework of its domestic legal system."

In response, Professor Abi-Saab points to Article 26 of the ICSID Convention, which states that "A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

As an exhaustion of local remedies requirement is a "condition of its consent," it is also a limit to jurisdiction. As such, a failure to abide by the 18 month litigation period should have resulted in the dismissal of the case for lack of jurisdiction, maintains Professor Abi-Saab.

Recent developments

Professor Abi-Saab resigned from the tribunal shortly after issuing his dissent, meaning Argentina will need to appoint a new arbitrator. Prior to his dissent, however, the proceedings were suspended after Argentina moved to disqualify Tercier

and van den Berg on the ground that they "may not be relied upon to exercise independent judgment."

Notes

Professor Georges Abi-Saab's dissenting option is available at: http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf

The majority's decision on jurisdiction and admissibility is available at: http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf

A summary of the decision on jurisdiction and admissibility is available from ITN at: http://www.iisd.org/itn/2011/10/07/awards-and-decisions-5/

Majority takes a broad reading of the MFN provision in the Germany-Argentina BIT *Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31*
Damon Vis-Dunbar

In a split decision, two members of an ICSID tribunal have allowed a German firm to by-pass litigation in Argentine courts and proceed directly to international arbitration.

The 24 October 2011 decision on jurisdiction underscores long-standing divisions among arbitrators on the use of the Most-Favoured Nation (MFN) provision; in particular, whether it encompasses matters related to jurisdiction, including allowing claimants to access more liberal dispute-resolution provisions in BITs of third parties.

The claimant, Hochtief, lodged its claim with ICSID in 2007, in connection with a dispute over the construction and operation of a toll road.

The German-Argentina BIT states that disputes may be submitted to arbitration following an 18-month litigation period in national courts – or if both disputing parties agree to go straight to arbitration.

The majority looked skeptically on the utility of the domestic litigation clause, noting that the parties would be free afterwards to pursue their claim in arbitration.

"To oblige the parties to spend 18 months in litigation, where one or other (or both) of them might have decided in advance to reject any decision that might emerge from the courts, appears useless," wrote the majority.

However, the two arbitrators side-stepped the question of whether, useless or not, the domestic litigation is a mandatory requirement by preceding to consider whether the claimant was entitled to the less-restrictive dispute resolution provision in the Argentina-Chile BIT, by way of the German-Argentina BIT's MFN clause.

The MFN clause in the German-Argentina BIT's refers to "activities in connection with investments," which Vaughan Lowe (the tribunal's president) and Charles N. Brower (the claimant's appointee) concluded "no doubt" includes dispute settlement.

That decision stands in contrast to a 2008 jurisdictional ruling in *Wintershall v. Argentina*, where the tribunal faced the same issue with respect to the German-Argentina BIT. In the Wintershall decision, the tribunal declined jurisdiction on the grounds that abiding by the conditions of the dispute resolution clause is "part and parcel" of Argentina's consent to arbitration.

The majority in the *Hochtief* decision noted, however, that the claimant had to select the dispute resolution provision of the Argentina-Chile BIT is its entirety, rather than pick and choose among elements of the dispute settlement clauses in the different treaties. While having no bearing on the majority's decision to accept jurisdiction, the caveat links to a criticism recently levied by Professor Brigitte Stern in her dissenting opinion to the award in *Impregilo S.p.A. v. Argentina*. Professor Stern warned against allowing claimants to access parts of other treaties that favour their claim, while discarding less desirable aspects – which in effect creates 'super' treaties that are more favourable to investors than any one treaty alone.

Christopher Thomas' dissent

Christopher Thomas, Argentina's appointed arbitrator, challenged a number of the majority's opinions. While the majority viewed the 18-month domestic litigation requirement as "pointless," Mr. Thomas came to its defense. He argued that bringing the dispute in local courts "can contribute to a resolution of a dispute, or at least a narrowing of the issues in dispute."

Mr. Thomas also challenged, in a variety of ways, the decision to allow the MFN provision in the German-Argentina BIT to extend to dispute settlement provisions in other BITs. In his view, the dispute resolution provision sets out mandatory steps that underpin Argentina's consent to arbitration.

Mr. Thomas also noted that the MFN clause in question does not refer to "all matters subject to this Agreement," which, in other cases, tribunals have used as a justification to include dispute resolution procedures. Moreover, Mr. Thomas believed that the treaty's drafters had in mind 'activities' directly related to the management and operation of the investment (for instance, the treaty provides examples like the acquisition of raw materials and the sale of products).

Placing the debate over the purpose of the MFN clause in perspective, Mr. Thomas notes that it was not until the 2000 *Maffezini v. Spain* decision on jurisdiction that the MFN clause was extended to dispute settlement. As such, Mr. Thomas explains that "it is entirely plausible that the Contracting Parties did not specifically exclude the conditions for gaining access to dispute settlement under (the MFN provision) because it did not occur to them that the MFN clause could be used to modify (the dispute resolution) stipulations. Prior to Maffezini, that was not only a reasonable and legitimate view, it was the orthodox view."

Notes

The decision on jurisdiction is available at: http://italaw.com/documents/Hochtief_v_Argentina_Jurisdiction_24Oct2011_En.pdf

Christopher Thomas' dissenting opinion is available at: http://italaw.com/documents/Hochtief_v_Argentina_JurisdictionDissent_24Oct2011_En.pdf

A summary of the decision on jurisdiction and admissibility is available from ITN at: http://www.iisd.org/itn/2011/10/07/awards-and-decisions-5/

Jurisdiction declined for indirectly held stakes in Slovakian health insurance companies *HICEE B.V. v. The Slovak Republic, UNCITRAL*
Damon Vis-Dunbar

The majority of an UNCITRAL tribunal has declined jurisdiction in a claim by a Dutch-incorporated investor after ruling that an ambiguously worded provision in the Dutch-Czechoslovakia BIT excludes investments that are routed through local subsidiaries in the host country.

The 23 May 2011 partial award was made public following an access to information request to the Slovakian government by the news service Investment Arbitration Reporter.

The claim, in which the claimant sought over a billion dollars in compensation, is in reaction to changes to Slovakia's domestic laws which affected the profitability of health insurance business. The Dutch claimant, HICEE, acquired a Slovakian holding company, Dovera Holding, which turn held stakes in various health insurance companies.

As a preliminary matter, the parties agreed to focus on a provision in the BIT that states that the term investment "shall comprise every kind of asset either directly or through an investor of a third state …" The tribunal's interpretation of this provision would determine whether HICEE's stakes in the Slovakian companies were covered by the BIT.

In Slovakia's opinion, the provision meant that the BIT did not cover 'indirect' investments made through local subsidiaries, as was the case with HICEE's investment.

In contrast, the claimant contended that the provision implied that the investment could be made either through a Dutch company or through a subsidiary in a third country, but in either case does not exclude investments that are then channeled through a Slovakian subsidiary.

Despite objections by the claimant, the majority, comprised of Sir Franklin Berman and Judge Peter Tomka, turned to a note purportedly made by the Dutch Finance Ministry to its parliament during the treaty's ratification process. This note seemed to back up Slovakia's position. The notes explain:

"Normally, investment protection agreements also cover investments in the host country ('subsidiary' – 'sub-subsidiary' structure). Czechoslovakia wishes to exclude the 'sub-subsidiary' from the scope of this Agreement, because this is in fact a company created by a Czechoslovakian legal entity, and Czechoslovakia does not want to grant, in particular, transfer rights to such a company."

The majority found this note to be "valid supplementary material which the Tribunal may, and in the circumstances must, take in dealing with the question before it." Given that it provided evidence in support of Slovakia's interpretation of the provision in question, the majority declined jurisdiction.

Judge Bower's dissent

In a dissenting opinion, Charles N. Bower, the claimant's appointee, shared the claimant's view that the provision described two directions from which an investment could be made – directly from the host country, or from a subsidiary in a third country – rather than a restriction on investments structured through subsidiaries in the host country. Indeed, he found the majority's interpretation, based on the Dutch notes, to be "at the very least, incongruous".

In Judge Bower's view, it was unnecessary to turn to the Dutch note for interpretative guidance, given that the plain meaning of the provision. For that reason, he maintained that the Vienna Convention on the Law of Treaties, to which the tribunal turned to for guidance on whether and how to use the Dutch notes, would not support using supplementary materials to provide interpretive guidance.

Moreover, he found the Dutch note to be problematic in other ways. He questioned its reliability, for example, noting the notes were found in the governmental files in Prague, not The Hague, and that Dutch officials did not cooperate with requests for documentation.

He also rejected the notion that the note signaled an agreement, or "concordance of views" as termed by the majority, between the Netherlands and Slovakia, given Slovakia's self interest in supporting the information in the note in order to defend itself in the arbitration.

Challenge to Judge Tomka dismissed

Following the majority's decision to decline jurisdiction, the claimant filed a challenge against Judge Tomka, Slovakia's nominee to the tribunal. It argued that Judge Tomka faced a conflict of interest, on the grounds that he was seeking re-nomination to the International Court of Justice and required Slovakia's endorsement.

The President of the Stockholm Arbitration Institute rejected the challenge, albeit without providing reasons.

Costs

On the question of costs, the majority ordered the claimant to bear 60 percent of the arbitration costs, and the respondent the other 40 percent. Both parties are responsible for their own legal fees. The majority noted that the parties were cooperative during the proceedings, concise with their legal arguments, and each raised difficult and novel issues.

Notes

The partial award and dissenting option are available at: http://italaw.com/documents/HICEEv.SlovakRepublicPartialAwardandDissentingOpinion.pdf

Total damages significantly reduced in the Chevron-Ecuador arbitration *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877.*
Vyoma Jha

In a final award dated 31 August 2011, an UNCITRAL tribunal awarded Chevron and Texaco some US$96 million in a dispute with Ecuador.

The ruling follows a March 2010 partial award, which held Ecuador to be in breach of the U.S.-Ecuador BIT for failing to provide the claimants an "effective means of asserting claims and enforcing rights" in Ecuador's courts.

The claims relate to seven lawsuits filed by Texaco Petroleum in the early 1990s against Ecuador for breaching oil exploration contracts concluded by them between 1973 and 1977. Chevron, which bought Texaco in 2001, initiated the arbitration against Ecuador in May 2006 alleging that Ecuador violated its obligation to provide fair and equitable treatment and the obligation under Article II(7) of the BIT to provide an effective means of asserting claims and enforcing rights.

In its partial award, the tribunal noted that Article II(7) provides a "distinct and potentially less-demanding test" than the "high threshold" that must be met to establish denial of justice under customary international law. Thus, according to the tribunal the delay by Ecuadorian court in deciding the Texaco lawsuits, which had been pending for almost 13 years at the start of the arbitration, exceeded the allowable threshold under Article II(7) of the BIT.

The tribunal held that the claimants were entitled to almost US$698 million in damages, which was subject to adjustments for taxes and pre-award interest.

Calculation of total damages

The tribunal's main consideration in the final award regarded the tax rate to apply to the US$698 million in damages.

The tribunal accepted the conclusions of party-appointed experts in Ecuadorian tax law and settled on a tax rate of 87.31% on the principal and a 25% income tax rate on the interest. These calculations brought the final award down steeply to US$96 million.

On the question of the arbitration costs, the tribunal expressed a preference for the principle of "costs follow the event," apart from exceptional circumstances. However, the tribunal concluded that, since neither party was clearly successful, both sides were left to bear their own costs as well half of the tribunal costs.

Recent developments

Ecuador is seeking to set aside the awards on jurisdiction, liability and damages in the Netherlands, the legal site of the arbitration, on grounds that the tribunal made an "erroneous interpretation" of Article II(7) of the U.S.-Ecuador BIT by the tribunal.

In a separate action, Ecuador initiated state-to-state arbitration against the United States on 28 June 2011. Ecuador had asked the US government to support its interpretation of Article II(7) of the BIT; however, the US did not respond. The Ecuador-US arbitration, in which Ecuador seeks a ruling on the interpretation of Article II(7), will be conducted under the UNCITRAL procedural rules.

Notes

The tribunal in Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador consisted of Prof. Karl-Heinz Böckstiegel (presiding arbitrator), Honorable Charles N. Brower (claimant's nominee) and Prof. Albert Jan van den Berg (respondent's nominee).

The award is available at: http://italaw.com/documents/ChevronEcuadorFinalAward.pdf

For ITN's previous reporting on the Partial Award dated 30 March 2010, refer "Tribunal finds Ecuador in breach of BIT for its judiciary's slow handling of Texaco lawsuits", by Fernando Cabrera Diaz, April 2010 available here: http://www.iisd.org/itn/2010/04/07/tribunal-finds-ecuador-in-breach-of-bit-for-its-judiciary-s-slow-handling-of-texaco-lawsuits/

Turkey defeats US$ 10.1 billion claim, as tribunal finds no "investment" under the Energy Charter Treaty *Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8 (ECT).*

Vyoma Jha

A three-member ICSID tribunal has declined jurisdiction in a dispute linked to the Uzan family. The Uzans are a wealthy Turkish family that has been enmeshed in multiple legal disputes around the world, a number related to fraud allegations against them. The family is also connected to several investment-treaty cases against Turkey, all of which have been dismissed on jurisdictional grounds.*

Background of the present dispute

This arbitration revolves around a US$10.1 billion claim brought by Libananco Holdings Co. Ltd., a Cypriot company, against Turkey for alleged breaches of the Energy Charter Treaty (ECT). The claimant alleged that it owned shares in two Turkish utility companies, Cukurova Elektrik Anonim Sirketi (CEAS) and Kepez Elektik Turk Anonim Sirketi (Kepez), which belonged to members of the Uzan family, prior to the incidence of the alleged expropriation.

The dispute concerns the seizure of CEAS' and Kepez's assets in which Libananco claims to hold shares, and the cancellation of concession agreements between CEAS and Kepez and the government of Turkey on 12 June 2003.

The claimant filed the request for arbitration against Turkey on 23 February 2006, almost three years after the alleged incident of expropriation.

No "investment" by Libananco

The claimant first argued that Libananco acquired shares in CEAZ and Kepez through 32 transfer agreements between October 2002 and May 2003. Later, however, Libananco changed its story and claimed that the shares in the two companies had been transferred to it prior to the alleged expropriation through three main acts of teslim, i.e. the legal transfer of possession under Turkish law.

The tribunal proceeded to reject Libananco's argument that it was only required to provide prima facie evidence of ownership of the share certificate at the jurisdictional stage. In reply, Libananco offered several accounts of how it had received the shares from members of the Uzan family, but these ultimately left the tribunal unconvinced.

Consequently, the tribunal held that Libananco lacked an "investment" and was not an "investor" within the meaning of the ICSID Convention or the ECT.

The tribunal ordered the claimant to pay Turkey US$602,500 in reimbursement of the Turkey's advance on costs of arbitration, as well as US$15,000,000 for legal fees and out of pocket expenses.

On a related note, the European Court of Human Rights (ECHR) has recently dismissed claims brought by 47 minority shareholders in CEAS and Kepez who alleged violations of the European Convention on Human Rights on account of Turkey's actions of terminating the concession and share delisting. The ECHR noted that Turkey had complied with the domestic law while delisting the shares and that the shareholders had domestic recourse to challenge the actions of Turkey. Therefore, the ECHR dismissed the claims as "ill-founded" and "inadmissible".

Notes

The tribunal comprised of Michael Hwang (President), Henri Alvarez (Claimant's nominee) and Sir Frank Berman (Respondent's nominee).

The award is available at: http://italaw.com/documents/LibanancoAward.pdf

* Several tribunals have taken a similarly dim view of other claims against Turkey involving members of the Uzan family. For example:
Europe Cement Investment & Trade S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2. See previous ITN reporting: "Tribunal dismisses claim by Europe Cement against Turkey; Claimant ordered to bear cost of the arbitration", by Damon Vis-Dunbar, September 2009, available here: http://www.iisd.org/itn/2009/08/31/tribunal-dismisses-claim-by-europe-cement-against-turkey-claimant-ordered-to-bear-cost-of-the-arbitration/

Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2. See previous ITN reporting: "Cementownia claim against Turkey found to be "manifestly ill-founded"", by Elizabeth Whitsitt, November 2009, available here: http://www.iisd.org/itn/2009/11/01/cementownia-claim-against-turkey-found-to-be-manifestly-ill-founded/

Mr. Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20. See previous ITN reporting "Claim against Turkey deemed "frivolous"", by Damon Vis-Dunbar, September 2010, available at: http://www.iisd.org/itn/2010/09/23/awards-and-decisions/

resources and events

Resources

Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers

International Institute for Sustainable Development, December 2011

This handbook provides an accessible introduction to investment treaties and their relevance to sustainable development. The handbook provides a brief history of investment treaties, before delving into a discussion of the contents of these treaties and their implications. The handbook features commentary on fair and equitable treatment, expropriation, national treatment, most favoured nation treatment, performance requirements, free transfer of capital, umbrella clauses, and dispute settlement. It concludes with a discussion of how the problems associated with investment treaties can be addressed. Available at: http://www.iisd.org/publications/pub.aspx?pno=1534

Improving International Investment Agreements

Routledge Research in International Economic Law, Forthcoming: March 2012

This book discusses some of the criticisms directed at international investment law and offers potential solutions. The book is prepared by a group of scholars and practitioners from Canada and Europe. It takes a multidisciplinary approach to the subject, with analysis from the legal, political and economic perspectives. The first part of the book traces the evolution in investment treaty-making and provides an evaluation from a political economy and economics perspective. The other three parts are organised around the concepts of efficiency, legitimacy and sustainability. Each contributor analyzes one or more issues of treaty negotiation, substance or dispute resolution, with the ultimate aim of improving investment treaty-making in these respects. More information is available at: http://www.routledge.com/books/details/9780415671972/

Mining for Profits in International Tribunals

Institute for Policy Studies, November 2011

This report takes a critical look at investor-state arbitration and describes recent trends in disputes related to oil, mining, and gas. The report finds that at the most frequently used tribunal, the International Center for Settlement of Investment Disputes (ICSID), 43 of 137 pending investor-state cases are related to oil, mining, or gas. By contrast, one year ago there were only 32 such cases and 10 years ago there were only 3. The report also finds that Latin American governments receive a relatively large share of the claims. Latin American governments make up about 10 percent of the 157 ICSID member governments, yet they are the targets of 68 (50 percent) of all ICSID cases and 25 (nearly two-thirds) of the 43 current extractive industries cases. Available at: http://www.ipsdc.org/files/3936/Mining_for_Profits_November_2011_FINAL-2.pdf

Yearbook on International Investment Law and Policy 2010-2011

Oxford University Press, 2011

The Investment Yearbook is an annual, peer-reviewed publication now in its third edition. The present volume includes a Symposium on the new EU competence over investment and chapters addressing such central issues as essential security clauses, climate change law, land acquisitions, State- controlled entities, and third-party funding, while examining the importance and relevance of dispute settlement within the current regime. It concludes with a debate on quantitative methods in research in international investment law. More information is available at: http://www.vcc.columbia.edu/yearbook

Non-Precluded Measures in Indian International Investment Agreements and India's Regulatory Power as a Host Nation

Prabhash Ranjan, Asian Journal of International Law, 30 November 2011

This article provides the first-ever detailed analysis of Non-Precluded Measures (NPM) provisions in India's investment treaties from the perspective of India's regulatory power as a host nation. It critically analyses NPM provisions in fifty-seven Indian investment treaties by studying the divergence in their formulation and argues that the present formulation of NPM provisions in Indian investment treaties is inadequate for the exercise of regulatory power by India for all its policy needs. Hence, in the light of the growing pros and cons of investor treaty arbitration, the article concludes that NPM provisions in Indian investment treaties should be reformulated in a manner that balances investment protection with India's regulatory power to pursue non-investment-related policy objectives. Available at: http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8444515&fulltextType=RA&fileId=S2044251311000129

Events 2012

January 19
FREEZING THOSE COSTS: A SWEDISH-ROMANIAN DIALOGUE ON CONTROLLING ARBITRATION COSTS, THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (SCC) AND THE SALC ADVOKATBYRA, Bucharest, Romania, http://www.sccinstitute.se/?id=42012

January 30 – February 3
UNCITRAL WORKING GROUP II, ARBITRATION AND CONCILIATION, PREPARATION OF A LEGAL STANDARD ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION, Vienna, Austria, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

March 28-31
ASIL 106TH ANNUAL MEETING – CONFRONTING COMPLEXITY, AMERICAN SOCIETY OF INTERNATIONAL LAW, Washington, D.C., United States, http://www.asil.org/annual-meeting.cfm

April 21-26
THIRTEENTH SESSION OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD XIII), Doha, Qatar, http://www.unctad.org/Templates/meeting.asp?intItemID=1942&lang=1&m=21643

June 10-13
21ST INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION CONGRESS (ICCA), Singapore, http://www.iccasingapore2012.org/site/

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