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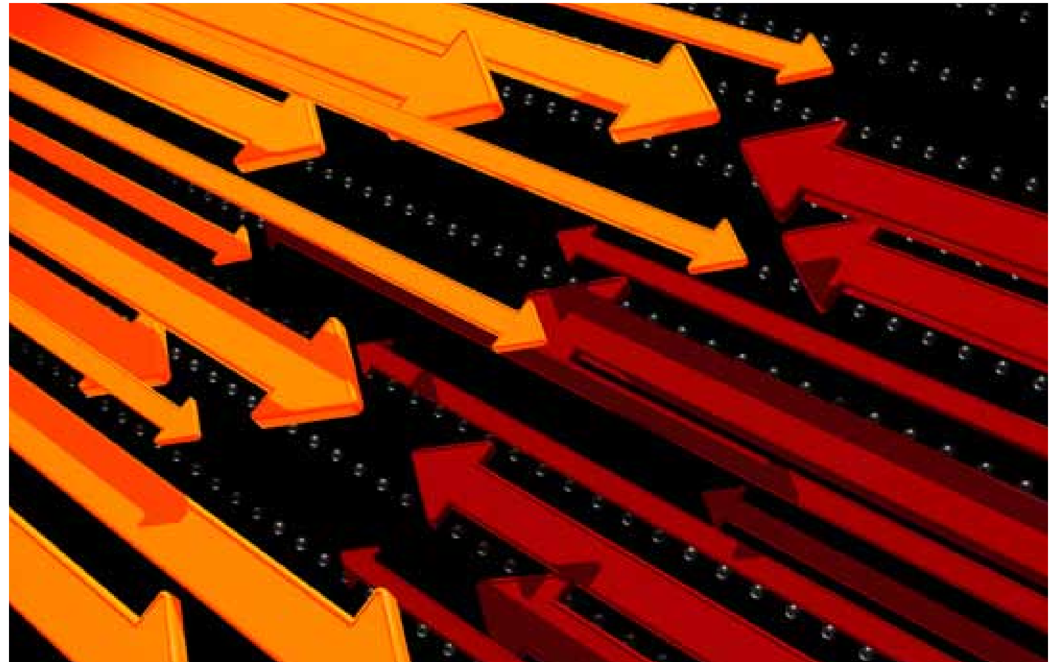
by Jean E. Kalicki



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The IMF's New Transfers Policy and the Trading System
by Kevin P. Gallagher

Peru's State Coordination and Response System for International Investment Disputes
by Ricardo Ampuero Llerena

UNCTAD's Investment Policy Framework for Sustainable Development: Potential and Issues
by Aldo Caliari

The Sixth Annual Forum of Developing Country Investment Negotiators: Understanding and Harnessing the New Models for Investment and Sustainable Development by Chantal Ononaiwu

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contents

3 **Features**
Counterclaims by States in Investment Arbitration
Jean E. Kalicki

5 The IMF's New Transfers Policy and the Trading System
Kevin P. Gallagher

7 Peru's State Coordination and Response System for International Investment Disputes
Ricardo Ampuero Llerena

9 UNCTAD's Investment Policy Framework for Sustainable Development: Potential and Issues
Aldo Caliari

11 The Sixth Annual Forum of Developing Country Investment Negotiators: Understanding and Harnessing the New Models for Investment and Sustainable Development
Chantal Ononaiwu

12 Integrating Sustainable Development into International Investment Agreements: A Commonwealth Guide for Developing Country Negotiators
Veniana Qalo

14 **News in Brief:** Canada receives investor complaints over provincial energy and environment policies; EU agrees on legislation dealing with member state investment treaties; Spain faces another potential claim over cuts to renewable energy subsidies

15 **Awards and Decisions:** Occidental v. Ecuador; Quiborax and Allan Fosk Kaplún v. Bolivia; Bosh International v. Ukraine; Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. vs. Petroleos de Venezuela

19 **Resources and Events**

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Counterclaims by States in Investment Arbitration

Jean E. Kalicki

feature 1

It is quite common in investment arbitration for the respondent State to include in its defense to treaty claims one or more criticisms of the investor's underlying conduct. Such "counterattacks" may include arguments that the investment was illegal from the start, that its operations in due course violated local law, or that the investor breached its direct obligations to the State under a contract. Yet while such arguments feature prominently in State defenses, they are rarely framed as counterclaims seeking affirmative relief. The reason may lie in an instinctive preference by States to pursue any affirmative claims in their own courts. But it may also lie in perceived limits to the jurisdiction of international tribunals to hear State counterclaims. The perception that the institution of investment arbitration is limited to a one-sided presentation of claims, rather than a mutual airing and balancing of claims by both parties, has led to broader criticism of the system.

Two recent ICSID decisions, reaching entirely different conclusions on the issue of jurisdiction over State counterclaims (*Spyridon Roussalis v. Romania*[1] and *Goetz v. Burundi*[2]), suggest a need to revisit this issue in a more systematic way. This essay touches briefly on certain jurisprudential and policy factors that may explain the divergent results and frame future cases for further analysis.

First, by way of background, until recently very few cases squarely confronted the issue of jurisdiction over State counterclaims. In some early cases, counterclaim jurisdiction was founded on contract rather than a treaty,[3] and the issue was therefore uncomplicated, since contracts generally allow either party to assert claims for breach. In other cases, tribunals found it unnecessary to address the jurisdictional issue head on.[4] One early tribunal that did consider these issues carefully was *Saluka Investments B.V. v. Czech Republic*, which found that in principle counterclaims could be heard under a treaty that referred broadly to arbitration of "all disputes … concerning an investment" and incorporated the UNCITRAL Rules, which themselves directly contemplate counterclaims.[5] However, the import of this ruling was significantly limited by two other findings: first, that the tribunal could not hear counterclaims based on breach of a State contract that had its own mandatory dispute resolution clause; and second, that it could only hear counterclaims arising directly as a consequence of the claimant's having made an investment, not based on general obligations of law applicable to everyone within Czech territory. These two caveats largely swamped the general observation about counterclaims under the treaty.

The *Roussalis* and *Goetz* decisions have now revived the issue, by expressly considering the ability of States to pursue counterclaims at ICSID under BITs. The tribunals differed in result, with the majority in *Roussalis* (Andrea Giardina and Bernard Hanotiau) rejecting jurisdiction over a strong dissent by Michael Reisman, and the unanimous tribunal in *Goetz* (Gilbert Guillaume, Jean-Denis Bredin and Ahmed El-Kosheri) upholding jurisdiction over counterclaims. The different rulings have engendered debate, both as a strict doctrinal matter involving the sources of consent to State counterclaims in investment arbitration, and as implicating a broader policy debate about the fundamental objectives of investment arbitration.

Because the policy debate lurks not far beneath the doctrinal debate, it is worth bringing it front and center, before examining the more complex issues of consent. First, what are the reasons to allow counterclaims by States? There are several. It may lead to efficiency, to the centralization of inquiry and the avoidance of duplication, all factors that Professor Reisman emphasized in his *Roussalis* dissent, where he argued that these are "the sorts of transaction costs which counterclaim and set-off procedures work to avoid." It may avoid inconsistent results in different fora that can engender confusion for the parties and create threats to the legitimacy of the system. It can avoid the sort of impasses that result from anti-suit injunctions and anti-anti-suit injunctions against parallel proceedings, such as have plagued (for example) the many chapters of *Chevron v. Ecuador*. And it could avoid the irony of a State having moved so far towards acceptance of international arbitration that it embraces it as an alternative to its own national courts, only to be confronted by an investor (who selected arbitration over those local courts for its own claims) insisting on local court exclusivity for the State's corresponding claims. Professor Reisman in *Roussalis* criticized the majority for "directing the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant."

On the other hand, there are important policy reasons also for restricting counterclaims by States in investment arbitration. Since State claims are more likely to arise from concession contracts than BIT obligations (treaties generally do not impose any direct obligations on investors), counterclaims may be seen as an end-run around carefully negotiated contractual dispute resolution clauses. Counterclaims may also embroil tribunals, even more than they are already, in disputes governed solely by local law rather than international law, creating a potential crisis for the legitimacy of tribunals which can claim no greater expertise on such matters than national courts. Finally, extensive use of counterclaims could chill investors from invoking international arbitration against States, and thus potentially defeat the broader goal of BITs to reassure investors by providing an agreed forum for their own claims if and when aggrieved.

The doctrinal debate about sources of consent to State counterclaims has played out, importantly, against this complex policy debate. The first doctrinal question is whether it is sufficient for jurisdiction that both parties have consented to arbitrate under the ICSID Rules. For this question, it is necessary to unpack the dense text of ICSID Convention Article 46,[6] which couples a mandatory "shall" ("the Tribunal shall … determine any … counterclaims") with a series of prerequisites ("except as the parties otherwise agree," "arising directly out of the subject matter of the dispute," "provided they are within the scope of the consent of the parties" and "provided they …

are otherwise within the jurisdiction of the Centre"). The recent decisions have focused mainly on one of these requirements: that the counterclaims "are within the scope of the consent of the parties." For Professor Reisman (dissenting in *Roussalis*)[7] and for the *Goetz* tribunal,[8] the investor's consent to ICSID was sufficient to imply a consent to counterclaims; there was no need to locate additional or affirmative consent in the underlying BIT. But while this approach may be satisfying from a policy perspective, it arguably is not consistent with Article 46's own reference to "within the scope of consent" as an *extrinsic* precondition to the tribunal's hearing counterclaims. It is worth recalling the bedrock notion that States' ratification of the Convention does not itself provide their consent to jurisdiction over any particular dispute; rather, consent for any particular claim must be sourced to a writing other than the Convention, such as a treaty, contract, or national legislation. If that is the case for the investor's claims, why not also for the State's counterclaims? Stated otherwise, if Article 46 itself provided that consent, then its incorporated requirement of consent ("provided they are within the scope of consent") would be entirely circular and extraneous.

In this sense, the *Roussalis* majority's conclusion that a claimant's mere filing at ICSID is insufficient in and of itself to create consent to counterclaims is more intellectually robust; the majority reasoned that "the scope of the consent" of the parties referenced in Article 46 must be determined by reference to instruments external to the Convention, such as by the dispute resolution clause contained in the BIT. And certainly, if we examine the different BITs at play in the two recent cases, the differing treaty language provides a more satisfying explanation for the divergent results. The Greece-Romania BIT in *Roussalis* provided in its Article 9 that "disputes between an investor…and the other Contracting Party concerning *an obligation of the latter* under this Agreement, in relation to *an investment of the former*, shall if possible be settled," or "*the investor concerned* may submit the dispute" to arbitration (emphasis added). The majority found this was a narrow offer to arbitrate only investor claims, not a consent to arbitrate State counterclaims— and that it covered only obligations "under this Agreement" (*i.e.* ones imposed on States), not obligations imposed on investors under local law or contract. By contrast, Article 8(1)(b) of the Belgium-Burundi BIT in *Goetz* covered disputes concerning the interpretation or application of any investment authorization granted by host State authorities; the tribunal noted that Burundi's claims about a bank's alleged noncompliance with its operating certificate fell within this definition. Article 8(5) of the BIT apparently also referred to national law as well as international law.

For future cases, however, the text of the relevant BIT may not be sufficient to answer all questions regarding jurisdiction over State counterclaims. Contractual dispute resolution clauses may be equally relevant, and could function in one of two ways. First, a clause could be an independent source of consent to counterclaims notwithstanding a *narrow* BIT clause: even if the BIT has a consent clause framed as narrowly as the one in *Roussalis*, if a concession contract stipulates that claims for breach may be presented to ICSID, that would constitute an independent source of consent, along the lines of the two early Guinea cases addressed above (*MINE* and *Atlantic Triton*). But equally, a contract clause could function as a potential "agreement otherwise" within the language of ICSID Convention Article 46, notwithstanding a *broad* BIT clause; even if a BIT covers "all disputes relating to investments," which could be seen as reflecting consent to State counterclaims brought under local law, if a concession contract sends contractual claims exclusively to another forum, then arguably this would be a specific "agreement otherwise" precluding that particular class of counterclaims, notwithstanding the broader BIT consent to counterclaims more generally. This was what *Saluka* held back in 2004, with regard to counterclaims arising directly out of a Share Purchase Agreement. In addition to contractual clauses, future cases also may have to examine issues of possible waiver or possible ad hoc consent to counterclaims. In principle, nothing in Article 46 requires that the investor's consent to counterclaims appear in the same instrument as the State's consent to the investor's claims. After all, consent without privity is a hallmark of ICSID arbitration.

An alternate solution lies, of course, in the development of treaty language expressly to address counterclaim jurisdiction. If future jurisprudence—based on interpretations of Article 46 and varying BIT or contract language—does not reliably permit State counterclaims to be resolved in a single efficient forum with investors' claims arising from the same subject matter, then States in due course may reform the system to clarify their intent that this occur. This could take the form either of interpretative notes about existing treaty text, or more likely the negotiation of specific provisions about counterclaims in new treaties. Some countries are already beginning to contemplate such provisions, including in proposed model BIT language that would directly impose certain substantive obligations on investors and expressly reference the possibility of State claims against investors for breach of such obligations. In some models currently under review, the investor would have to submit, as a condition precedent to its presenting its own claims, an instrument confirming its advance consent to any counterclaims the State may wish to assert. It remains to be seen, of course, whether such ideas are accepted in any new treaties, and if so whether investors themselves embrace the structure, or alternatively consider it a deterrent to structuring investment through vehicles falling within the scope of the new treaty language. That is a subject for another day.

Author

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Notes

1 See only Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor State Arbitration*, 15 J. INT'L ECON. L. 223 (2012); Rahim Moloo & Justin Jacinto, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law, in* [2011-2012] Y.B. INT'L INV. L. & POL'Y (Karl Sauvant ed., forthcoming 2012), working paper version available on SSRN at http://ssrn.com/abstract=2036243.

2 ICSID Case No. ARB/01/2 (21 June 2012).

3 *See, e.g., MINE v. Guinea*, ICSID Case No. ARB/84/4 (6 January 1988) (awarding Guinea damages from the investor's initiation of AAA arbitration in violation of an agreement to resolve disputes before ICSID); *Atlantic Triton Co., Ltd. v. Guinea*, ICSID Case No. ARB/84/1 (21 April 1986) (rejecting Guinea's counterclaim on the merits).

4 *See, e.g., Alex Genin et al. v. Estonia*, ICSID Case No. ARB/99/2 (25 June 2001) (finding that evidence did not support Estonia's counterclaim, without expressly addressing the issue of jurisdiction); *Gustav F.W. Hamester GmbH & Co. v. Ghana*, ICSID Case No. ARB/07/24 (18 June 2010) (finding that Ghana had not pursued its counterclaims after listing them in its initial prayer for relief, and therefore that it was unnecessary to determine whether counterclaims would fall within the scope of consent).

5 *Saluka*, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004).

6 "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

7 *See Roussalis* dissent ("When the States Parties to a BIT contingently consent … to ICSID jurisdiction, the consent component of Article 46 is ipso facto imported into any ICSID arbitration which an investor then elects to pursue," so long as the BIT itself does not preclude counterclaims).

8 *See Goetz* ¶¶ 278-79 (reasoning that by concluding the BIT, Burundi accepted that disputes could be submitted to ICSID arbitration according to the conditions and procedures in the Convention, including that counterclaims would be evaluated under the conditions in Article 46; by accepting the offer, Goetz in turn consented; therefore jurisdiction exists *regardless* of whether the BIT contains any provision affirmatively providing jurisdiction over counterclaims).

feature 2

The IMF's New Transfers Policy and the Trading System

Kevin P. Gallagher

In late 2012, the International Monetary Fund (IMF) officially endorsed an "institutional view" on the management of capital flows. Though the IMF will continue to urge nations to eventually liberalize all capital transfers, henceforth the IMF will advise nations, under certain circumstances, to deploy capital controls on inflows and outflows of capital. In its new view the IMF pointed out that such advice may conflict with obligations that nations have under trade and investment treaties, and offered to provide a forum for reconciliation. This short note provides an overview of the new IMF view, pinpoints how it may conflict with country obligations under trade and investment treaties, and discusses remedies for reform.

What the IMF decided

On December 3, 2012 the IMF made public an Executive-Board approved 'institutional view' on capital account liberalization and the management of capital flows. In a nutshell, the IMF's new 'institutional view" is that nations should *eventually* and sequentially open their capital accounts (IMF, 2012b). This is indeed in contrast with its view in the 1990s that all nations should be uniformly required to open their capital accounts regardless of the strength of a nation's institutions. The IMF now recognizes that capital flows also bring risk, particularly in the form of capital inflow surges and sudden stops that can cause a great deal of financial instability. Under such conditions, and under a narrow set of circumstances, according to the new 'institutional view' the IMF may recommend the use of capital controls to prevent or mitigate such instability in official country consultations or Article IV reports. In other words, the IMF now sanctions staff and management to recommend the use of capital controls to nations under certain circumstances. And under a very narrow set of circumstances a nation may receive recommendations to discriminate capital flows based on residency.

IMF view and trade and investment treaties

The IMF is aware of the fact that they may recommend capital controls to nations that do not have the policy space to deploy such instruments because they would be deemed actionable under a trade agreement or investment treaty. In the final report the IMF states:

> "As noted, the Fund's proposed institutional view would not (and legally could not) alter members' rights and obligations under other international agreements. Rather, conformity with obligations under other agreements would continue to be determined solely by the existing provisions of those agreements. Thus, for example, even *where the proposed Fund institutional view recognizes the use of inflow or outflow CFMs as an appropriate policy response, these measures could still violate a member's obligations under other international agreements if those agreements do not have temporary safeguard provisions compatible with the Fund's approach* (IMF, 2012b, 42)."

This echoes what the IMF stated in a board report earlier this year:

> "The limited flexibility afforded by some bilateral and regional agreements in respect to liberalization obligations may create challenges for the management of capital flows. These challenges should be weighed against the agreements' potential benefits. In particular, such agreements could be a step toward broader liberalization. However, *these agreements in many cases do not provide appropriate safeguards or proper sequencing of liberalization*, and could thus benefit from reform to include these protections (IMF 2012a, 8)."

Indeed, the IMF suggests that the new IMF institutional view could help guide future trade treaties and that the IMF could serve as a forum for such discussions.

> "In particular, the proposed institutional view could help foster a more consistent approach to the design of policy space for CFMs under bilateral and regional agreements. Recognizing the macroeconomic, IMS, and global stability goals that underpin the institutional view, *members drafting such agreements in the future, as well as the various international bodies that promote these agreements, could take into account this view in designing the circumstances under which both inflows and outflows CFMs may be imposed within the scope of their agreements. Similarly—and depending on the stages of development of the relevant signatories—the sequenced approach to liberalization under the integrated approach could be taken into account to guide the pace and sequencing of liberalization obligations, and the re-imposition of CFMs due to institutional considerations* (IMF, 2012b, 33)."

Which nations will be the most affected?

At a symbolic workshop in Argentina during the summer of 2012 (Argentina has been subjected to numerous investor-state cases for measures it took to mitigate its 2001 crisis), economists, policymakers, legal scholars and members of civil society met to conduct a "compatibility review" regarding the extent to which nations have the flexibility to regulate cross-border finance under global trade and investment rules (Gallagher and Stanley, 2013).

The review found numerous incompatibilities between trade rules and efforts to regulate cross-border finance. The group saw regional and bilateral deals are far more incompatible with the ability to regulate cross-border finance than is the World Trade Organization (WTO) regime.

But there are still a number of concerns about the WTO. Under the WTO's General Agreement on Trade in Services (GATS) and under United States' trade and investment

treaties nations must to some degree liberalize their capital account. Nations must partially do so in order to allow trade in financial services under their GATS commitments (though many countries have not made commitments for financial services) and absolutely allow all transfers of investments to occur "freely and without delay" in US treaties. So for each case the use of capital controls would be actionable. The question is whether these treaties have ample safeguards for the prudential use of capital controls.

The GATS has both "prudential carve-out" and a "balance of payments safeguard," but there is real concern that the conditions under which nations can evoke such safeguards are overly narrow. Scholars and policymakers point to the language in these safeguards that say nations must take measures in the event of "serious balance-of-payments and external financial difficulties or threat thereof" as only pertaining to controls on outflows in the middle of a crisis and not on the measures on inflows that the IMF prefers (Hagan, 2000; Viterbo, 2012). Others express concern that prudential measures must be temporary and that they may have to undergo a "necessity test" by the WTO to see if an alternative measure should have been used.

These concerns have implications well beyond the WTO, as WTO language becomes the foundation for numerous regional and bilateral trade and investment treaties that go even deeper than the WTO. The Trans-Pacific Partnership (TPP) under negotiation between the US and numerous Pacific Rim nations, as currently proposed, would mandate that all forms of cross-border finance be allowed to flow "freely and without delay."

The draft treaty (like most US treaties) has language similar to the WTO's prudential carve-out but makes the circumstances under which it can be evoked even more limiting—and there is no balance of payment safeguard whatsoever (Anderson, 2011). Moreover, the TPP would allow private investors to directly file claims against governments that regulate them, as opposed to a WTO-like system where nation states (i.e., the regulators) decide whether claims are brought. Therefore, under investor-state dispute settlement those sectors that may bear the cost have the power to externalise the costs of financial instability to the broader public while profiting from awards in private tribunals.

> "The IMF is aware of the fact that they may recommend capital controls to nations that do not have the policy space to deploy."

Toward a reconciliation of financial regulation and the trading system

The IMF view recommends that the Fund collaborate with other international organizations to coordinate positions on capital flows. The Task Force mentioned earlier discussed four ways that the inconsistencies between capital account regulations and trade and investment treaties could be reconciled:

Refrain from taking on new commitments in regimes incompatible with the ability to deploy capital account regulations (CARs). Nations could refrain from making Mode 1 and Mode 3 commitments under GATS altogether, and refrain from signing FTAs and BITs without proper safeguards and dispute settlement.

Adopt 'interpretations' of existing treaty language. Both the WTO and FTAs-BITs allow for 'interpretive notes' or amendments that could clarify or change existing language in current treaties.

Amend existing treaties to reconcile current incompatibilities. Another route to reform would be formal amendments to existing treaties. Amendments to the GATS can be submitted to the Ministerial Conference by a member or by the Council for Trade in Services, and be adopted by consensus or with a two-thirds majority vote. For an amendment to enter into force it has to be ratified by two-thirds of WTO members.

Design new rules for future treaties. Treaties currently under negotiation or those that may occur in the future could be designed to have a narrower definition of investment, negative list negotiations, adequate balance of payment and prudential carve out exceptions, special and differentiated treatment, and dispute settlement procedures that exhaust domestic remedies and have state-to-state dispute settlement in consultation with macroeconomic and monetary authorities and experts.

The current negotiations for a Trans-Pacific Partnership are an opportunity for reform. Indeed, emerging market negotiators have proposed language that would broaden the policy space for the use of capital account regulations within the treaty. Ironically, the US remains officially opposed to such proposal, even though the US approved the institutional view on capital flows at the IMF.

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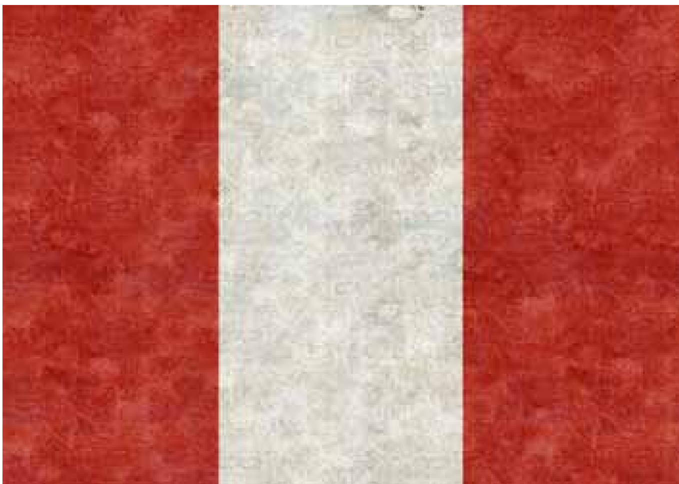
feature 3

Peru's State Coordination and Response System for International Investment Disputes

Ricardo Ampuero Llerena



Over the last 20 years, Peru has developed a clear policy for attracting investment, which is reflected, among other things, in the number of signed bilateral investment treaties (BITs) and ratified free trade agreements (FTAs) with investment provisions, and the use of investment contracts by the Peruvian State with foreign investors[1]. These developments, combined with an attractive economic and stable political climate, have contributed to achieving one of the country's main objectives, namely to significantly increase foreign direct investment.[2]

Needless to say, most international investment protection instruments provide that disputes arising between foreign investors and host States will be resolved by arbitration. Just as Peru has joined the global trend of concluding investment protection agreements, the country has also been no stranger to the considerable increase in international investment disputes observed in recent years. To address this growth in international investment arbitration in line with its investment attraction policy, Peru has created a system for efficiently and effectively resolving potential disputes.

Following Peru's first international investment dispute in 2003 (an earlier case in 1998 led to an agreement that ended the dispute), a number of aspects involved in the handling and prevention of investment disputes were identified as obstacles to the appropriate defence of the State's interests. These included the signing of an increasing number of investment protection instruments, the lack of coordination within the State in terms of gathering information and clearly defining the responsibilities of the entities involved, and the lack of a clear process for retaining outside legal counsel and paying the legal costs associated with such proceedings.

Further to an analysis of these and other aspects, Peru's Coordination and Response System for International Investment Disputes (Sistema de de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión, or SICRECI) was created in 2006 by Law No. 28933.

SICRECI's principal objectives as set out under Article 3 of this legislation are:

- Optimize the response and coordination within the public sector to handle international investment disputes in a timely and appropriate manner.
- Centralize information on investment agreements and treaties signed by the Peruvian State that refer to international dispute settlement mechanisms.
- Establish an alert mechanism to warn of emerging international investment disputes.
- Define coordination procedures for the public entities[3] involved in a dispute.
- Internalize the costs generated by the public entities involved in a dispute.

SICRECI comprises the Coordinator, a Special Commission and all of the public entities that enter into agreements with national or foreign investors conferring rights or guarantees, or that represent the Peruvian State in agreements that contain investment-related provisions.

The Peruvian Ministry of Economy and Finance is the Coordinator of SICRECI. Its main duties are to centralize information and coordinate the system; keep informed of any emerging investment dispute; receive notification or alerts of the commencement of dispute resolution mechanisms or the direct negotiation stage, as applicable; and establish and maintain a public registry with information on the agreements and treaties set out in the previous paragraph.

The Special Commission is the inter-agency collegiate entity established to represent the State in all stages of international investment disputes, and is composed of the following permanent members:

- A representative from the Ministry of Economy and Finance (Chair)
- A representative from the Ministry of Foreign Affairs
- A representative from the Ministry of Justice
- A representative from the Private Investment Promotion Agency (ProInversión)

The Special Commission may also include non-permanent members, depending on the circumstances:

- A representative from the Ministry of Foreign Trade and Tourism, in the event of disputes that arise in the application of treaties with investment provisions
- A representative from each public entity involved in a dispute

Once it has been notified with the alert of the beginning of a dispute, the Special Commission is, *inter alia*, responsible for assessing the possibility of reaching a settlement in the direct negotiation stage and participating in these negotiations, depending on the strategy adopted; requesting technical reports from the entities involved on matters pertaining to the dispute; proposing the hiring of legal counsel and other professionals required; appointing arbitrators; facilitating the work of the outside counsel retained for the defence of the State; approving the availability of funds required for its participation in the corresponding negotiations; and determining the responsibility of the public entities involved in the dispute.

The work of the Special Commission is supported by a Technical Secretariat, the core functions of which include conducting an initial assessment of the dispute and preparing a preliminary report that is submitted to the other members; preparing reports on courses of action and strategies and any other information necessary for the Commission to perform its duties; and preparing and keeping the Special Commission's meeting minutes.

Given that SICRECI is a comprehensive system aimed at preventing as well as handling international investment disputes, the legislation creating it includes a few aspects that should be highlighted. SICRECI involves two main processes: the communication of information regarding investment agreements and treaties signed, and an alert system of the beginning of a dispute. The purpose of the first process is to facilitate access to a registry of public information on investment agreements and treaties so that government officials can monitor the State's commitments. The second process addresses the direct handling of a dispute.

“Peru's initiative in creating SICRECI has proven to be efficient and necessary, especially considering the significant increase in the number of cases coming to its attention.”

In addition, SICRECI establishes criteria that must be applied in writing in dispute settlement provisions of investment agreements entered into by public entities, with a view to standardizing and facilitating the actions of SICRECI members. These provisions must:

- Establish a period of direct negotiation or settlement of at least 6 months before the dispute can be submitted to international arbitration.

- Establish the recourse to neutral dispute settlement systems, as set out in the regulations of Law No. 28933.

- Establish the parties' responsibility for the costs arising from their participation in the arbitration or settlement.

- Establish the investors' duty to notify the System Coordinator, without prejudice to their duty to notify their counterpart, where applicable, in order to give effect to the notification of the commencement of the direct negotiation period.

It should be noted that based on the lessons learned in handling international investment disputes, the SICRECI Coordinator is working with the public entities concluding investment agreements with investors to incorporate additional requirements into their dispute settlement provisions, including, for example, the investor's obligation to present, together with the notification of a potential dispute, detailed information about the dispute, including (i) background, (ii) relevant facts, (iii) clear identification of the disputed points, (iv) clearly defined claims and, where possible, (v) proposals for alternative dispute resolution. The objective is to facilitate the complete and full understanding of the dispute by the Special Commission as soon as it is formally notified of its existence, in order to increase the possibility of achieving a satisfactory outcome in the negotiation stage.

In addition to the registry of public information on investment agreements and treaties, the SICRECI Coordinator is also implementing an early alert system that allows for effective action to be taken with respect to a potential dispute and for taking the appropriate measures to avoid the matter ending up in a dispute that requires the involvement of the Special Commission.

Peru's initiative in creating SICRECI has proven to be efficient and necessary, especially considering the significant increase in the number of cases coming to its attention. Peru currently has nine pending cases, eight of which have emerged since 2010. SICRECI has been effective in addressing the number of cases handled by the Peruvian State as well as their broad nature.

In a context where the cases respond to specific situations, regulations and decisions in a variety of sectors and industries, it is increasingly important that the entities involved in the dispute be incorporated into the State's representation and that appropriate coordination be maintained among them. This not only leads to orderly, efficient and coordinated State action, but it also allows for the clear identification of responsibilities and the internalization of the costs of the measures prescribed by national, regional and local government agencies.

Even more importantly, SICRECI is a clear indication of Peru's serious approach to its policy of attracting investment. The creation of a system for preventing and handling investment disputes reflects Peru's intention to create a truly stable and predictable investment climate that recognizes the importance of early dispute identification and resolution as well as the appropriate defence of the State in such proceedings.

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Notes

1 Peru currently has 37 reciprocal investment promotion and protection agreements along with more comprehensive trade agreements, including FTAs that include investment provisions. Similarly, according to the Private Investment Promotion Agency – ProInversión – there are some 91 investment contracts.

2 ProInversión's webpage (www.proinversion.gob.pe) reports that as of December 2011, the stock of foreign direct investment (FDI) in Peru was just over US$22 billion, an increase of 69.14% compared to the US$13 billion in FDI Peru reported in December 2001.

3 Law No. 28933. Article 1: Definitions: Public entity: Any organization with legal status, including all levels of national, regional and local government, including its decentralized public agencies and enterprises, enterprises in which the State has a controlling interest, constitutionally autonomous bodies; regulatory bodies; collection and supervisory bodies; special legally registered funds, and any other bodies of a similar nature not mentioned in this paragraph.

feature 4

UNCTAD's Investment Policy Framework for Sustainable Development: Potential and Issues

Aldo Caliari

The United Nations Conference on Trade and Development (UNCTAD) has released its Investment Policy Framework for Sustainable Development (IPFSD)[1]. UNCTAD characterizes it by saying it emphasizes "a balanced approach between the pursuit of purely economic growth objectives …, and the need to protect people and the environment," and underscores the interests of developing countries in investment policymaking.

This article engages in an independent assessment of the IPFSD from the standpoint of those two claims. The IPFSD comprises three parts: Core Principles; guidelines for national investment policies; and options for policymakers negotiating international investment treaties. Only the first and the last are assessed in this article.[2]

Core principles for investment policymaking

Among the Core Principles that the IPFSD attempts to convert collectively and individually into policy guidelines, Principle 2 features a welcome call for policy coherence. Unfortunately, it fails to give some guiding norm for subordination; for example, that in case of conflict, it is the sustainable development and human rights commitments undertaken by a country that should prevail over investment commitments.

Principle 4 is about dynamic policymaking: "Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics."

This principle is an exciting contribution to the current debate on international investment rules. It provides grounds for encouraging that investment treaties be subject to automatic and periodic review. The need to adapt investment policies to incorporate what is learned through their implementation tends to be absent in international investment agreements that, once subscribed, are hard to renegotiate. Even in the limited instances that theoretically allow for renegotiations, these tend to be subject to insurmountable obstacles.

On the other hand, two Principles are especially problematic. Principle 7 on openness to investment, states: "In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment." Principle 8 states: "Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory."

Now, sustainable development is defined as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs." The assumption cannot be automatic that, *a priori*, a regime of openness to FDI (with some exceptions) today will not compromise options required for future generations to meet their needs. The ability of a regime to serve sustainable development will depend on the particular configuration of regimes and mixtures between domestic and foreign in a given country.

The adoption of openness as a principle does not coexist comfortably, either, with the interests of developing countries that UNCTAD claims to defend. The notion of open trade responds to the theory of comparative advantage, elaborated having in mind trade in goods. Regardless of where one stands on the benefits of open trade, extending such arguments to open investment is not a straightforward proposition.

In the case of Principle 8 on protection to established investors, again, there is no reason why non-discrimination should be consecrated as a principle, rather than an exception to be allowed in cases where investment can prove to fit into the sustainable development strategy and generate positive impact.

Tensions between Principle 4 and Principles 7 and 8 are also bound to emerge; the latter call for a predictable and stable entry framework may limit the scope for examination and "dynamic policymaking." Indeed, taken to the extreme, a highly stable entry framework will be logically one that does not allow any kind of learning from experience.

Principle 5 is on balanced rights and obligations: "Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all."

Thus the principle reaffirms the need to strike a balance and move away from the manifestly unbalanced system of investment treaties and regimes in force today.

Principle 6 is one to welcome: "Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects."

UNCTAD goes as far as saying that regulation is not just a State right but a necessity. However, the phrase "to minimize potential negative effects" is a weaker option than "to avoid" such effects altogether. It is also ambiguous whether "subject to international commitments" intends to include non-investment commitments (such as human rights, for instance) or only international investment commitments—in which case this part of the sentence would cancel out what is good in the right to regulate.

International investment agreements: Policy options

The IPFSD recognizes that the space for many recommendable national policy measures will be constrained by the clauses in international investment agreements. It aims, therefore, to offer guidance for countries negotiating such treaties. In this regard, the IPFSD distinguishes three levels of challenges: strategic, design of provisions in agreements, and multilateral consensus building.

At the strategy level, UNCTAD looks at pros and cons of IIAs. It chooses a cautious "can" to refer to IIAs alleged ability to promote investment, and warns that IIAs may become "largely a vehicle for the protection of interests of investors and home countries without giving due consideration to the development concerns of developing countries." It further asserts that, on average, existing treaty provisions are heavily skewed in this way.

The IPFSD also recommends watching for the interactions of international agreements. For example "commitments made to some treaty partners may easily filter through to others through most-favoured-nation clauses."

On the design of provisions in IIAs, the IPFSD offers welcome support for several approaches that, in many cases, had been first developed by civil society.

For instance, UNCTAD suggests that IIAs could balance State commitments with investor obligations, noting that "Legally binding obligations on companies and individuals are stipulated by national law but are absent in international treaties." Arguably, if treaties stipulate rights to investors, they can and should also impose obligations on private parties.

In this context UNCTAD suggests that IIAs stipulate that investors should "comply with … national laws of the host State when making and operating an investment, and … at the post-operation stage." The failure of investors to comply with their obligations could then be the basis for host States to make a counterclaim if sued in an investment tribunal. This is a good idea so far, but UNCTAD goes on to add investor compliance with national laws should be subject to such laws conforming to "the host country's international obligations, including those in the IIA." If this latter condition is attached, it could easily cancel out what is achieved by adding such a clause.

UNCTAD's recommendation that countries safeguard some policy space by "clarifying the scope and meaning of particularly vague treaty provisions such as the fair and equitable treatment standard and expropriation…" echo civil society concerns about excesses in interpretation of such provisions.

Noting that host countries have faced claims of up to US$114 billion, UNCTAD recognizes the burden on defending countries and the damage to policy space. Moreover, it recognizes that investor-state mechanisms have been used by investors in unanticipated ways, showing an increasingly blurred line between political risk and under interference on the one hand and legitimate domestic policies on the other.

Within the alternative clauses that treaties could include, UNCTAD reviews examples covering scope and definition, national treatment, MFN treatment, fair and equitable treatment, expropriation and investor–state dispute settlement.

When discussing the scope of IIAs, UNCTAD warns about the misuse of provisions on definition of investment, signaling the importance of carving out, for instance, government debt, portfolio investment, or areas of public policy and sensitive sectors. In regards to the problem of investors channeling complaints through legal entities based in the contracting parties, it argues such practice could be countered with provisions that only "genuine investors" from the contracting parties can benefit from treaty provisions.

UNCTAD says national treatment may need to be circumscribed by negotiators given that States may wish to afford preferential treatment to national investors for industrial policy or other reasons. And on MFN treatment, it highlights that IIAs have started explicitly excluding dispute settlement issues and obligations undertaken in treaties with third parties from MFN obligations, in response to a number of investment tribunals that have construed MFN as allowing investors to invoke more favorable provisions of a treaty between the host State and a third country.

On the controversial issue of investor–state dispute settlement, the IPFSD recognizes flaws that have been displayed recently, such as inconsistent and unintended interpretations, unanticipated uses by investors, challenges against policy measures in the public interest, costly and lengthy procedures and limited or no transparency. Among the remedies it proposes "promoting the use of alternative dispute resolution methods, increasing transparency of procedures, encouraging arbitral tribunals to take into account standards of investor behaviour when settling investor-State disputes, limiting resort to ISDS and increasing the role of domestic judicial systems, providing for the possibility of counterclaims by States, or even refraining from offering ISDS."

The IPFSD makes suggestions on how to operationalize sustainable development objectives, along three —clearly not exclusive—cluster methods: adjusting existing provisions to make them more sustainable development friendly, adding new provisions and introducing special and differential treatment.

This section of the IPFSD is complemented by a 16-page table with very detailed set of options that for each of the areas typically covered under IIAs provides a spectrum of optional approaches. This portion cannot be considered a set of "good practices" because it is not really siding with any particular option. But their greatest merit as a contribution to the debate is that it places within the spectrum of valid options many that are rarely – if ever – considered by treaty negotiators.

For instance, parties to an IIA might opt for:

- not banning any performance requirement (4.9.4)
- incorporating exceptions for regulatory measures that aim to protect human rights or allow for prudential measures (5.1.4)
- specifying that only a narrow set of issues are subject to investor-State dispute settlement (or omitting investor–State dispute settlement altogether, naming host State's domestic courts as the appropriate forum (6.2.4 and 6.2.6)
- mechanisms for joint interpretation of the treaty by the Parties in case of ambiguities (6.3.1)
- limiting remedies and compensations to ensure that the amount is commensurate with the country's level of development (6.4.2)

The fact that these options are for the most part absent from existing North-South treaties is the *realpolitik* fact that most powerful countries have templates that are tabled on a take-it-or-leave-it basis. Moreover, in the trade-off between interests of investors and the sustainable development concerns of the host countries, the evolution of IIAs has a clear trend to being further skewed towards the former. In one place in the IPFSD, UNCTAD sounds a hopeful note in mentioning that investment treaties are evolving and cites the US recent review of its bilateral treaties template. But critics have noted how little the template has incorporated changes that favors interests of host countries. Still, only policy advice to developing countries that encompasses all available policy options and their potential consequences as a basis for consideration by parliaments and citizens' debate is the only hope for advancing paradigms for investment that truly supports sustainable development in the future.

Author

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Notes

1 In October 2012, UNCTAD published a summary of the IPFSD in Investment Treaty News, which is available here: http://www.iisd.org/itn/2012/10/30/towards-a-new-generation-of-investment-policies-unctads-investment-policy-framework-for-sustainable-development/

2 For a longer commentary, including detailed assessment of the second part of the IPFSD, see Investment policy for sustainable development, UNCTAD proposes.

feature 5

The Sixth Annual Forum of Developing Country Investment Negotiators: Understanding and Harnessing the New Models for Investment and Sustainable Development

Chantal Ononaiwu

The Sixth Annual Forum of Developing Country Investment Negotiators was held on October 29-31, 2012, in Port of Spain, Trinidad and Tobago and co-hosted by the International Institute for Sustainable Development (IISD), the Government of Trinidad and Tobago, the Caribbean Community (CARICOM) Secretariat and the South Centre. Since it was first convened in 2007, interest and participation in the forum has grown steadily. This year's event attracted 75 participants from 36 countries in Africa, Asia and Latin America and the Caribbean, as well as regional and international organizations, including the Commonwealth Secretariat, the United Nations Conference on Trade and Development (UNCTAD), the United Nations Economic Commission for Africa, the Caribbean Export Development Agency and the Southern African Development Community (SADC).

The forum is the only event of its kind and affords developing country investment negotiators a unique platform for knowledge-building, exchange of experiences and networking. Having attended the forum for the first time last year in Uganda, I found the experience to be invaluable, a view which was cemented after my participation this year.

The forum encourages participants to develop their own critical perspectives on issues which are germane to the negotiation of international investment treaties, such as the costs and benefits of these instruments, the implications of investment treaty provisions for sustainable development, the role of investment treaties in the broader legal framework for investment including domestic law and contracts, and the risks and challenges of the investor-state arbitration system.

The specific objective of this year's forum was to discuss and examine ways of making the transition to an investment framework that is more balanced and supportive of sustainable development. In that regard, the forum focused on three tools that can assist countries in achieving that goal, all of which were finalised in 2012. Like the IISD's 2005 Model Investment Agreement for Sustainable Development, these instruments are useful references for countries seeking to build a sustainable investment framework. The first is UNCTAD's Investment Framework for Sustainable Development, which sets out core principles which can be developed into guidelines for national investment policies and options for investment treaties. The second is the Commonwealth Secretariat's Investment Guide for Developing Country Negotiators. Formally launched at the forum, the guide identifies best practices in integrating sustainable development into international investment agreements and examines the costs and benefits of alternative approaches. The third is the Model Investment Treaty template for SADC States, which was developed by the Investment Committee of SADC.

The focus of the sessions was broad-ranging and the presentations and discussions were both stimulating and thought-provoking. Participants gained a better understanding of the new models for investment and sustainable development and the ways in which they can guide not only the negotiation of investment treaties but also the elaboration of the domestic legal framework for investment. Attendees also enhanced their appreciation of the challenges in making the transition to a sustainable development model, and possible solutions to addressing past approaches that are at odds with an investment framework that supports sustainable development. In addition, the forum facilitated greater awareness of the growing breadth of investor-State claims and the implications for sustainable development. Importantly, negotiators developed greater insights into options for implementing sustainable development into core provisions of investment agreements, in particular, fair and equitable treatment, expropriation, pre-establishment rights, performance requirements and investor obligations.

The forum enables participants to benefit from the depth of knowledge and experience of a wide-cross section of experts with diverse backgrounds, including those working in intergovernmental organizations, nongovernmental organizations and in private practice. However, an invaluable benefit of participating in the forum is the opportunity for developing country negotiators themselves to share their experiences with their counterparts in various regions of the world. This exchange of experiences is facilitated not only through the participation of negotiators as speakers in the substantive sessions, but also through breakout group sessions in which participants assess the costs and benefits of various options for crafting provisions in investment treaties. This process of peer exchange can serve to generate consensus around the relative merits of pursuing certain options for investment treaty provisions.

The forum also affords participants opportunities to network and forge meaningful relationships with counterparts around the world. Moreover, the annual rotation of the venue of the forum to different regions ensures that negotiators from around the world can benefit from participation. Indeed, the hosting of this year's forum in the Caribbean enabled officials from most CARICOM countries to attend for the first time.

The close involvement of former participants in the development of the agenda ensures the relevance of the forum to developing country investment negotiators and enhances their sense of ownership of the process and commitment to its future development.

Investment negotiators from developing countries should prioritize participation in the forum as it further equips them to weigh and balance carefully various options and guide the process of making appropriate choices for the investment legal framework for their country or region.

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Integrating Sustainable Development into International Investment Agreements: A Commonwealth Guide for Developing Country Negotiators

feature 6

Veniana Qalo

In November 2012 the Commonwealth Secretariat completed a practical guide, titled *"Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries,"* to help enable developing countries to design international investment agreements (IIAs) that support their development needs.[1] The guide marks the culmination of an intense and very successful consultative and expert-group process held in the Commonwealth Caribbean, Pacific, South Asian and African regions. It has also been subjected to a rigorous peer review process comprising renowned experts in the field to ensure that it meets international standards.

The guide identifies an area of crucial need among its poorest, smallest and most vulnerable members; and provides a cost-effective, instructive and very deeply appreciated tool across the Commonwealth's developing country membership.

The guide is designed to be a useful reference for policy-makers, legal experts, legal researchers and civil society groups. It explains how IIAs can be more effective tools to attract investment and to ensure that investment leads to sustainable development. It is expected that it will be of use to developing countries in negotiating bilateral investment treaties (BITs), but various provisions may also be suitable for inclusion in economic partnership agreements, investment provisions in preferential trading agreements and other international economic agreements relating to investment.

The guide analyzes the costs and benefits of existing approaches from a sustainable development point of view. It provides a menu of options for states negotiating IIAs, including new ideas for treaty provisions that could enhance the prospects for ensuring that investors' activities contribute to sustainable development.

This brief note discusses key challenges of negotiating IIAs and how the guide can assist relevant stakeholders in addressing these, as well as its essential features, its targeted audiences and the key policy issues covered.

The challenges of negotiating and living with IIAs

Attracting foreign investment is a cornerstone of the development policy of most developing countries. One strategy to encourage investment from foreigners is to enter into IIAs.

Most IIAs are bilateral investment treaties between capital-exporting developed countries and capital-importing developing countries. These treaties offer protection for foreign investors operating in host countries. Developing countries hope that by offering protection, an IIA will increase inflows of foreign investment from existing and future investors. But the evidence of the link between IIAs and foreign investment inflows is weak, and not all foreign investment contributes to sustainable development. At the same time, the forms of IIA typically sought by developed countries can constrain the ability of host countries to regulate foreign investors operating within their borders. IIAs may make it difficult for countries to achieve essential public policy objectives, including their development goals and the maintenance of environmental, human rights and labour rights standards.

The constraints that IIAs impose on host states, combined with costly, inconsistent and sometimes surprising decisions by investor-state arbitration tribunals regarding the meaning of broadly worded IIA obligations, have led many countries to rethink the obligations an IIA should include.

> "IIAs may make it difficult for countries to achieve essential public policy objectives, including their development goals and the maintenance of environmental, human rights and labour rights standards."

Addressing challenges related to IIAs?

The Commonwealth's guide is designed to explain how IIAs can do a better job of promoting sustainable development in host states. It explains how IIAs can support the efforts of host countries to regulate

foreign investment inflows in order to ensure that they contribute to sustainable development.
The guide achieves these goals by:

1. Identifying emerging best practices in existing agreements;

2. Suggesting new and innovative provisions; and

3. Discussing how states can achieve better coherence between their IIAs, their other international commitments and their domestic policy.

Essential features of the guide

The guide contains the following features, which are designed to explain how IIAs can do a better job of promoting sustainable development in a manner that serves the needs of its different intended users most effectively:

- Discusses the basic purposes of IIAs.

- Describes the links between IIAs and inward investment flows and those between investment inflows and sustainable development.

- Presents the various current approaches to IIA provisions.

- Identifies new ways to modify traditional IIA provisions.

- Describes new types of sustainable development provisions that can be included in future agreements relating to sustainability assessments, human rights, labour rights, environmental protection and corruption.

- Explains the policy implications of all provisions discussed and evaluates their costs and benefits.

- Provides sample provisions.

Who is the guide intended for?

The guide is intended to serve the needs of a variety of users, including:

- A resource to help policy-makers make more informed policy choices

- A negotiators' handbook

- A technical reference for legal experts and researchers

- A source of information on IIAs for civil society groups and advocates

Key policy issues discussed

The guide discusses many of the potential social, cultural and environmental effects of IIAs. It also explains the current debates regarding the legal interpretations of various IIA provisions. Issues discussed include:

- Do IIAs contribute to economic growth?

- How can IIAs contribute to sustainable development?

- How can IIAs encourage investment more effectively?

- What is the impact of IIAs on regulatory sovereignty?

- How can investors' home states be engaged to support sustainable development in host states?

- Can IIAs be used to implement international human rights obligations and promote corporate social responsibility?

- How do IIAs interact with WTO obligations, other investment agreements and domestic policy?

- Should IIAs include investor-state dispute settlement?

- What kinds of changes can be made to investor-state arbitration procedures to make them less onerous for states and more predictable?

Conclusions

The guide is not intended to be prescriptive and it's not without limitations. It does not compare IIAs with investment contract commitments or insurance, which may be used as substitutes for, or complements to, IIAs as ways to encourage investment. Nor does the guide's focus on IIAs suggest that IIAs constitute the best or only approach to attracting and retaining foreign investment. Other policies may be preferable, or have greater impact.

Rather than surveying all possible approaches to attracting investment, the guide aims to help developing countries with existing IIAs and the negotiation of new ones. Its main purpose is to provide a source of useful information and analysis for countries that have negotiated, or are considering negotiating, IIAs.

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Canada receives investor complaints over provincial energy and environment policies

In recent months the government of Canada has received two complaints related to energy and environmental policies adopted by its provinces. Both investors have served Ottawa with notices of intent to submit a claim to arbitration under NAFTA's investment chapter.

A Delaware-based energy firm is challenging the Canadian province of Quebec's restrictions on developing shale gas resources. Lone Pine Resources Inc. seeks more than C$250 in compensation.

Lone Pine complains of legislation passed in June 2012 that revoked oil and gas exploration permits in areas below the St. Lawrence River; that legislation came on the heels of a partial moratorium on hydraulic fracturing in Quebec.

The Quebec government is concerned about environmental damage from hydraulic fracturing, or "fracking"—a technique that injects water and chemicals at high pressure to fracture shale rock and extract oil and gas from below the ground's surface. The provincial government has ordered an environmental study on fracking, to be completed in 2014.

A second notice of intent was filed by a US wind power company, Windstream Energy LLC. The firm's complaint centers of the Province of Ontario's moratorium on off-shore wind farms. The firm says it seeks C$475 million in compensation.

Windstream's Canadian arm entered into a feed-in-tariff (FIT) contract with the Province on Ontario in 2009 for an off-shore wind project. The company alleges that Ontario committed to streamline the approval process for projects that had obtained FIT contracts.

However, the project has been put on hold following a moratorium on further off-shore wind developments in early 2011. The Province said it needed more scientific research on the impacts of off-shore projects—however, Windstream alleges that public opposition to wind projects, and concerns over cost, are the key factors behind the moratorium.

Windstream asserts breaches of NAFTA's provisions on expropriation and fair and equitable treatment. The company also charges that by treating other investors more favourably—it argues, for example, that it is the only company with an FIT contract that has been subject to a moratorium—Canada has breached its commitments related to non-discrimination.

Windstream's October 17, 2012, notice of intent is available here: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/windstream-1.pdf

Lone Pine's November 8th, 2012, notice of intent is available here: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/lone-1.pdf

EU agrees on legislation dealing with member state investment treaties

The three European institutions responsible for law-making—the European Commission, the European Council of Ministers and the European Parliament—agreed on new legislation governing bilateral investment treaties in December.

In the wake of the EU's Lisbon Treaty, the EU has been considering how to treat the 1,200 investment treaties that exist between EU member states and non-European countries. The Lisbon Treaty, which entered into force on December 1st, 2009, granted the EU exclusive competence over foreign direct investment, in effect shifting the power to negotiate investment treaties with non-EU states from the EU member states to the Union.

The European Commission first proposed the draft legislation in 2010; after some modification, it has become the basis for the legislation agreed in December.

According to a statement by the European Commission on December 12th, 2012, the new legislation will ensure a smooth transition towards the new EU investment policy by: a) providing legal certainty for European and foreign investors that benefit from existing treaties; b) empowering EU member states to, "under certain conditions," negotiate new BITs.

The Commission stresses that "the 1200 plus Bilateral Investment Treaties concluded by Member States remain valid under international law."

In terms of new treaties, the legislation allows member states to negotiate treaties with non-European countries if those countries are not targeted for EU-wide agreements. The Commission notes that the negotiations "will be conditional and the process closely monitored by the Commission, with a view to ensuring the overall compatibility with the EU common investment policy."

In the longer run, however, the Commission wants EU-wide agreements to replace the current network of bilateral deals negotiated by member states.

Meanwhile, work continues on forging a new EU-wide legal framework and positions for the negotiation of investment treaties. In May 2012, for example, the Commission issued a draft text on investor-state dispute settlement in EU investment treaties.[1]

The EU is currently negotiating investment agreements with Singapore, Canada and India, as part of broader free trade agreements. The EU is also preparing to negotiate with Morocco, Tunisia, Jordan, Egypt and Japan, and is exploring the possibility of an agreement with China.

Spain faces another potential claim over cuts to renewable energy subsidies

Spain may face claims under the Energy Charter Treaty over an energy bill described as "fiscal measures for sustainable energy."

An infrastructure asset manager for Deutsche Bank, Rreef Infrastructure, opposes a plan for new tax measures contained in the bill, which was approved by the Spanish Cabinet in September.

Under the plan, which must be approved by parliament, a new 6% tax will be levied on the profits earned by all power generating facilities. The plan also includes cuts in subsidies for renewable energy facilities that also make use of fossil fuels.

The proposed tax hikes have faced strong resistance from renewable energy producers. The Spanish Wind Energy Association, for example, claims that the 6% tax on electricity generation will cost wind producers €241 million in 2013.

According to Spanish press reports, Rreef's director, Bernardo Sottomayor, said the tax measures violated Spain's commitments under the ECT, but without detailing the specific breaches. He indicated that other investors may also be interested in joining a claim if the energy bill is passed by parliament.

The bill is an effort to stem Spain's high tariff deficit, which reached €24 billion 2011. Spain's Minister for Industry, Energy and Tourism, José Manuel Soria, said the new tax measures would bring the tariff deficit down to zero by 2013.

If Rreef pursues a claim, it would be the third against Spain under the ECT. In November 2011, a group of 14 foreign investors served Spain with a notice of arbitration over cuts in solar tariffs. According to the Global Arbitration Review, Dutch and Luxembourg investors Charanne and Construction are also pursuing a claim against Spain under the ECT in reaction to the changes in feed-in-tariffs introduced in 2010.

Notes

1 For a description of the Commission's proposal, see "Analysis of the European Commission's Draft Text on Investor-State Dispute Settlement for EU Agreements", By Nathalie Bernasconi-OsterWalder, Investment Treaty News, July 19th, 2012, http://www.iisd.org/itn/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements/

awards & decisions

Claim against Slovakia dismissed, as tribunal complains of poorly presented case *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case* No. ARB/06/11
Damon Vis-Dunbar

The Republic of Ecuador has been ordered to pay US$1,769,625,000 billion in damages—the largest award to be handed down in an ICSID case—after a tribunal determined that Ecuador's decision to terminate an American oil company's participation contract was tantamount to expropriation.

While the tribunal agreed with Ecuador that the claimants—Occidental Petroleum Corporation and Occidental Exploration and Production Company (OEPC)—breached the participation contract, it nonetheless ruled that Ecuador's response to that violation was disproportionate.

Background

Under Occidental's participation contract with Ecuador, the company was granted rights to explore and exploit oil in Block 15, located in the Amazon region, and keep a share of the oil that it produced.

The seeds of the dispute were planted in a 'farmout' agreement with Alberta Oil Corporation (AEC), which gave the Canadian firm a 40% economic interest in Occidental's operations. Occidental and AEC also envisioned a second stage to the agreement, in which AEC would be granted legal title to the operations in Block 15.

Some four years later, on the heels of a US$75 million award in favour of Occidental in connection with another dispute with Ecuador, the farmout agreement came under scrutiny by authorities in Ecuador. The deal with AEC would ultimately lay the basis for the Minister of Energy to terminate Occidental's contract in May 2006.

Was approval required?

A key point of contention was whether Occidental required the government of Ecuador's approval to enter into the farmout agreement with AEC. Under the terms of Occidental's participation contract with Ecuador, government approval was required to transfer rights under the participation contract to third parties.

Occidental argued that the farmout agreement only provided AEC with an economic interest in the project; it would not be until the second stage of the agreement, when AEC would be granted legal title, that rights would be transferred.

In siding with Ecuador, however, the tribunal determined that AEC was granted more than an economic interest, it also gained managerial and voting rights under is agreement with Occidental. As such it, the tribunal concluded that Occidental had made a "serious mistake" in not gaining government approval.

Yet the tribunal would add that Occidental had not acted in bad faith. While noting that the company was clumsy in its communication with the Ministry of Energy and Mines—and appeared to be internally divided on whether to seek approval from Ecuador—it did not attempt to conceal the deal. Indeed, the agreement was announced in a press release, and discussed with government officials, although the farmout agreement itself with AEC was not shared with government.

Was the response proportional?

The tribunal went on to consider whether the government's decision to terminate its contract with Occidental was a proportionate response to the oil company's violation. After considering the principle of proportionality in Ecuadorian and international law, it decided that it was not.

Influencing that decision was the conclusion that the farmout agreement had not caused economic harm to Ecuador. The tribunal noted that AEC was already an approved operator in Ecuador, and that "it is overwhelmingly likely that approval would have been given if authorization had been sought in October 2000."

The tribunal also implied that Ecuador's response was motivated in part by the fact that it had recently lost an arbitration with Occidental in an investment-treaty claim over value added tax. That award provoked a significant political and public backlash against Occidental.

"It is sufficient to note that (the VAT award) seems to have led to a good deal of ill-feeling against OEPC, as did the discovery that OEPC had transferred rights under the Participation Contract in violation of the laws of Ecuador," wrote the tribunal.

The tribunal also emphasised that other, less severe options were open to the government, including demanding a transfer fee from Occidental, and revising the production contract in order to improve the terms for Ecuador. It noted that the Ministry of Energy and Mines had not resorted to terminating contracts for similar infractions by other companies.

Having determined that Ecuador's response was not proportionate in the context of Ecuadorian and international law, the tribunal had "no hesitation" in finding that it amounted to a breach of fair and equitable treatment and was tantamount to expropriation under the Ecuador-US BIT.

Arbitrators disagree over damages

Following a lengthy consideration of damages, the majority of the tribunal, L. Yves Fortier (president) and David A.R. Williams (claimants' nominee) determined that damages amounted to US$ 2.35 billion. The majority then reduced that amount by 25% due to Occidental's violation of the production contract.

Ecuador's nominee to the tribunal, Brigitte Stern, agreed with the majority that Ecuador had acted disproportionately in terminating the contract with Occidental. However, in a sharply worded dissent, she disagreed with the majority's decision on damages.

In Professor Stern's opinion, Occidental was only eligible for 60% of the damages, having transferred 40% of the participation contract to AEC.

In contrast to the majority, Professor Stern decided that the farmout agreement could not be considered "inexistent" or void as a result of Ecuador's termination of the participation contract. Rather, the agreement should be considered valid and binding until declared otherwise by a court.

Professor Stern stated that a selective reading of Ecuadorian cases, and a potential reliance on flawed translations, led the majority to incorrectly rule the farmout agreement invalid—and in doing so has "manifestly exceeded its jurisdiction."

The majority's damages decision on damages is "in violation with fundamental principles of international law," wrote Professor Stern, and went on to describe two unacceptable results that flow from the decision. Either Occidental pays AEC 40% of the damages, "which means the majority has in fact granted damages to the benefit to AEC/Andes—which would be a manifest excess of power ..." Or Occidental will hold onto the full award, "but then the decision of the majority will have

condoned the violation of the international principle against unjust enrichment."

Notably, Professor Stern's dissent displays terms that would provide ammunition for an annulment request—one the few grounds on which an award which a "tribunal has manifestly exceeded its powers." Ecuador has signaled that it will seek annulment of the award.

The award is available here: http://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf

Professor Brigitte Stern's dissent is available here: http://www.italaw.com/sites/default/files/case-documents/italaw1096.pdf

The dispute between Quiborax and Bolivia proceeds to the merits phase *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* ICSID Case No. ARB/06/2, Decision on Jurisdiction

Larisa Babiy

On September 27th, 2012, seven years after the notice of arbitration was filed, an arbitral tribunal upheld jurisdiction in a case opposing Chilean investors to the Plurinational State of Bolivia.

Quiborax, a Chilean mining company, together with Mr. Allan Fosk, its Chief Financial Officer, and Non Metallic Minerals (NMM), a Bolivian mining company of which Quiborax maintained to be the majority shareholder, claimed that Bolivia unlawfully revoked NMM's 11 mining concessions. The claimants alleged, among other reasons, that Bolivia breached the Bolivia-Chile BIT by not according them fair and equitable treatment and by committing expropriation.

Bolivia presented several objections to the tribunal's jurisdiction. First, it argued that the claimants were not investors within the meaning of the BIT and accused them of fabricating evidence in this respect for the sole purpose of gaining access to ICSID arbitration. Second, it asserted that the claimants did not make an investment within the meaning of the BIT and of the ICSID Convention. Finally, it stated that the claimants could not invoke the protection of the BIT, since their investment was made in breach of Bolivian laws.

kompetenz-kompetenz

The first phase of the proceedings was unusually eventful.

Both parties requested multiple time extensions to finalize a settlement agreement they eventually never concluded. In 2009 the arbitration resumed and Bolivia initiated criminal proceedings against Mr. Fosk and others to ascertain whether they fabricated evidence to prove their status of investors. Consequently, the claimants filed a request for provisional measures before the arbitral tribunal and obtained a decision ordering Bolivia to suspend the criminal proceedings. As a result, Bolivia filed an unusual challenge to all members of the tribunal, which was later rejected by the ICSID Secretary General.

At the jurisdictional stage the claimants argued that, by its conduct in the arbitration, Bolivia forfeited its right to object to the tribunal's jurisdiction. They invoked the inherent powers of the tribunal to preserve the integrity of the proceedings, and requested the arbitrators to declare Bolivia's objections inadmissible. The tribunal, however, sided with Bolivia and stated that it could not abdicate the task of determining its own jurisdiction, by virtue of the *kompetenz-kompetenz* principle (i.e. the principle according to which a tribunal has jurisdiction to rule on its own jurisdiction).

Another contended issue was whether the evidence obtained during the criminal proceedings against Mr. Fosk and others was admissible. Rejecting claimants' objection, the tribunal considered that it had broad discretion to rule on the admissibility of any evidence brought before it. It went on to conclude that the evidence from the criminal proceedings was admissible, and that its probative value will have to be addressed if and when necessary.

Bolivia questions Quiborax' acquisition of NMM

According to the claimants, Quiborax and Mr. Fosk became majority shareholders of NMM in 2001. Bolivia, instead, claimed that the tribunal lacked jurisdiction *ratione personae*, since the claimants never became shareholders of the company. On the contrary, Bolivia alleged that the claimants submitted fabricated evidence in this regard.

Bolivia claimed that the sequence of transactions that allegedly resulted in the acquisition of NMM was absurd, that the claimants failed to submit key documents to prove the acquisition and that those submitted presented multiple irregularities.

The tribunal reviewed the entire record of the case and found that, despite some "documentary discrepancies", the claimants' account of the facts was "consistent and well-documented" and, thus, that it had jurisdiction ratione personae over the dispute.

An objective definition of investment.

Bolivia argued that the tribunal lacked jurisdiction over the dispute because the claimants did not make an investment within the meaning of the BIT and of the ICSID Convention. The host State claimed that legal certainty called for an objective definition of investment and proposed a test based on six elements, which included conformity with the laws of the State, contribution to its economic development and good faith.

The tribunal affirmed that the ICSID Convention contained an objective definition of investment, which must be met irrespectively of the definition of investment contained in the BIT. It stated that the definition encompassed three elements: contribution of money and assets, duration and risk. The tribunal considered that contribution to the host State's development "may well be the consequence of a successful investment," but it is not an element of its definition. The tribunal also deemed that neither conformity with the laws of the State, nor respect of good faith determined the existence of an investment.

With this reasoning in mind, the tribunal partially upheld Bolivia's objection and decided that Mr. Fosk, detaining one single share of NMM, made no contribution of money and assets and thus, did not make any investment. However, the arbitrators considered that Quiborax, having paid for the 51% of shares of NMM, indeed invested in Bolivia.

Legality requirement had both subject-matter and temporal limitations

Bolivia objected to the tribunal's jurisdiction asserting that the claimants' transfer of NMM's shares was made in breach of Bolivian law and thus in violation of the legality requirement set forth in the BIT. Bolivia proposed an extensive interpretation of this requirement, submitting that it covered any breach of Bolivian law, regardless of its seriousness and of the time in which it occurred.

The claimants, instead, supported a narrower approach. They maintained that the legality requirement applied only to violations of the host State's fundamental principles or investment regime and that it was temporarily limited to the time of the establishment of the investment. Moreover, they claimed

that Bolivia was now barred from raising such objection, since it failed to do so in almost three years of negotiations.

The tribunal was not convinced by any of the approaches proposed. It considered that the requirement has both subject-matter and temporal limitations. From the temporal perspective it is limited to the establishment of the investment. From the subject-matter perspective, instead, it covers only "non-trivial violations" of the host State's laws, violations of its foreign investment regime and fraud.

Finally, the tribunal found that the fact that the parties engaged in long settlement discussions could not bar Bolivia from contesting the legality of the investment in the arbitration. According to the tribunal, a different conclusion would have a "chilling effect on the host State's willingness to entertain settlement negotiations."

The tribunal was composed by Prof. Gabrielle Kaufmann-Kohler (president), Marc Lalonde (claimant's nominee) and Prof. Brigitte Stern (Bolivia's nominee).

The decision is available in English here: http://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf

And in Spanish here: http://www.italaw.com/sites/default/files/case-documents/italaw1099.pdf

Case by US construction firm against the Ukraine is dismissed *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine,* ICSID Case No. ARB/08/11
Damon Vis-Dunbar

In decision dated October 25th, 2012, an ICSID tribunal has rejected all claims against the Ukraine by an American construction firm and its Ukraine-based affiliate.

Background

The claimants, Bosh International, Inc, and B&P Ltd Foreign Investments Enterprise, entered into a joint venture to develop and operate a hotel complex with Tara Schevchenko University in Kiev in 2003.

Several years later a university audit of the agreement uncovered a number of "irregularities." For example, while the building was intended to cater to educational activities, the audit determined that the facility had been used largely for business seminars. A second audit by an office of the Ministry of Finance—the General Control and Revision Office (CRO)—raised similar concerns.

The ministry's audit recommended a number of actions, including that the university consider terminating its agreement with B&P.

Shortly after, the university commenced court proceedings. A local court initially rejected the university's case, but it was re-submitted and a commercial court issued a judgement that terminated the joint venture agreement with B&P.

Tribunal considers attribution

The claimants argued that actions taken by Ukrainian courts, the Ministry of Justice, CRO and the University of Kiev were attributable to the state of Ukraine. While finding little difficultly in seeing the acts of government ministries and the courts as attributable to the state, the tribunal paused to consider whether the same applied to the university.

Taking guidance from the International Law Commission's articles on state responsibility, the tribunal decided that the university could not be considered a state organ. But the tribunal considered the issue of whether the university exercised elements of governmental authority to be more complex.

Although a separate legal entity, and largely autonomous, the tribunal also found that the university exercised certain aspects of governmental authority, such as its provision of education services and management of state-owned property.

However, the tribunal concluded that the university's agreement with B&P did not relate to these governmental functions, but was better understood as a "private or commercial activity which was aimed to secure commercial benefits for both parties."

FET and expropriation claims dismissed

The claimants charged that the Ukraine breached its commitments on fair and equitable treatment, and expropriation under the United States-Ukraine BIT. A claim under the BIT's umbrella clause was also asserted.

In support of the FET and expropriation claims, the claimants argued CRO had directed the university to terminate its agreement with B&P, and exceeded its mandate in doing so. The claimants also argued that CRO's audit was arbitrary and lacked due process.

Turning to the evidence, the tribunal found these claimants to be unsubstantiated: CRO's audit appeared to conform to Ukraine law, and B&P was granted appropriate due process.

Nor did the tribunal accept the claimants' charge that CRO directed the university to terminate the contract. Rather, CRO's recommendation was to "consider" termination, and, therefore, CRO could not be held responsible for an expropriation.

The claimants' claim that the university had acted in bad faith was also dismissed. Here the tribunal referred back to its earlier decision that the university's actions could not be attributed to the state.

Umbrella clause

The claimants' referred to the BIT's umbrella clause (which reads: "Each Party shall observe any obligation it may have entered into with regard to investments") and argued that the Ukraine was responsible for contractual breaches by the university.

In response, the tribunal considered whether "Each Party" referred only to state parties, or also extended to entities controlled by the state. The tribunal noted that the BIT distinguishes between the terms "Party" and "State enterprise" as legal entities.

In the tribunal's opinion, the 'Party' referred to in the umbrella clause refers to a party acting in the capacity of the state. Given its earlier decision that the university's agreement with B&P could not be attributed to the state, the tribunal concluded Ukraine had not entered into an 'obligation' with respect to the claimants.

The tribunal found itself "fortified" by the fact that, in its review of 20 cases involving claims under an umbrella clause, none entailed a "contract entered into by the investor with an entity akin to the University."

Notably, for "the sake of completeness," the tribunal considered how it would have ruled if the university's conduct could be attributed to the state. Aligning itself with the decisions in cases such as *Société Générale de Surveillance v. Republic of the Philippines*, the tribunal determined that an umbrella

clause should not "override" the dispute resolution provisions in a contract. Rather, before invoking the umbrella clause, "the claimant in question must comply with any dispute settlement provision included in that contract."

In the case of the claimants' contract with the university, disputes were to be settled in accordance with Ukrainian legislation. As the contract dispute between B&P and the university had already been considered by Ukrainian courts, and the contract terminated by an order of the court, the tribunal determined that the claimants could not now assert a claim for breach of the contract under the umbrella clause.

No misconduct by Ukrainian courts

The claimants' final claim asserted that Ukrainian courts failed to respect the principle of *res judicata*, and by doing so committed a breach of fair and equitable treatment under the BIT.

The claimants pointed to the fact that the university's first effort to terminate its contract with B&P before a commercial court failed when the court declined jurisdiction. Rather than appealing the decision, the claim was re-submitted to another commercial court judge, and that judge agreed to terminate the contract.

However, the tribunal found that the court's acted consistently with Ukrainian law. Nor, viewed through the lens of international law, could the courts be considered to have offended a sense of judicial propriety.

The tribunal emphasised that the claimants had an opportunity to try their case before Ukrainian courts, but declined to do so. "In this regard," wrote the tribunal, "it seems to the Tribunal that the Claimants are bound by their litigation strategy and its consequences."

Costs

The tribunal ordered to claimants to contribute US$150,000 towards the Ukraine's legal costs (one-sixth of its costs) due to delays in the proceedings requested by the claimants. The parties' must split the ICSID fees.

The tribunal was Dr. Gavan Griffith (president), Professor Philippe Sands (claimant's appointee), and Professor Donald McRae (respondent's appointee)

The award is available here: http://www.italaw.com/sites/default/files/case-documents/italaw1118.pdf

ConocoPhillips subsidiary awarded US$ 66.8 million against Venezuela's state-owned oil company *Phillips Petroleum Company Venezuela Limited (Bermuda) and ConocoPhillips Petrozuata B.V. vs. Petroleos de Venezuela, S.A.*, ICC
Patricia Cristina Ngochua

An International Chamber of Commerce tribunal awarded a subsidiary of ConocoPhillips US$66.8 million against the Venezuelan state-owned company Petroleos de Venezuela, S.A. (PDVSA). In the same decision, dated September 17th, 2012, the tribunal rejected a US$102.9 million claim by another subsidiary of ConocoPhillips against PDVSA.

The proceeding consolidated two separate arbitration requests arising out of agreements entered into between the claimants and PDVSA's subsidiaries related to investments in the Petrozuata and Hamaca projects.

The Petrozuata project

ConocoPhillips argued that the failure of a PDVSA subsidiary, Maraven, to absorb oil production cuts imposed by the Venezuelan government as an OPEC-member state out of its own production violated a guaranty agreement with PDVSA.

In deciding for ConocoPhillips, the tribunal rejected PDVSA's argument that the production curtailments ordered by the Venezuelan government constituted a "*hecho del principe*" (i.e. an external non-imputable cause) under the Venezuelan Civil Code. That principle excuses non-performance of a contractual obligation where non-compliance cannot be avoided, is based on the principle of good faith, and could not be foreseen.

In arriving at this conclusion, the tribunal noted that PDVSA failed to meet the high burden of proof required to justify Maraven's non-performance of its obligations.

In its defense, PDVSA also argued that the 2007 'Migration Law' had the effect of extinguishing all contractual agreements related to the Petrozuata project. However, ConocoPhillips countered that this would amount to giving the Migration Law a "retroactive" effect which is prohibited under the Venezuelan Constitution.

In finding for ConocoPhillips, the tribunal agreed that considering ConocoPhillips' claims as extinguished would amount to giving retroactive effect to the Migration Law. The tribunal rejected PDVSA's assertions that the Migration Law was in the public interest, and therefore qualified as an exception to the principle that a law may not have retroactive effect.

The Hamaca Project

Here ConocoPhillips argued that the failure of another PDVSA subsidiary, Corpoguanipa, to call a board meeting that may have led to the adoption of measures to mitigate the impacts of OPEC-driven production cuts was a breach of its contractual obligations.

However, the tribunal concluded that ConocoPhillips failed to establish a sufficient causal link between its claim for damages resulting from Corpoguanipa's decision not to convene a board meeting and its alleged breach of contractual obligations.

The tribunal also noted that PDVSA's obligations under the Hamaca guaranty agreement limited its liability to "obligations specific to Corpoguanipa." Since the contract provisions underlying ConocoPhillips' claim did not relate to obligations that were specific to Corpoguanipa, but were intended more generally to provide a system of proportionate reallocation in case of production cuts, the tribunal found that PDVSA was not liable to ConocoPhillips.

This ICC arbitration is separate from an ongoing proceeding brought by ConocoPhillips before an ICSID tribunal in 2007 after Venezuela enacted a series of laws that effectively nationalized ConocoPhillips' investments in the Petrozuata and Hamaca projects, and the offshore Corocoro development project.

Costs and Expenses

Arbitration costs were fixed at US$820,000, to be borne equally by each side. Claimants and the respondent were ordered to shoulder their own legal expenses.

The tribunal was Pierre Tercier (president), Horacio Alberto Grigeria Naon (claimants' nominee), and Ahmed Sadek El-Kosheri (respondent's nominee).

The award is available here: http://www.iareporter.com/downloads/20120924/download

resources and events

Resources

Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements
Edited by Olivier De Schutter, Johan Swinnen, Jan Wouters. Routledge, November 2012

This book presents original research that examines the growth of international investment agreements as a means to attract foreign direct investment and considers how this affects the ability of capital-importing countries to pursue their development goals. The book uses economic and legal analysis to answer questions that have become central to discussions on the impact of economic globalization on human rights and human development. It explains the dangers of developing countries being tempted to 'signal' their willingness to attract investors by providing far-reaching protections to investors' rights that would annul, or at least seriously diminish, the benefits they have a right to expect from the arrival of FDI. It examines a variety of tools that could be used, by capital-exporting countries and by capital-importing countries alike, to ensure that FDI works for development, and that international investment agreements contribute to that end. The book is available to order here: http://www.routledge.com/books/details/9780415535489/

Indirect Expropriation in International Investment law
By Suzy H. Nikièma, PUF, The Graduate Institute Geneva, November 2012

International investment law gets increasing attention due to the proliferation of foreign investment protection treaties and the new possibilities for investors to directly refer to international arbitration tribunals. Indirect expropriation, which can affect a foreign investor, is a current and contentious aspect of international investment law, as it reflects the conflict between the foreign investor's private interests and the host state's public interests. Unlike direct expropriation which is now well-known and used, the definition of indirect expropriation remains largely unclear. This book examines the conditions under which a governmental measure can be considered indirect expropriation and thus trigger the right to compensation. The book proposes a new analytical framework and offers definitions that can be legally applied to take into account state and investors' concerns. The book is available to order in French here: http://www.amazon.fr/Lexpropriation-indirecte-droit-international-investissements/dp/294050301X/ref=sr_1_fkmr0_1?ie=UTF8&qid=1354199287&sr=8-1-fkmr0

Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators
By J Anthony VanDuzer, Penelope Simons and Graham Mayeda. Commonwealth Secretariat, 2013

This guide is designed to assist developing countries to negotiate IIAs that are more effective in promoting their sustainable development. It identifies and consolidates emerging best practices from existing treaty models, evaluating the costs and benefits of different approaches; suggesting new and innovative provisions to encourage foreign investment flows; and outlining how states can achieve coherence among their IIAs. The guide covers: substantive obligations of host states regarding investor protection; new provisions addressing sustainable development; dispute settlement; investment promotion and technical assistance; and provisions on entry into force and termination. The book is available to order here: https://publications.thecommonwealth.org/integrating-sustainable-development-into-international-investment-agreements-955-p.aspx

Regionalism in International Investment Law
By Leon Trakman and Nicola Ranieri. Oxford University Press, 2013

This book provides a multinational perspective on international investment law. The book approaches the field of foreign direct investment from both academic and practical viewpoints and analyzes different bilateral, regional, and multinational agreements. The academic perspective yields a strong conceptual foundation to often misunderstood elements of international investment law, while the practical perspective aids those actively pursuing foreign direct investment in better understanding the landscape, identifying potential conflicts which may arise, in more accurately assessing the risk underlying the issues in conflict and in resolving those issues. Thorny issues relating to global commerce, sovereignty, regulation, expropriation, dispute resolution, and investor protections are covered, depicting how they have developed and are applied in different regions of the world. The book is available to order here: http://www.oup.com/us/catalog/general/subject/Law/InvestmentandFinanceLaw/?view=usa&ci=9780195389005

Public Health in International Investment Law and Arbitration
By Valentina Vadils. Published by Routledge, July 2012

Is a State free to adopt measures to protect the public health of its citizens? If so, what are the limits, if any, to such regulatory powers? This book addresses these questions by focusing on the clash between the regulatory autonomy of the state and international investment governance. With a focus on the 'clash of cultures' between international investment law and public health, the author critically analyses the emerging case law of investment treaty arbitration and considers the theoretical interplay between public health and investor rights in international investment law. The book also explores the interplay between investment law and public health in practice, focusing on specific sectors such as pharmaceutical patents, tobacco regulation and environmental health. It then goes on to analyze the available means for promoting consideration of public health in international investment law and suggests new methods and approaches to better reconcile public health and investor rights. The book is available to order here: http://www.routledge.com/books/details/9780415507493/

Events 2013

February 4-22
REGIONAL COURSE ON KEY ISSUES ON THE INTERNATIONAL ECONOMIC AGENDA FOR THE LATIN AMERICAN AND CARIBBEAN REGION, UNCTAD, Medellin, Colombia. http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=176

February 4-8
UNCITRAL WORKING GROUP II, 2000 TO PRESENT: ARBITRATION AND CONCILIATION. 58TH SESSION, New York, United States. http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

February 6
BRUNEL LECTURE: THE INTERNATIONAL JUDGE, A LECTURE BY PHILIPPE SANDS, Brunel University, London, UK. http://qwww.brunel.ac.uk/law/research/university-research-centre/cipl

February 21-22
16TH ANNUAL IBA INTERNATIONAL ARBITRATION DAY, International Bar Association, Bogota, Colombia, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4054049C-69FC-4B7A-9737-F3913A103556

May 7
THE NEW ICC ARBITRATION RULES 2012 - CHANGES & FIRST EXPERIENCES, International Chamber of Commerce, Vienna, Austria. http://www.icc-austria.org/de/Seminare/Aktuelle-Seminare/1218.htm

June 28
INTERNATIONAL ARBITRATION AND RELATED MATTERS, International Bar Association, St. Petersburg, Russia, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=D1AAE6B9-1568-4ECE-9024-A574A703A087

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