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A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals

by Matthew C. Porterfield

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contents

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feature 1

A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals

Matthew C. Porterfield

Broad interpretations of the standard for fair and equitable treatment (FET) by investment tribunals have become a source of increasing controversy.[1] Some countries—including the United States and Canada—have responded by attempting to limit FET to the standard of protection under customary international law (CIL), which is formed through the "general and consistent practice of states" that they follow out of a sense of legal obligation (*opinio juris*).[2] The European Union, in contrast, appears to be committed to preserving a standard for FET that is not limited to CIL in exercising its new authority over investment under the Lisbon treaty. These diverging approaches to FET are a point of contention in the negotiations on the Canada – EU Comprehensive Economic and Trade Agreement (CETA), and will also need to be addressed in the U.S. – EU Transatlantic Trade and Investment Partnership (TTIP) negotiations that will likely begin later this year.

In theory, linking FET to CIL results in a standard of protection that is more deferential to the regulatory authority of governments than the EU's "autonomous" standard. A CIL-linked standard should also have greater legitimacy given that it is rooted in the actual practice of states that they believe to reflect their international legal obligations rather than simply the pronouncements of investment tribunals.

In practice, however, investment tribunals continue to construe even CIL-based FET provisions to impose broad limits on government authority by accepting, without any evidence of state practice or *opinio juris*, the pronouncements of previous tribunals as definitive evidence of the standard under CIL. The award in *Railroad Development Corp. v. Guatemala*[3] (RDC) is an example of this approach, which renders the linkage of FET to CIL largely meaningless. The reluctance of investment tribunals to base their interpretations of CIL on actual state practice and *opinio juris* suggests that more aggressive approaches may be necessary to deter tribunals from adopting increasingly broad interpretations of FET.

Linking fair and equitable treatment to customary international law

Fair and equitable treatment provisions have been a standard element of investment treaties since Germany and Pakistan signed the first BIT 1959.[4] These provisions—usually included within "minimum standard of treatment" articles—have been construed broadly by investment tribunals to include a right to a "stable and predictable" business and regulatory environment, allowing investors to seek compensation for changes in tax and regulatory standards.[5] As a result of these broad interpretations, FET provisions have become both the most frequently invoked and the most controversial substantive standard of protection in investor-state arbitration.

Much of the debate over FET has concerned its relationship to the customary international law standard of protection for aliens. Although there has always been some inconsistency among investment treaties regarding the language of FET provisions, the contrast between the CIL-linked and autonomous approaches to FET came into sharper focus in 2001 when the United States, Canada and Mexico issued a formal interpretation of NAFTA's minimum standard of treatment article, clarifying that the minimum standard and its FET component were limited to the customary international law standard of protection of aliens.[6]

"The reluctance of investment tribunals to base their interpretations of CIL on actual state practice and opinio juris suggests that more aggressive approaches may be necessary."

The United States and Canada have continued to link FET to CIL in subsequent international investment agreements and have been joined in this practice by other countries, including Australia and New Zealand.[7] In theory, a standard for FET that is actually rooted in customary state practice should be relatively uncontroversial, given that it would be limited to the level of protection that states generally and consistently provide to foreign investors.

The BITs of the major European capital exporting countries, however, typically contain autonomous fair and equitable treatment provisions that are not limited to the customary international law standard of protection.[8] Although the European Parliament has expressed support for linking the standard for FET to CIL in future EU investment agreements,[9] the European Commission has indicated that such agreements should incorporate the highest standards of protection of Member States' BITs, presumably including autonomous FET provisions.[10] The U.S.-EU High Level Working Group on Jobs and Growth has similarly called for a U.S. - EU agreement that includes "investment liberalization and protection provisions based on the highest levels of liberalization and highest standards of protection that both sides have negotiated to date."[11]

The debate over the relationship between FET and CIL will likely be a significant issue in the U.S. - EU TTIP negotiations. The issue has already become a source of controversy in the negotiations on the Canada - EU Comprehensive Economic and Trade Agreement (CETA). A leaked document from the European Commission indicates that Canada's insistence that the CETA contain a FET standard that is limited to CIL "is a problem for the EU, as it may significantly reduce the level or protection for investment afforded by the FET standard itself."[12]

Does linking FET to CIL effectively constraint its interpretation?

Although CIL is supposed to be based on actual state practice and *opinio juris*, in practice arbitrators tend to define the CIL-linked standard for FET in exactly the same manner as the autonomous standard: by reference to previous arbitral awards and academic writings, without any evidence of either state practice or *opinio juris*.[13] This phenomenon is well-illustrated by the recent award in *RDC v. Guatemala*, in which the tribunal rejected the arguments of not only Guatemala, but also three other CAFTA parties, including the United States, that CAFTA's CIL-linked FET standard should be defined by reference to actual evidence of state practice and *opinio juris*.

The dispute arose out of a 50-year contract that RDC entered into in 1997 with FEGUA, a Guatemalan state-owned enterprise, to provide railway services in the country. RDC charged in 2005 that FEGUA has breached its contractual obligations to remove squatters from the railway right of way and to make payments to a Railway Trust Fund. In 2006, Guatemala terminated the contract granting RDC the right to use FEGUA's railway equipment on the grounds that it was contrary to the national interest. RDC brought a claim under the Dominican Republic - Central America - United States Free Trade Agreement (CAFTA), arguing that Guatemala had violated several provisions of CAFTA's investment chapter.[14] The tribunal concluded that in terminating the contract Guatemala had failed to provide RDC with fair and equitable treatment in violation of Article 10.5 of CAFTA, which states that "each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment . . . ."[15]

The tribunal's approach to identifying the relevant standard of protection under CIL was much more interesting than its decision concerning Guatemala's breach of the standard. Guatemala argued that RDC had the burden of demonstrating the relevant standard under CIL, and that in discharging that burden it could not simply rely on previous awards of investment tribunals as either constituting or proving state practice.[16] Three other CAFTA Parties—the United States, El Salvador and Honduras—made "non-disputing Party" submissions in which they supported Guatemala's position that RDC had the burden of demonstrating the relevant standard under CIL based on state practice and *opinio juris* rather than arbitral awards.[17]

> "In practice arbitrators tend to define the CIL-linked standard for FET in exactly the same manner as the autonomous standard."

The RDC tribunal, however, did not base its conclusions concerning the relevant standard for FET on a review of state practice and *opinio juris*. Instead, it simply adopted the broad formulation applied by the tribunal in *Waste Management II*, an investment arbitration under Chapter 11 of NAFTA, which indicated that FET encompassed due process, transparency, and "natural justice."[18] The RDC tribunal acknowledged that the *Waste Management II* characterization of FET was itself based on previous NAFTA awards rather than state practice.

The tribunal conceded that "arbitral awards do not constitute state practice,"[19] but characterized their use to define CIL as "efficient." This rationale for reliance on arbitral awards to determine the content of CIL is unpersuasive. Although arbitral awards may be an "efficient" source of opinion evidence concerning the content of CIL, they are of limited probative value when, as in *RDC*, they are not based on or supported by evidence of state practice and *opinio juris*.[20] Moreover, if the relevant standard under CIL for FET can be established based on arbitral awards without reference to relevant state practice and *opinio juris*, it would make the distinction between CIL-linked and autonomous FET standards largely irrelevant.

Options for avoiding excessively broad interpretations of FET

RDC and similar awards could create pressure for negotiators to consider alternative approaches for constraining interpretations of FET. Potential options including the following:

a. FET provisions could include language stating that an investor claiming that a state has violated a customary international law obligation has the burden of demonstrating that the obligation exists based on evidence of actual state practice and *opinio juris*, and that such an obligation may not be established solely through arbitral awards or secondary sources.

b. FET provisions could clarify that assertions by states in arbitral proceedings (both as respondents and non-disputing parties) concerning the standard of protection under CIL constitute relevant opinio juris and are therefore highly probative of the relevant standard.

c. FET provisions could include "an exhaustive list of State obligations under FET," as the United Nations Conference on Trade and Development (UNCTAD) has suggested.[21]

d. FET provisions could be omitted altogether from future investment agreements (another option identified by UNCTAD).[22]

Given the different approaches taken to FET by the United States and the EU, the U.S. - EU TTIP negotiations present an opportunity to explore some of these options. It seems unlikely that an FET provision would be omitted altogether from a U.S.-EU agreement, but one or more of the other alternatives noted above could both impose needed restraint on the interpretation of FET by tribunals and restore some measure of state control over its content.

Author

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Notes

1 See UNCTAD, WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, available at http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf at 139 ("Some tribunals have read an extensive list of disciplines into the FET clause, which are taxing on any State, but especially on developing and least-developed countries; lack of clarity persists regarding the appropriate threshold of liability.")

2 See International Court of Justice, Continental Shelf case (Libyan Arab Jamahiriya v. Malta), Judgment, para. 27 (June 3 1985) ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States . . ."), available at www.icj-cij.org/docket/files/68/6415.pdf.

3 Railroad Development Corporation (RDC) v. Republic of Guatemala, ICSID CASE NO. ARB/07/23, Award (June 29, 2012) (hereinafter "RDC Award"), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C116.

4 See Agreement Between the Federal Republic of Germany and the Islamic Republic of Pakistan on the Encouragement and Reciprocal Protection of Investments, art. 2.2 (1959), available at http://www.pakistanembassy.de/index.php?id=198.

5 See, e.g., Occidental Exploration & Prod. Co. v. Republic of Ecuador, Final Award, paras. 180-92 (July 1, 2004) (Ecuador's change in policy regarding assessment of a value-added tax violated Occidental's rights to a stable and predictable legal environment as an "essential element" of FET).

6 NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

7 See, e.g., Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ch. 11, art. 6(2)(c) (Feb. 27, 2009), available at http://www.dfat.gov.au/fta/aanzfta/chapters/chapter11.html#fr6. ("[T]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights.")

8 See Mahnaz Malik, Best Practices Series Bulletin #3 — Fair and Equitable Treatment (September 2009) ("European countries have traditionally opted for the unqualified 'fair and equitable' treatment standard which is at the nub of the uncertainty."), available at http://www.iisd.org/pdf/2009/best_practices_bulletin_3.pdf.

Some EU Members, however, have linked FET to CIL in their recent BITs. See European Parliament, Directorate-General for External Policies, Policy Department, The EU Approach to International Investment Policy After the Lisbon Treaty, at 35 (Oct. 2010) (noting that FET has been linked to CIL in "[t]he recent BITs from Germany and those between Canada and Latvia, Slovakia, Czech and Romania . . . ."), available at http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=33990.

9 European Parliament resolution of 6 April 2011 on the future European international investment policy at 4 (2010/2203(INI)) ("future investment agreements concluded by the EU should be based on the best practices drawn from Member State experiences and include . . . fair and equitable treatment, defined on the basis of the level of treatment established by international customary law"), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0141+0+DOC+PDF+V0//EN.

10 "The Union should follow the available best practices to ensure that no EU investor would be worse off than they would be under Member States' BITs." European Commission, Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy, COM(2010) 343 final at 11 (July 7, 2010), available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf.

11 See Final Report – U.S-EU High Level Working Group on Jobs and Growth at 3 (February 11, 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

12 See European Commission, EU Canada Comprehensive Trade Agreement -- landing zones, at 9, para. 7(6) (Nov. 6, 2012), available at http://thetyee.ca/Documents/2012/11/27/EU_Postion_Nov2012.pdf.

13 One significant exception is the award under NAFTA Chapter 11 in Glamis Gold v. United States, Award (June 8, 2009), available at http://www.state.gov/documents/organization/125798.pdf. The tribunal in Glamis indicated that the burden was on the claimant to establish the relevant standard of protection under CIL based on state practice and opinio juris. See id. paras. 600-605.

14 The tribunal rejected RDC's assertions that Guatemala had indirectly expropriated its investment and denied it national treatment. RDC Award, paras. 152, 155.

15 RDC Award, para. 212, quoting CAFTA, art. 10.5.

16 RDC Award, paras. 159-60.

17 RDC Award, paras. 207 - 211.

18 RDC Award, para. 219, quoting Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award of April 30, 2004, para. 98.

19 RDC Award, para. 217.

20 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103, cmt. a (1987) (arbitral awards constitute merely "secondary evidence. . . . [which] may be negated by primary evidence, for example, as to customary law, by proof as to what state practice is in fact.")

21 See UNCTAD, WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, available at http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf at 139.

22 UNCTAD has also advocated consideration of this approach. Id. See also South African Development Community Model Bilateral Investment Treaty Template with Commentary (July 2012), available at http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf ("The fair and equitable treatment provision is . . . a highly controversial provision. The Drafting Committee recommended against its inclusion in a treaty due to very broad interpretations in a number of arbitral decisions.")

feature 2

Enabling Risky Business: Human Rights and the Role of Officially Supported Trade Finance and Investment Guarantees

Matthias Sant'Ana

In 1919 the British government established the first government export credit insurance program "to aid unemployment and to re-establish export trade disrupted by the conditions of war."[1] Other industrial states soon followed, establishing their own agencies to address market failures in the private trade finance sector, to counter competitive subsidization by other states, to support domestic industrial policy and to spur exports in the face of financial and other crises at home and abroad. These Export Credit Agencies (ECAs) were expected to gradually recede into niche sectors as private financial actors grew in size, became integrated worldwide, and proved more capable of assessing and dispersing risk.

The onset of the global financial crisis, however, has shattered these predictions, as ECAs stepped in to fill the gap left by private financial institutions. Yet the expanded role played by ECAs in supporting trade finance has not been matched with stronger rules that address the human rights-related impacts of ECA financed projects. Given narrow set of regulations that currently apply to ECAs, this brief article argues that more needs to be done to ensure that ECA financed projects do not cause harm to home states.

The role of ECAs in trade finance

The importance of trade finance can hardly be exaggerated. Eighty to ninety percent of trade transactions involve some form of credit, insurance or guarantee.[2] In a recent assessment of the impact of the global credit crisis on trade finance, the total value of trade finance arrangements was estimated at US$15.9 trillion, of which roughly a tenth is directly intermediated by ECAs.[3] According to data compiled by the Berne Union (BU), an international association of export credit agencies, exposure of its members for 2011 amounted to over US$1.7 trillion, of which roughly 10% are investment guarantees and 37% medium- to long-term export credits.[4]

Export credit and investment guarantee agencies[5] take various forms and operate in different ways, but a few common features distinguish them from other actors in the trade finance and investment insurance fields. On the *formal level*, some ECAs are incorporated under domestic law as administrative departments within ministries, some are semi-autonomous public institutions, and still others are private corporations. Of the latter, some are totally or partially owned by the state, while others are authorized by law to operate as agents of specific state export credit policies, and do part of their business on their own account, and part on the government's account. The unifying factor is that all of these agencies can rely on an explicit or implicit governmental backing. This support has two aspects: on the one hand, through ECA intermediation, exporter's risk of loss is ultimately transferred to the tax-payer; on the other hand, ECA claims against foreign firms or states will be pursued by the state, increasing incentives for repayment. On the *functional level*, although ECAs undertake a great variety of transaction types they tend to specialize in medium- to long-term operations and to focus on political— rather than commercial—risks. They complement private sector involvement in short-term export credit, which is generally safer due to its self-liquidating character.[6]

Four main reasons for state involvement in the export credit and investment guarantee sector can be underlined.[7] The first reason for government involvement was the impact of information asymmetry and availability on the willingness of private markets to underwrite overseas transactions. In the mid-twentieth century, governments were in a better position to collect and analyze information about foreign risks, and better poised to exercise influence over other governments. A second reason was the relatively smaller and more segmented nature of capital markets. Government-run export credit agencies did not have to consider capital and currency requirements, and could absorb even large losses by paying from the public budget and spreading repayment over time. Moreover, ECAs could expect 'political coverage' from their home state: ECA home-states could espouse claims against defaulting foreign firms or sovereigns. In the context of debt restructuring, ECA-held debt has been given *de facto* preferential status. A third reason was that states used ECAs to further industrial policy so as to manage employment levels, avoid balance-of-payment difficulties, or champion emerging industries. Private finance lacks incentives to *prefer* home-state exporters over other, possibly more lucrative, investment. Finally, states established ECAs so that during crises these agencies could respond positively to credit contraction in the private sector.

> “The expanded role played by ECAs in supporting trade finance has not been matched with stronger rules that address the human rights-related impacts of ECA financed projects.”

The importance of the first two reasons discussed above might have declined somewhat in importance due to the increased integration of capital markets, improved risk assessment capacity in the private sector, the increased size of global financial actors, and better legal framework for enforcement of transnational agreements through arbitration. But the role of ECAs has remained crucial with respect to the last two objectives. From the early phases of the crisis until now, the G20 has relied on export credit and insurance guarantee agencies to fill in the gap left by deleveraging private financial institutions, bringing public guarantees in support of US$250 billion of trade transactions in 2009 and 2010 alone.[8] This has led to overall ECA exposure steadily increasing to reach US$1.7 trillion, as previously mentioned. These initiatives were coupled with crisis response package at the multilateral level: the Multilateral Investment Guarantee Agency nearly doubled its guarantees since 2008 to reach US$5.2 billion in 2011[9], while the International Financial Corporation's transactions have increased by 35% since 2008, reaching US$15 billion.[10] Regional responses have been even larger, with the European Bank for Reconstruction and Development and European Investment Bank group making €27 billion available by late 2010.[11]

The regulation of ECAs

Despite the importance of ECAs in supporting global trade and investment, regulation of their activity has focused on a very narrow set of issues. This is troubling as ECAs provide financial support on terms, for reasons, and with a degree of coverage that private risk insurers cannot or will not match. They underwrite the riskiest investments, in the most politically and economically unstable regions of the world. As public or publicly mandated entities, these agencies could be more easily held accountable—by both national democratic institutions and, to a certain extent, by international monitoring bodies—than other financial institutions.

It is in response to the issue of competitive subsidization in the 1960s that states began considering regulation of ECAs. Indeed, export subsidies were not a major area of regulation in the pre-WTO world, although policy-makers could easily see that the gains from tariff reductions would be nullified if states were allowed to replace these barriers by equally trade-distorting subsidies. So it is out of a concern for ensuring a competitive trade environment that the OECD began discussions on the question of 'officially supported export credits,' leading to the adoption of a gentleman's agreement on the issue in 1978.[12] This agreement has evolved considerably since[13] and received binding recognition in the Marrakesh Agreements establishing the WTO, through items (j) and (k) of the 'Illustrative List of Export Subsidies' contained in Annex I to the *Agreement on Subsidies and Countervailing Measures* (SCM agreement).[14] In a nutshell, international discipline on export credit focuses on two issues: the 'breaking even' requirement prohibits ECAs from running persistent deficits as had been the case where losses incurred by ECAs were consistently assumed by tax-payers. Secondly, ECAs may not practice interest rate subsidization below the OECD agreement levels, prohibiting states from subsidizing rates below capital market standards for protracted periods. Both restrictions focus on 'leveling the playing field' for international trade, and avoiding the repetition of 'interest rate subsidization' wars.

ECAs and human rights – the case for stronger regulation

Although the OECD framework has more recently been enriched by the adoption of additional non-binding policy guidelines and understandings on environmental standards[15] and sustainable lending,[16] these arrangements have generally done little to assuage concerns that ECAs promote harmful forms of exports and investment. Even if some ECAs today are more strictly regulated at the national level, and even if they have been subject to greater public scrutiny than their private sector counterparts, the residual and complementary character of their business focus has meant that the riskiest projects are either financed by these agencies, or not financed at all.[17] Domestic scrutiny of the screening and eligibility criteria employed by ECAs is therefore of utmost importance to ensure that loans and guarantees underwritten by tax-payers do not end up supporting transactions and projects that are harmful to the human development and debt sustainability prospects of recipient states, and human rights enjoyment in host-states.

There is little evidence that the crisis measures adopted by individual ECAs or by multilateral agencies gave due consideration to issues of socio-environmental impacts or to debt sustainability in the medium- and long-term. The haste to 'fill the trade finance gap' raises concerns that screening and eligibility criteria applied by ECAs—already considered by most observers as being too few and to weakly implemented—might not have been strictly adhered to. This would increase the pool of unsound exports and investment projects being underwritten by tax-payers and increase the risk that developing and emerging economies might be saddled with unsustainable and unproductive debt. The exceptional character of the measures adopted since 2008 only exacerbates what is a more general problem of the position of ECAs in global economic governance: as creatures of industrial policy these institutions are focused on avoiding economic difficulties at home, without much consideration of what effects their loans and guarantees might have in host-states. Unlike purely private sector actors, however, ECAs and their support for potentially harmful transactions overseas might engage the responsibility of their home-state on human rights grounds.

As we have argued elsewhere,[18] the UN Charter and international human rights law can be construed as demanding, at a bare minimum, that states ensure that economic regulation of world trade and investment does not impede development and does not cause foreseeable and avoidable human rights harm abroad. This is itself linked to a requirement of due diligence: export credit agencies relying on an explicit or implicit public guarantee ought to ensure that in the screening and selection procedure projects are assessed in terms of impacts on human rights and general developmental outcomes. More broadly, however, it is worth asking what regulatory policy states should pursue when defining the mandates of their own ECAs: a narrow focus on 'trade fairness' in times of stability and on 'filling the trade finance gap' in moments of crisis has not served us well, and has nullified most benefits from official development assistance.[19] It is time to adequately price the externalities of developed state's industrial policies and address their distributive effects at home and abroad.

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Notes

1 Delio E Gianturco, *Export Credit Agencies: The Unsung Giants of International Trade and Finance.* Westport, CT: Greenwood Publishing Group, 2001, p. 41.

2 M. Auboin, 'Restoring Financial Trade During a Period of Financial Crisis: Stock-Taking of Recent Initiatives', *WTO Staff Working Paper* (ERSD-2009-16), 2009, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535309> (accessed 26 March 2012), p. 2.

3 J.P. Chauffour and M. Malouche (eds), *Trade Finance During the Great Trade Collapse.* Washington: World Bank Publications, 2011, p. 4.

4 Berne Union, *Statistics 2007-2011*, available at <http://www.berneunion.org/pdf/Berne%20Union%202012%20-%20Charts%20and%20numbers%20for%20website.pdf >

5 Export credit agencies and investment guarantee agencies are sometimes folded into a single entity, and sometimes handled by agencies with distinct legal personalities. In the US, for instance, the Export-Import Bank of the United States (*Eximbank*) handles export credit while the Overseas Private Investment Corporation (OPIC) provides political risk insurance for US investors seeking guarantees for foreign direct investment. For simplicity's sake we will refer interchangeably to both types of agencies by a single acronym.

6 M. Auboin, 'International regulation and Treatment of Trade Finance: What are the Issues?', *WTO Staff Working Paper* (ERSD-2010-09), February 2010, at p. 1.

7 Malcolm Stephens, *The Changing Role of Export Credit Agencies*, Washington: International Monetary Fund, 1999, pp. 29-30. (articulating the 'conventional wisdom' for state involvement around ten reasons).

8 M. Auboin, 'Restoring Financial Trade During a Period of Financial Crisis: Stock-Taking of Recent Initiatives', *WTO Staff Working Paper* (ERSD-2009-16), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535309>

9 MIGA, *Annual report 2011*, Washington: World Bank Publications, p. 4.

10 IFC, *Annual Report 2012*, Washington: World Bank, p. 25.

11 EBRD, EIB, WB, *Final Report on the Joint IFI Action Plan*, March 2011, available at <http://www.ebrd.com/downloads/news/Final_Report_on_Joint_IFI_Action_Plan_Feb_2011.pdf>, pp. 12-16.

12 OECD, *Arrangement on Officially Supported Export Credits*, 1978.

13 The latest edition of the Arrangement was adopted in January 2013. More importantly, however, a number of additional OECD agreements concern measures for specific sectors (aircraft, etc.) or providing specific guidance with respect to environmental standards, corruption, or sustainable lending. These agreements can be accessed at <http://www.oecd.org/tad/exportcredits/>.

14 *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 *U.N.T.S.* 14.

15 OECD, *Council Recommendation on Common Approaches on Environment and Officially Supported Export Credits* [TAD/ECG(2012)5].

16 OECD, *Principles and Guidelines for Sustainable Lending to Low-Income Countries*, 22 April 2008 [TAD/ECG(2008)15].

17 I have discussed the question in greater detail in 'Risk Managers or Risk Promoters? The impacts of export credit and investment guarantee agencies on human development and human rights' in Olivier De Schutter, Johan Swinnen, Jan Wouters (eds). *Foreign Direct Investment and Human Development: The Law and Economics of International Investment* (New York: Routledge, 2013), pp. 189-232.

18 *ibid.*, pp. 208ff.

19 In this respect, see Eurodad, *Responsible Finance Charter*, 2011, available at <http://eurodad.org/uploadedfiles/whats_new/reports/charter_final_23-11.pdf>, p. 3.

feature 3

How to Incorporate Human Rights Obligations in Bilateral Investment Treaties?

Patrick Dumberry and Gabrielle Dumas Aubin

Bilateral investment treaties (BITs) are, at least in their present form, asymmetrical. Foreign investors are being accorded substantive *rights* under these treaties without being subject to any specific *obligations.* In this context, one question that has been increasingly debated in academia and in civil society is whether there is a need for a greater degree of balance in BITs between the legitimate interests of investors and host countries. This question is part of a boarder debate on how human rights violations committed by corporations doing business abroad can best be addressed. Some international instruments, such as international human rights treaties, are specifically directed at the activities of corporations. However, the obligations contained in these instruments are binding on the contracting states and *not* on corporations themselves.[1] International law (as it now stands) does not impose any *direct* legal obligations on corporations.[2] However, nothing in international law prevents countries from signing treaties (such as BITs) that would impose human rights obligations upon corporations.

This short essay examines one promising option: to impose human rights and other non-investment obligations directly upon corporations in BITs.[3] Very few BITs refer directly to human rights issues. However, when they do, they clearly do not impose any binding obligations on foreign corporations. As a result, human rights concerns can only be raised in a very limited number of circumstances before arbitral tribunals in the context of BIT arbitration proceedings.[4] The following paragraphs will provide a concrete analysis of how BITs could be drafted (or redrafted) to incorporate non-investment obligations.

The first question is where human rights obligations on investors could be placed in BITs? Referring to corporations' responsibilities in the preamble of a BIT would undoubtedly have a positive impact. The preamble is a contextually important part of a treaty and could serve to indicate and colour the treaty's object and purpose. However, a simple reference to human rights in the preamble would not create any substantive obligations for the investors. A more promising avenue is for human rights obligations to be expressly referred to in the main text of the BIT. The type of language used is another related and equally important issue. Merely *encouraging* investors to do something has not worked in the past and is unlikely to be an effective remedy in the future. It is therefore paramount that a treaty provision creates mandatory legal obligations that would *force* corporations to adopt a certain behavior. The provision must also establish a mechanism whereby non-compliance is efficiently sanctioned by an arbitral tribunal.

A pragmatic approach calls for limiting the scope of obligations imposed upon corporations in BITs to those found in the following areas of law: human rights, labour rights, protection of the environment and anti-corruption. But how should these obligations be incorporated into BITs? One option would be for parties to determine for themselves, during treaty negotiations, which of the many fundamental human rights and other non-investment obligations they want to include in the BIT. In our view, this is not the most suitable approach as such negotiations would likely take a considerable amount of time and raise numerous controversial issues. A more straightforward solution would be for BITs to refer directly to the following five well-recognized international instruments that corporations must comply with: *Universal Declaration of Human Rights* (1948), *United Nations International Covenant on Civil and Political Rights* (1966), ILO *Declaration on Fundamental Principles and Rights at Work* (1998), *United Nations Convention Against Corruption* (2003), and the *Rio Declaration on Environment and Development* (1992).

The first reason for choosing these particular instruments is because they have been ratified or endorsed by a significant number of countries. It is easier to convince countries to incorporate human rights obligations when the principles contained in these few instruments are not controversial and are supported by the vast majority of them. In fact, the content of some of these instruments is considered as customary international law. The second reason why these five instruments should be selected is simply because they are already accepted by a large number of corporations as guiding principles of conduct for their business activities abroad. This is, for instance, the conclusion reached by John Ruggie, the former UN Special Representative for Business and Human Rights, in a survey on representatives of multinational corporations.[5] Similarly, in the context of the "United Nations Global Compact," a non-binding initiative, no less than 8,700 corporate participants and other stakeholders from over 130 countries have committed themselves to respect ten universal principles that are drawn from the above-mentioned five instruments.[6] These ten principles have also been accepted by a considerable number of countries via a UN General Assembly Resolution in 2010.[7] It is therefore submitted that countries will be increasingly more open to the imposition of international legal obligations on corporations knowing that there already exists widespread support for them in the business community.

The above-mentioned five international instruments are certainly not the only ones that could be referred to in BITs. Reference could also be made, for instance, to soft law instruments that have been adopted by countries; instruments such as the ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises* or the OECD *Guidelines for Multinational Enterprises*. However, the main problem with this proposal is the non-binding nature of these instruments. While it is true that these soft law instruments include some principles that are themselves contained in other international treaties that are binding on countries, the other principles do not impose any obligations on either party. Countries are unlikely to be willing to 'transform' these soft law instruments into hard law ones by simply incorporating them in their BITs.

Referencing specific international treaties in a BIT is only the first step to be considered when seeking to improve the protection of human rights in the context of BITs. The investor-state dispute resolution clause of the treaty must also contain a provision indicating specifically how human rights obligations imposed upon corporations can actually be enforced before an arbitral tribunal. The provision must make it clear that an arbitral tribunal has jurisdiction over allegations of human rights violations committed by corporations. There are at least three different enforcement possibilities that can be envisaged in a BIT's investor-state dispute resolution clause. We have proposed elsewhere specific drafting examples for each option.[8]

As a first option, an investor's protection under a BIT could be *conditioned* upon its respect for human rights (and other non-investment) obligations. This is the 'clean hands' doctrine.[9] Contracting parties are free to limit consent to arbitration to disputes that satisfy specific characteristics. Thus, nothing prevents them from conditioning the availability of substantive protection for investors on their compliance with fundamental human rights obligations. If a tribunal comes to the conclusion that a corporation has committed human rights violations contrary to its obligations under a BIT, it could find the investor's claim inadmissible. In fact, several arbitral tribunals have already, to some extent, made use of the clean hands doctrine and held that they either lacked jurisdiction or that a claim was inadmissible when faced with the illegal conduct of an investor, such as misrepresentations made by the claimant, fraud, or bribery/corruption. The solution that prevailed so far for bribery, should, *a fortiori*, be applicable when a tribunal comes to the conclusion that a corporation has committed human rights violations contrary to its obligations under a BIT.

A second available option would be to permit an investor's claim even in the face of human rights violations, but to allow the respondent state to raise any such allegations during the arbitral proceedings. This is the 'offsetting of damages' (or 'mitigation') option. A tribunal would thus take into account such allegations when making its determination on the merits of the dispute. Such allegations should also have an impact on a tribunal's assessment of compensation for damages claimed by an investor. A third available, 'counterclaim,' option is a variant of the 'mitigation option.' Under this option, a claimant investor would be permitted to file a claim even in the face of human rights violations, but the host country would be allowed to raise human rights allegations in a counterclaim. The possibility for counterclaims by host countries should be expressly provided for in the BIT's investor-state dispute resolution clause.

At the moment, the prospect of a new generation of BITs balancing the rights and obligations of corporations is uncertain. There does not seem to be any clear political will amongst countries for such developments. Ultimately, all countries, both developed and developing, would have a great interest in pursuing these changes in future treaties. In our view, emerging markets (which appear as host countries in most cases) will increasingly realize that the proposed changes are for their benefit since they provide additional tools in their defence against claims by foreign investors. Objections to the proposed changes may come from capital-exporting countries whose goal in signing BITs is to provide extensive legal protection to their national investors conducting business abroad. Yet, there is a growing concern about the negative impact that corporate activities may have on local populations with respect to human rights and related issues. In our view, one simple way for capital-exporting States to respond to these grievances from segments of civil society would be to adopt BITs imposing human rights obligations upon corporations.

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Notes

1 "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts," Report of the Special Representative of the UN Secretary-General, Mr John Ruggie, on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/035 (February 9, 2007), para. 44.

2 One notable exception is the peremptory norms of international law (*jus cogens* norms) for which corporations can be held directly accountable.

3 Patrick Dumberry and Gabrielle Dumas-Aubin, "How to Impose Human Rights Obligations on Corporations under Investment Treaties?", 4 *Yearbook on International Investment Law and Policy* (2011-2012), p. 569-600.

4 Patrick Dumberry and Gabrielle Dumas-Aubin, "When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration," 13(3) *Journal of World Investment & Trade* (2012), p. 349-372.

5 "Interim Report of the Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises," John Ruggie, E/CN.4/2006/97 (February 22, 2006), 34.

6 United Nations, Global Compact - The Ten Principles (available at http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html (last visited April 21, 2012).

7 United Nations, Global Compact, UN GA Res. 64/223, March 25, 2010.

8 Dumberry & Dumas-Aubin, supra note 3, p. 589 ff.

9 Patrick Dumberry and Gabrielle Dumas-Aubin, "The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law", *Transnational Dispute Management Special Issue: Aligning Human Rights and Investment Protection* (2013), 10(1).

feature 4

Remedies in Investor-State Arbitration: A Public Interest Perspective

Margaret B. Devaney

"It would be strange indeed, if the outcome of acceptance of a bilateral investment treaty took the form of liabilities 'likely to entail catastrophic repercussions for the livelihood and economic well-being of the population' of [the host state]*."*

This quote from Professor Brownlie's Separate Opinion on the Issues at the Quantum Phase in *CME v Czech Republic*[1] points to the potentially deleterious impact of an award of damages in investor-state arbitration and, more generally, highlights the potential intersection between the remedies awarded in investor-state arbitration and matters of public interest.[2] While an extensive body of literature maps the tensions between regulatory sovereignty and investor protection in international investment law and analyses the balancing of private and public interests in arbitral practice, only a small sub-set of this literature makes reference to public interest considerations at the remedies stage of the investor-state arbitration process.[3] Conversely, the literature on the remedies awarded in investor-state arbitration is primarily aimed at describing the mechanics of the complex valuation methods that have been applied by investment treaty tribunals in assessing damages rather than in considering the potential role of the remedies stage from a public interest perspective.

This trend, with few exceptions, appears to be mirrored in arbitral practice. Concepts such as the public interest, regulatory autonomy or sustainable development have seldom been referred to by investor-state tribunals when deciding on the quantum of damages or compensation to be awarded to claimant investors.[4] The references that do exist have generally denied the relevance of such considerations at the remedies stage, at least in the specific circumstances of the case at hand.[5] This is true for both the existing standards of 'fair market value' for lawful expropriations and 'full reparation' for unlawful expropriations, which derive from the rules on state responsibility under international law.

For example, in deciding on the quantum of compensation to award for a lawful expropriation based on the 'fair market value' standard, the tribunal in *Santa Elena v Costa Rica* noted that the fact that property was taken for a legitimate public purpose, in this case the protection of the environment, does not alter the level of compensation that must be paid. The same tribunal also noted that the international source of the obligation to protect the environment makes no difference to the the level of compensation payable.[6]

Similarly, in relation to the 'full reparation' or *Chorzów Factory*[7] standard applicable to unlawful breaches, the only substantial explicit recognition of public interest considerations has come in the form of the distinction drawn between lawful and unlawful expropriations in *ADC v Hungary* and in subsequent awards.[8] Prior to the ADC award, arbitral tribunals generally applied the relevant treaty standard for lawful expropriation to determine the quantum of damages for unlawful expropriations, even in the case of multiple treaty breaches.[9] However, in *ADC v Hungary* the 'full reparation' standard rather than the standard set out in the relevant investment treaty was applied. The investor possessed a series of development rights at Budapest airport, which were expropriated just as passenger traffic was about to substantially increase. Since the value of the investment had increased between the date of the taking and the date of the award, that extra amount was awarded in accordance with the 'full reparation' standard. The *ADC* tribunal did, however, note that such an increase in value between the date of the taking and the date of the award was unusual, if not unique.

Despite the current lack of reference to public interest considerations in determining the quantum of damages or compensation to be awarded to claimant investors, there is a close connection between the design and application of a remedy and how the rights which that remedy protects are balanced with public policy goals.[10] This 'social' function of remedies has been recognised in public law cases in domestic legal systems in which a balancing of the interests of the injured party as against the interests of the public generally occurs in deciding on the extent of the remedy to be awarded.[11] In investor-state arbitration, while some (but by no means all) tribunals have recognised that host state and investor interests should be balanced in assessing liability at the merits stage and have applied proportionality testing to achieve this, this normative choice has not discernibly affected the approach of those tribunals to assessing the quantum of damages or compensation payable by the host state.

I would argue that, in order to ensure an optimal balance between host state and investor interests, the normative basis deemed appropriate to the merits stage should in fact carry through to the remedies stage.[12] This would accord tribunals greater flexibility to recognize the 'shades of grey' which may exist in the relationship between the investor and host state as opposed to requiring an 'all or nothing' approach to liability. Such flexibility is much needed given that the lack of flexibility displayed by arbitrators in interpreting long-term contracts and investment treaties when dealing with fundamental changes in circumstances (such as a situation of economic turmoil) has been identified as a key factor underlying the backlash against investment arbitration.[13]

In fact, the remedies stage can be seen as a 'natural home' for the balancing of interests given that investment treaty tribunals are accorded a much greater degree of discretion at the remedies stage than at other stages of the arbitral process. This allows tribunals to approximate compensation or damages or to rely on 'equitable considerations' or 'equitable principles' in justifying a particular award.[14] For example, in *AMT v Zaire* the tribunal stated that it was exercising *"its discretionary and sovereign power to determinate* (sic) *the quantum of compensation….taking into account the circumstances of the case before it."*[15] Similarly, in *Santa Elena v Costa Rica "proceeded by means of a process of approximation"* based on the parties' submissions as to the value of the property on the date of the expropriation.[16]

In any event, application of the 'fair market value' and 'full reparation' standards involves a significant element of arbitral discretion.[17] For example, investment treaty tribunals must commonly determine a 'fair market value' in respect of a unique asset which the seller does not want to sell and for which no willing buyer is likely to appear following an expropriation,[18] which means that the market value of the asset must be constructed by inference from a range of other evidence. Similarly, applying the 'full reparation' standard involves plotting the hypothetical alternative course of events which would have occurred had the unlawful act not occurred: an exercise which requires a certain margin of discretion to be afforded to arbitrators.[19]

Thus, the existing valuation standards of 'fair market value' and 'full reparation' should be critically evaluated to determine the extent to which they can already accommodate public interest considerations, given the discretion which arbitrators can exercise in applying these standards and in evaluating damages or compensation generally. These valuation standards have the advantage of bringing a level of certainty to the valuation process (at least in theory) and this should not be blithely sacrificed. For example, it may be the case that economic difficulties on the part of the host state can, in many cases, be adequately reflected within the calculation of damages or compensation according to these standards. Thus, in applying the 'full reparation' standard, the hypothetical situation of the investor had the wrongful act not occurred would have been (most likely adversely) affected by host state economic conditions and this should be reflected in the damages calculation. Similarly, the economic conditions prevalent in the host state at the time of the expropriation will generally affect the 'fair market value' of the expropriated asset.[20]

> "The literature on the remedies awarded in investor-state arbitration is primarily aimed at describing the mechanics of the complex valuation methods that have been applied by investment treaty tribunals."

In relation to the possibilities for new or renegotiated international investment agreements (IIAs), it is interesting to note that UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD)[21] includes a number of options relating to the remedies stage in its menu of drafting options for policy-makers, several of which would require derogation from prevalent existing valuation standards. For example, IPFSD suggests a policy option providing for the amount of compensation to be *"equitable in light of the circumstances of the case"* and goes onto suggest that specific rules on damages for treaty breach could be delineated, such as excluding the recoverability of punitive and/or moral damages, limiting the recoverability of lost profits (up to the date of the award) or ensuring that the amount of damages payable is commensurate with the country's level of development.[22] IPFSD also suggests that future IIAs could provide that non-compliance with universally recognized standards, such as the International Labour Organization's Tripartite Multinational Enterprises Declaration,[23] the UN Guiding Principles on Business and Human Rights,[24] or with applicable Corporate Social

Responsibility standards,[25] may be considered by a tribunal when interpreting and applying treaty provisions and when determining the amount of damages due to the investor.[26]

Some of IPFSD's suggestions are likely to prove more workable than others and a number may be perceived to overly dilute the protection afforded to foreign investors under IIAs. In addition, since it is not the function of IPFSD to do so, no guidelines or suggestions are given as to how reforms to future IIAs that affect the various stages of the arbitral process could inter-relate and, in particular, how reforms relating to the merits stage could inter-relate with remedies-related provisions. However, IPFSD's inclusion of remedies-related suggestions in its menu of policy options is to be welcomed as it opens up for discussion the role of remedies in investor-state arbitration from a public interest/ sustainable development perspective.

In conclusion, despite the growing body of literature on both the balancing of private and public interests in investor-state arbitration and an increasing awareness on the part of investor-state arbitration tribunals that public interests may need to be taken into account in applying and interpreting investor rights, the remedies stage has remained largely unexamined from this perspective. Likewise, the question of whether balancing of public and private interests at the remedies stage could ameliorate some of the difficulties associated with balancing of interests at the merits stage has not been comprehensively addressed. It is submitted that these are issues worth exploring as part of an integrated approach to the promotion of sustainable development concerns in investor-state arbitration and, more generally, in international investment law.

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Notes

1 Professor Ian Brownlie, Separate Opinion on the Issues at the Quantum Phase of CME v Czech Republic, 13 March 2003, paragraph 78; see also paragraphs 31, 32, 58 and 74-80.

2 In this article "public interest consideration" refers to host state regulatory autonomy together with the legitimate public purposes behind host state regulation in circumstances where legislative measures are the subject of challenge under investment treaties.

3 See, for example, Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State', (2007) 8(5) Journal of World Investment and Trade 726; Lahra Liberti, 'The Relevance of Non-Treaty Investment Obligations in Assessing Compensation' in Pierre-Marie Dupuy et al. (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009) 557-564; T. W. Wälde and B. Sabahi, 'Compensation, Damages and Valuation in International Investment Law', 4(6) Transnational Dispute Management; M. Toral and T. Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox considerations' in Michael Waibel, Asha Kaushal, et al (eds.), *The Backlash against Investment Arbitration* (Kluwer Law International, 2010), 582-583; Filip Balcerzak, 'Determination of compensation in investor – state arbitrations: is there a place for human rights arguments?', Paper presented at the First Conference of the Postgraduate and Early Professionals/Academics of the Society of International Economic Law, Hamburg, 27 and 28 January 2012; Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press, 2008), Chapter 7; Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press, 2012), Chapter 5; Diane Desierto, 'Human Rights and Investment in Economic Emergencies: Conflict of Treaties, Interpretation, Valuation Decisions', presented at the Society of International Economic Law (SIEL) 3rd Biennial Global Conference, July 2012.

4 In this article the term 'compensation' will be used to refer to a monetary payment made as a consequence of an expropriation made for a public purpose, executed in a non-discriminatory manner and in accordance with due process (a "lawful expropriation") and the term "damages" to refer to monetary payments made as a consequence of unlawful behaviour including unlawful expropriations.

5 See, for example, *Siemens v Argentina*, Award and Separate Opinion, ICSID Case No. ARB/02/8, IIC 227 paragraphs 349-354.

6 ICSID Case No. ARB/96/1, 17 February 2000, paragraphs 71-72.

7 Permanent Court of International Justice, *Case Concerning the Factory at Chorzów*, judgment, Series A, n.7, 13 September 1928, 47.

8 ICSID Case No. ARB/03/16, Award of 2 October 2006, paragraph 496; see also *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v The Argentina Republic*, ICSID Case No. ARB/97/3, Award in the Resubmitted Case of 20 August 2007, 243, paragraph 8.2.3 *et seq.*

9 See, for example, *Tecnicas Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No. ARB(AF)/99/2 and *Metalclad v Mexico*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award of 30 August 2000.

10 Anne van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: a Functional and Comparative view' in Stephan W. Schill (ed.) *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 721-754 at 722-723; Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press, 2011), 186; Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 Am. J. Int'l L. 833 at 845.

11 Irmgard Marboe, 'State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests' in Stephan W. Schill (ed.) *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 377-408.

12 See Christopher Serkin, 'The Meaning of Value: Assessing Just Compensation for Regulatory Takings' 99 NW. U. L. REV. 677, 742 (2005) making a similar point in relation to the valuation of compensation for takings of property in American jurisprudence.

13 Louis T Wells, 'Backlash to Investment Arbitration: Three Causes' in Michael Waibel, Asha Kaushal, et al (eds) *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 341-352.

14 Sergey Ripinsky with Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008) 124-126; see also *Aminoil v Kuwait*, 21 ILM 976, 24 March 1982, paragraphs 78 and 142, *Santa Elena v Costa Rica*, ICSID Case No. ARB/96/1, 17 February 2000, paragraphs 92 and 103.

15 ICSID Case No. ARB/93/1,. Award, 5 ICSID Rep. 11, paragraph 7.16.

16 ICSID Case No. ARB/96/1, 17 February 2000, paragraphs 92- 103.

17 Christopher Serkin, 'The Meaning of Value: Assessing Just Compensation for Regulatory Takings', 99 NW. U. L. REV. 677, 725–27 (2005); Diane Desierto, 'Human Rights and Investment in Economic Emergencies: Conflict of Treaties, Interpretation, Valuation Decisions', presented at the Society of International Economic Law (SIEL) 3rd Biennial Global Conference, July 2012, 46.

18 Mark Kantor, 'Valuation for Arbitration: Uses and Limits of Income-Based Valuation Methods' 4(6) Transnational Dispute Management 15.

19 Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2009) paragraphs 3.335-3.338; see Mark Kantor, *Valuation for Arbitration* (Kluwer Law International 2008), 135-137 citing Sergey Ripinsky, 'Damnum Emergens and Lucrum Cessans: Is it Relevant?', presented at the 8th Investment Treaty Forum, British Institute of International and Comparative Law, May 11, 2007 on the observation that some tribunals may have engaged in 'reverse engineering' whereby a 'fair' result which balances host state and investor interests is first envisaged and then the reasoning to match that outcome is developed.

20 Diane Desierto, 'Human Rights and Investment in Economic Emergencies: Conflict of Treaties, Interpretation, Valuation Decisions', presented at the Society of International Economic Law (SIEL) 3rd Biennial Global Conference, July 2012, 41-46.

21 United Nations Commission for Trade and Development, 'Investment Policy Framework for Sustainable Development' (IPFSD), (4 July 2012).

22 IPFSD, 57.

23 International Labour Organization, 'Tripartite declaration of principles concerning multinational enterprises and social policy' (4th Edition)(1 January 2006).

24 United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (21 March 2011).

25 Report of the Sub Commission on the Promotion and Protection of Human Rights, Commission on Human Rights, 'Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights', U.N. Doc. E/CN.4/2005/91, 15 February 2005, paragraph 7.

26 IPFSD, 58.

feature 5

Land Grab v Food Security: Can Global Regulation Cope?

Christian Häberli and Fiona Smith

It is now clear that in order to feed over 9 billion people by the year 2050, much more re-search and technological development, investment in agricultural production and international trade will be necessary. In many countries a key source of investment will have to come in the form of Foreign Direct Investment (FDI): that is, where foreign operators, often investment funds, invest in assets for the purposes of production. One of the most infamous ways this can occur is when a foreign investor acquires large tracts of land for the purposes of cultivation, ignoring traditional land tenure rights with written or tacit consent and support of the host government—this is the so-called 'land grab' phenomenon. While FDI issues are not limited solely to 'land grabs,' the difficulties in the agriculture context have been well publicised by NGOs and in the media: displacement of domestic producers and indigenous populations to make way for the investor, over-use of water resources ('water grab') and export of agricultural production from food deficit areas are some of the problems, especially in states with weak domestic governance structures. The host state's food security in this scenario can be under-mined rather than strengthened by the investment even where it brings substantial increases in productivity. This is problematic as the host state has a duty to uphold its citizens' rights in international and regional human rights law; specifically, their right to food and the right of indigenous peoples to use their land and exploit natural resources on that land for the purposes of feeding themselves.

However, these negative aspects should not overshadow the fact that FDI can have very positive benefits, especially for food deficit countries. Carefully managed foreign investment could enable up to 6 million hectares of additional land to be cultivated by 2030. The investor, even where the production is fully exported, can provide foreign exchange and tax revenues which the state can use to buy food on the global market, or re-invest in increasing food crop production. Local producers may also enter into partnership agreements or production contracts with an investor, for instance for crops like sugar cane and oilseeds.

Agro-FDI is a two-edge sword therefore: only when managed properly will it bring food security benefits. However, the current global governance structure for agro-FDI unevenly distributes rights and obligations between the host state, the investor and the investor's home state in such a way that there is very little legally enforceable obligation (at the regional and international level) on the investor to conduct its investment in ways that do not undermine the host state's food security; and there are also limited legally enforceable, or 'hard law,' obligations on the part of the investor's home state to reinforce 'ethical' behaviour of investors abroad.

Strong investor rights versus host state obligations

Ironically, it is the weak host state that is subject to the most significant hard law obligations and responsibilities. After the investment has been made, foreign investment law assumes that the balance of power shifts from the investor to the host state because the host state retains the sovereign right to change its laws, or act in ways that the investment becomes economically non-viable for the investor. International investment law assumes that the investor must be protected from any direct or indirect expropriations. Attempts by the host state to 'retro-fit' legislation to address problems created by the investment, like promoting greater use of partnerships between the investor and local producers, or imposing caps on drawing water direct from rivers for irrigation as part of its food security policy, can result in the host state violating the rights of the investor to such an extent that the host state's actions can be regarded as a formal expropriation of the investment, entitling the investor to compensation.

Many investor-state contracts also contain so-called stabilisation clauses that bind the host state to the domestic law as it stands at the time of the investment. Unless the right to food and land tenure rights are fully enshrined in national law before the investment is made, this can become very problematic for a host state anxious to protect local food security rights and to fulfil its international right to food obligations. Displaced local producers cannot bring claims under a BIT, and an arbitration tribunal is not under an obligation to consider other areas of law, like the International Covenant on Economic and Social Rights of the United Nations.

Even if the host state managed to impose legally enforceable obligations on the investor on the basis of a pre-investment impact assessment, so the investment is conducted in accordance with domestic food security needs, weak host states often lack the institutional capacity to monitor the investor's behaviour and the capacity to ensure that their food security is not undermined by the investment. Inadequate control of agro-FDI can actually result in the host state violating its international legal obligations to its citizens in relation to the right to food.

Weak rules on investor behaviour

In contrast, at the international level the investor's behaviour and its monitoring by the investor's home state are only governed by voluntary codes of conduct, some of which aim to limit the adverse effect of the FDI on the host state's food security. For example, for the investor, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security require non-state actors, like large-scale investors, to "respect human rights and legitimate tenure rights." This is fulfilled if the investor conducts appropriate management assessments during the course of the investment to continuously check its activities are not infringing these rights and if the investor puts in place grievance procedures so any local land tenure right holders can make a complaint. The OECD Guidelines for Multinational Enterprises1976 (5th revised edition, 2011) also place positive obligations on agro-investors who are multinational corporations (MNCs) to respect the human rights of any local producers and indigenous peoples affected by their activities. Agro-investor MNCs should "encourage local capacity building" by working closely with the local community; maximise local employment opportunities; not push for 'loopholes in the BIT' to protect themselves from domestic human rights legislation and introduce their own monitoring systems to check they are adhering to the guidelines. MNCs should have their own policies on human rights that include how they plan to address human rights violations and how they carry out their activities in ways that do not infringe human rights. MNCs must also carry out "human rights due diligence" along the entire supply chain.

Under the OECD Guidelines on Multinational Corporations, the investor's own home state is required to set up National Contact Points (NCPs) to receive queries relating to the activities of their MNCs' FDI. This obligation includes advertising the existence of the Guidelines and promoting their objectives. More importantly, it requires that NCPs resolve issues arising from the activities of the MNC and share information concerning MNC activities located in other countries. The success of NCPs has been patchy however, one possible reason being their usual affiliation to ministries of economy without human rights knowledge, let alone any inter-agency or NGO participation. It seems that adherence to the recommendations of the NCP is more likely to occur if it is in the interests of the MNC to comply. This may well be the case, for instance, where an investor sees that its royalties or land lease payments never reach the villages around the farm from where it hires workers or buys water rights. The fact that the NCPs can apparently do little if MNCs decide not to comply reduces the Guidelines' potency as an effective constraint on FDI's adverse impact on food security. There is some indication that investors may be subject to some moral pressure in the home state to operate ethically abroad. So far, however, the UK, for example, has confined its extra-territorial reach to anti-bribery legislation and a series of soft law codes of conduct.

Conclusion

In essence, foreign investors in the agricultural sector are under regulated in the current framework of international investment law, voluntary guidelines and fragmented national investment legislation, and over protected in regional and bilateral investment treaties and domestic regulation. Some informal and soft law instruments do exist, but their effectiveness in policing the investor's impact on food security in the host state is limited. Seen from a home state's international food security obligations this is particularly problematic where that state not only provides legal protection to its investor but also promotes FDI with a number of additional measures. This bifurcation often happens through official development assistance offered in parallel to an investment project (i.e., infrastructure, schools, and hospitals), concessional finance, and investment insurance schemes, including through the Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes of the World Bank.

What should and can be done? We think three areas call for the attention of policy makers and operators, and all involve, to varying degrees, multilateral agencies and international financial institutions. First, host state regulatory capacity must be strengthened, given the majority of farmland investments are taking place in countries with weak land governance. Second, adherence to international guidelines for agro-FDI requires more than reporting by investors, especially in weak states where there is a need for independent monitoring, particularly by NGOs and the media. Third, home states should not remain inactive where their international obligations and reputations are concerned. As a minimum, their support for any agro-FDI project must be subject to both *ex ante* and *ex post* impact assessments, and to some sort of monitoring. On a general level, they should review their FDI regulation and policies, their BITs, and their trade agreements, with a view to safeguarding the public interest concerning global food security.

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feature 6

Arbitrators' Role in the Recent Investment Arbitration Boom

Cecilia Olivet and Pia Eberhardt

In the 2012 report *Profiting from Injustice*, jointly published by Corporate Europe Observatory and the Transnational Institute, we boldly asserted that law firms, arbitrators and third-party funders have, over the past two decades, helped maintain an investor-biased arbitration system and have fuelled the rise in investor-state disputes.[1] Some critics have responded to the report arguing that if the arbitration system is investor-biased, the problem lay solely in the way substantive norms of protection contained in bilateral investment treaties (BITs) are formulated. Arbitrators, so the argument goes, merely apply the rules as presented to them and should not be blamed.

This line of argumentation is only partly accurate.

Certainly investment rules are too broad in scope, vaguely phrased, and contain provisions that allow corporations the right to sue governments even when their actions are meant to protect people's basic rights or the environment. No doubt capital-exporting states, international institutions and business lobbies help shape the architecture of international investment law. Also, governments surely bear ultimate responsibility for signing biased treaties. However, we found evidence that arbitrators, particularly an elite group of them, bear considerable responsibility for promoting and perpetuating an ever-expanding investment regime that grants investors favourable treatment while generating lucrative business for the arbitrators themselves.

A small group of investment lawyers, undertaking various roles such as arbitrator-counsel, academics, policy advisers, lobbyists or media commentators, have taken positions of influence that allow them a direct role in shaping a global narrative that promotes the signing of investment treaties. These arbitrators influence the direction of the investment arbitration system in a way that expands its scope, allowing a greater pool of players to qualify as investors and place demands against states.

Arbitrators negotiate investor-biased treaties

Some of the elite arbitrators serving as government advisors have in fact negotiated investment treaties with very broad investor protection clauses. French arbitrator Jan Paulsson, for example, served as adviser to the Mexican government in the 1990s, during negotiations for investment protection rules (Chapter XI) in the North American Free Trade Agreement (NAFTA).[2] Another prominent US arbitrator, Daniel Price, led the same negotiations on behalf of the United States. Price was later reported to have helped persuade the Mexican government to accept investor-state arbitration[3], in effect making the Mexican government abandon a provision in the Mexican constitution that only national courts have the jurisdiction to hear cases brought up by foreign investors (known as the Calvo doctrine).

These two lawyers later received lucrative appointments after companies sued Mexico for breach of NAFTA rules.

Arbitrators lobby to prevent reform in the wording of investment protection clauses

Investment clauses that lack precision give companies a chance to sue in a variety of situations that would otherwise not have been possible. The United Nations Conference on Trade and Development has warned: "[A]n expansive interpretation of minimalist treaty language can give rise to a lack of predictability in the application of the standard. This, in turn, may lead to the undermining of legitimate State intervention for economic, social, environmental and other developmental ends.[4]

Despite this, arbitrators have consistently opposed attempts by governments to reform or reword certain clauses in existing BITs. Elite US arbitrator Charles Brower made his position clear: "My proposition is that any proposal that alters any of the fundamental elements of international arbitration constitutes an unacceptable assault on the very institution [...] Conversely, any proposal that does not attack these fundamental elements, but instead is designed to enhance them, should be considered carefully and may be found to represent an improvement to the process."[5] Interestingly, Brower's speech against reform was nominated by the Global Arbitration Review, an information service that caters to the legal industry, as "Best lecture or speech of 2012."[6]

The United States, having been sued several times by Canadian companies based on investment protection rules embedded in NAFTA, moved in 2004 to review the 1994 US Model BIT. The revised text included new language that gave the US state some policy space for regulation, particularly in the areas of health and environment. But international arbitrators reacted very strongly to the US move, although the proposed changes were found inadequate by environmental and labour organisations. Prominent US arbitrator (formerly a judge at the International Court of Justice) Stephen Schwebel condemned the proposed changes[7]. Daniel Price argued against weakening the provisions in the US Model BIT.[8] Another US arbitrator, William W Park, declared the policy shift as "highly problematic," adding that the shift will ultimately "cause significant harm to American interests abroad."[9]

Barack Obama himself, campaigning for president in 2009, vowed to review the 2004 model BIT to increase labour and environmental obligations. When the final revisions came out in 2012, no substantive changes were in fact included.[10] Judge Schwebel was part of the government's advisory committee and, together with the business lobbies, advocated against weakening investment protections measures.[11] He seems to have got his way.

Arbitrators' influence was also made quite patent after the Lisbon Treaty took effect in 2009, opening the door for possible reforms to investment treaties in the European Union (EU). The European Parliament (EP) released a resolution expressing "its deep concern regarding the level of discretion [given to] international arbitrators [in making] broad interpretation of investor protection clauses," which, the EP said, led to "the ruling out of legitimate public regulations." The EP then called on the European Commission "to produce clear definitions of investor protection standards in order to avoid such problems in new investment agreements."[12]

Some arbitrators put forward their views about the matter.

Canadian arbitrator Marc Lalonde expressed concern that the EU's proposed new investment policy would weaken investor protection. He noted that it would be to Canada's advantage to negotiate a single European BIT rather than 27 BITs, but he warned: "A proviso would be that, we don't end up with a second rate product or a weaker product than what is available at the present time when we negotiate on a bilateral basis with individual countries."[13]

The negotiating mandates finally approved by the European Council for investment protection chapters in free trade agreements with Canada, India and Singapore ignored the EP's recommendations.[14]

French arbitrator Emmanuel Gaillard raised concerns about the European Commission's proposal to phase out BITs between EU Member States (Intra-EU BITs).[15] Gaillard warned, despite inconclusive evidence, that the "effort to create a level playing field for investment in Europe will have the unintended consequence of driving companies that wish to invest in Europe away from the European Union."[16]

Arbitrators opt for expansive interpretations of investment treaty law

A study by Professor Gus van Harten shows that arbitral tribunals tend to adopt an expansive (claimant-friendly) interpretation of investment treaty clauses.[17] These enhance "the compensatory promise of the system for claimants and, in turn, the risk of liability for respondent states," van Harten writes. A similar observation was made recently by Singapore Chief Justice Sundaresh Menon, who noted that it was "in the interest of the entrepreneurial arbitrator to rule expansively on his own jurisdiction and then in favour of the investor on the merits because this increases the prospect of future claims and is thereby business-generating."[18]

Arbitrators promote the 'benefits' of investment treaties

Arbitrators often use rousing rhetoric to encourage countries to sign investment treaties, advance laissez-faire economic policy, and promote investor and arbitration-friendly positions.
Elite arbitrator Stephen M. Schwebel has voiced the opinion that "BITs are an immense advance in the field and should be nurtured and cherished rather than denounced and undermined." He also warned "the demise of BITs would be regressive for investors, states and the international community."[19]

William W. Park defends transnational corporations' economic rights. "In today's heterogeneous world," he writes, "cross-border investment will be chilled without a willingness of all countries to accept arbitration." Arbitrators (like him), Park says, are politically neutral. Arbitration responds to the apprehension that host-country judges might be biased, he says. It provides "a forum that is more neutral than host country courts, both politically and procedurally."[20]

The claim that investment agreements attract Foreign Direct Investment (FDI) is not supported by facts. A senior economist in the World Bank's Research Department, Mary Hallward-Driemeier, warned back in 2003 that an analysis of 20-years of data on bilateral FDI flows from the OECD to developing countries showed "little evidence that BITs have stimulated additional investment."[21] More recent studies have also shown that investment treaties are not a decisive factor in investor decision to go abroad.[22]

Other arbitrators opted to use scare tactics.

"If international arbitration goes, international economic exchanges will suffer immensely. Nothing will take its place,"[23] warned Jan Paulsson. "[I]f countries don't sign up to BITs they will have nothing to offer and will lose the investment, as has been seen many times,"[24] warned Chilean arbitrator (and former ambassador during the Pinochet dictatorship) Orrego-Vicuña.

These apocalyptic warnings have no basis in reality. For example, Brazil never signed any BIT but enjoys the largest amount of foreign direct investment of all Latin American countries.

Arbitrators protecting their own vested interests

Arbitrators have a financial and professional stake in strengthening investor protection.[25] The most influential among them handle the heaviest caseloads in investment-treaty disputes and most of the biggest cases in terms of amounts demanded by investor claimants. A very small group of arbitrators, numbering 15 across the world, have sat in the panels of 55 per cent out of 450 investment-treaty disputes known today. And they earn handsome rewards.

Unlike judges, there is no flat annual salary. Their fees range from approximately US$375 to US$700 per hour depending on the amount claimed, and subject to where and under which rules the arbitration takes place.[26] How much an arbitrator ultimately earns per case will depend in large part on the case's duration and complexity, with fees that can easily amount to several hundreds of thousands of US dollars per case.

In addition to the arbitrator fees, which are small in comparison to what counsel may earn, the role as an arbitrator can help law firms and law chambers, to which the arbitrator is affiliated, acquire clients. This leads to significant additional income streams for the arbitrator directly or his or her firm.

The concentration of cases in so few hands suggests that these arbitrators have a significant career interest in the system. If governments started restricting the language in investment treaties, or worse, terminating these treaties, the arbitrators' caseloads would shrink to an alarming degree. This suggests that while lax and vague rules are the key problem in investment treaties, arbitrators out to defend private profit over people's rights and the environment are themselves a part of the problem.

There are, even within the existing system, some steps that can be taken to help to roll back the power of the arbitration industry. The report calls for a switch to independent, transparent adjudicative bodies, where arbitrators' independence and impartiality is secured; the introduction of tough regulations to guard against conflicts of interest; a cap on legal costs; and greater transparency regarding government lobbying by the industry.

These steps, however, will not by themselves transform an investor-state arbitration system. Without governments turning away from investment arbitration, the system will remain skewed in favour of big business and the highly lucrative arbitration industry.

Author

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Notes

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news in brief

New rules on transparency in UNCITRAL investor-state arbitration agreed in New York

A United Nations working group agreed in February to new rules that will make at least some investor-state arbitrations conducted under the rules of UN Commission on International Trade Law (UNCITRAL) more transparent.

The UNCITRAL rules have long been criticised for allowing investor-state arbitrations to advance under a veil of secrecy. The new rules on transparency, forged over two years of negotiations, will give the public much greater access to arbitration proceedings and related documents; however, at least as presently designed, they will not apply to all investor-state arbitrations operating under the UNCITRAL rules.

In the final stages of negotiations, the working group clashed over whether and when the new transparency rules would apply. Under one approach, the transparency rules would only apply to investment treaties concluded after the new rules come into force unless states or disputing parties agree otherwise. In contrast, under an "opt-out" approach the new rules could apply to existing treaties if those treaties permitted.

At the February 4-8th meeting in New York, the working group favoured the former approach. As such, the rules will only apply: a) where the disputing parties agree to their application in a particular arbitration; or, b) where the state parties to a treaty provide specific consent after the rules have been adopted.

Arbitration proceedings that apply the new rules will be considerably more open than those under the old rules. Under the 1976 and 2010 (non-transparent) rules, either of the disputing parties can demand that the proceedings take place in-camera. Similarly, on its own motion or the request of a disputing party, a tribunal can block the release of written documents related to the proceedings. Particularly significant, neither disputing party can release the award without the other disputing party's agreement, effectively giving each party veto powers regarding the publication of awards.

In contrast, the new rules require that oral hearings are open to the public—with or without the consent of the disputing parties. Written documents related to the proceedings, such as the notice of dispute, pleadings, and awards, will also be published.

The working group favoured a single repository for these documents, preferably managed by the UNCITRAL secretariat. The World Bank's International Centre for Settlement of Investment Disputes (ICSID)—which already manages a public registry of its own cases—and the Permanent Court of Arbitration at the Hague have offered to manage the repository in case the UNCITRAL secretariat is unable to perform the service.

The February meeting also focused on whether a tribunal *must* accept submissions by non-disputing state parties to the treaty on issues of treaty interpretation, or whether it could exercise its discretion. Ultimately the working group agreed that arbitral tribunals should accept those submissions if offered as long as they don't unduly burden the proceedings or unfairly prejudice a disputing party.

Another important area of negotiation was exceptions to transparency—i.e., what can or cannot be kept from disclosure. Some members of the group thought that exceptions should be "self-judging," allowing a disputing party to with-hold information "it considers would impede law enforcement, or would be contrary to the public interest, or its essential security interest." But many other members felt that a self-judging rule gave disputing parties too much leeway to impose secrecy.

In the end, the working group agreed that the following types of information would be considered "confidential or protected" and could be shielded from disclosure: confidential business information; information that is protected against being made public under the treaty; information that is protected against being made public under the law of the respondent (in cases where the information relates to the respondent) or any laws or rules that the tribunal considers to be applicable; and information which would impede law enforcement.

The working group also agreed to insert a provision (found in a number of investment treaties) clarifying that nothing in the rules would require "a respondent to make available to the public information the disclosure of which it considers to be contrary to its essential security interests."

The UNCITRAL secretariat must now prepare a final draft of the rules to be considered for approval by the UNCITRAL Commission, which meets in Vienna in July.

The secretariat has also been asked to draft various pieces of text that could be used by governments to give their consent to the transparency rules in their existing investment treaties. That consent could take the form of a convention, which could avoid the need to enter into bilateral negotiations to amend each of their investment treaties, and model declarations.

President of Ecuador requests termination of US-Ecuador BIT

In a letter sent March 6th the President of Ecuador asked the President of the National Assembly (the country's legislative branch) to denunciate the United States-Ecuador bilateral investment treaty.

Ecuador has defended itself in numerous investment arbitrations, and has already terminated 9 BITS and withdrawn from ICSID. In one of the largest blows to the country, last September Ecuador was ordered to pay US$1.77 billion in damages by the majority of an ICSID tribunal—the largest award to-date in an ICSID arbitration—after the tribunal found that Ecuador had expropriated Occidental Petroleum Corporation's investment in the country.

President Rafael Correa also announced in March that the government would establish a commission to audit BITs, according to a report by the *Wall Street Journal*.[1] Mr. Correa said the audit would be performed by representatives of social movements and local and international experts.

Mr. Correa emphasized his preference for a regional approach to dealing with foreign investors. "Individually, these (multinational corporations) can trample our countries, can impose their abuses. Regionally we impose our conditions to multinationals. There will be a response from UNASUR, from ALBA," Mr. Correa is quoted as saying by the *MSJ*.

Ecuador proposed in 2009 that the Union of South American Nations (UNASUR) set up an arbitration center as a regional alternative to ICSID. Ecuador has also taken the initiative to propose rules for the new arbitration center.[2]

India suspends negotiations of bilateral investment treaties

Inside US Trade reported in February that India had suspended all negotiations of bilateral investment treaties while it conducts a review of its own model BIT.

Quoting an unnamed government official, the review of its model BIT began in September, and came on the heels of a number of recent investor claims against India.

Private sector sources speculated that the review would focus on investor-state dispute settlement provisions and the most-favoured nation provision.

The MFN provision was central to the success of an Australian claimant, White Industries, in a dispute that resulted in a damages award of A$4.08 million against India in November 2011. White Industries relied on the MFN clause to benefit from the obligation to "provide effective means of asserting claims and enforcing rights" contained in the India-Kuwait BIT.

India has also recently been the target of claims by Russian and Norwegian investors over a Supreme Court decision to revoke telecommunications licenses.

New Zealand is keen to introduce cigarette branding regulations, but awaits outcome of legal cases against Australia

The government of New Zealand has agreed to legislate for plain packaging of tobacco products. However, noting that similar legislation in Australia has resulted in legal challenges, the Cabinet has decided to delay implementation of the plan while it monitors the cases involving its neighbour.

New Zealand agreed "in principle" in April 2012 to introduce a plain packaging legislation, pending public consultations. In February of this year, the government announced that the results of the consultation "confirmed that plain packaging will be an effective means of reducing the appeal of smoking ..."

However, the Associate Minister of Health, Tariana Turia, added that "the Government acknowledges that it will need to manage some legal risks, as we have seen in Australia."

"To manage this, Cabinet has decided that the Government will wait and see what happens with Australia's legal cases, making it a possibility that if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes."

The tobacco company Philip Morris filed for arbitration against Australia in November 2011, claiming the government's regulations on cigarette branding breach the Hong Kong-Australia BIT. Oral hearings in that case are set to begin in February 2014.

Australia has also faces complaints at the World Trade Organization by the governments of Honduras, Ukraine and Dominican Republic, which argue that the plain packaging legislation violate trade rules on intellectual property.

Number of ICSID cases spikes in 2012

ICSID had 50 new cases in 2012, the largest number in its history. The 2012 figure compares to 38 cases in 2011 (which at that point was the highest to date) and 26 in 2010.

As of December 31st, 2012, ICSID had accepted a total of 412 cases since its establishment.

In 2012, Eastern Europe and Central Asian countries topped the list with 26% of cases, followed closely by South America with 24% of cases. Venezuela faced the highest number of claims, with 9 new cases introduced in 2012.

Historically, South American countries have faced the largest share of disputes.

Sixty-seven percent of claims last year came under the consent of bilateral investment treaties, 13% under investor-state contracts, 12% under host-state investment law, 4% under NAFTA, and 4% under the Energy Charter Treaty. This is close to the historical average of 63% under bilateral investment treaties, 20% under investor-state contracts, 6 percent under host-state investment law, 4% under NAFTA, and 4% under the Energy Charter Treaty.

Also in line with past years, the bulk of arbitrators appointed to ICSID case in 2012 are from Western Europe (42%) and North America (24%).

The ICSID caseload statistics are available here: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics

Notes

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awards & decisions

Claim against Venezuela dismissed; State acted legitimately in response to contractual violations

Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)04/6

Damon Vis-Dunbar

A claim by Vannessa Ventures against Venezuela has been rejected on its merits, with the tribunal concluding in a January 16, 2013 decision that Venezuela had responded properly to contractual violations. The Canadian company had sought over US$1 billion in damages, arguing that its newly acquired stake in a Venezuelan mining operation was expropriated.

Background

Vannessa acquired its share in the mining project from another Canadian firm, Placer Dome, for a nominal fee of US$50. Earlier, Placer Dome had entered into a joint venture with Corporación Venezolana de Guayana (CVG), a state agency. Under a shareholders agreement, Placer Dome and CVG formed a company called MINCA for the exploration and extraction of gold from the Las Cristinas mine.

Shortly after the mine was inaugurated in 1999, Placer Dome sought to suspend the project on the basis that it was economically unfeasible at a time of low gold prices. CVG agreed to a temporary suspension while a search was conducted for a new investor. That search proved difficult, however, and the parties failed to secure a willing investor.

With time running out on the temporary suspension of the project, Placer Dome entered into negotiations with Vannessa Ventures, a Vancouver-based company. CVG was not consulted on those negotiations, and it was not until after a deal had been struck that CVG was informed.

The agreement with Vanessa granted Placer Dome a share of the revenues should Vannessa exploit Las Cristinas. Notably, it also promised Placer Dome a share of any damages that may be awarded should Vannessa sue Venezuela for breach of contract.

CVG viewed the deal as "unpleasant and insincere," and citing a number of contractual violations, moved to rescind the work contract and concessions attached to the Cristinas mine. After a set of legal proceedings in Venezuelan courts, Vannessa lodged a claim at ICSID for breaches of the Canada-Venezuela BIT in 2004.

Jurisdiction

The majority of the tribunal accepted jurisdiction, while one unnamed member declined. In declining jurisdiction, the unnamed arbitrator concluded that Vannessa's investment had not been made in "good faith," as required by Venezuelan law. However, in the majority's view the issue of good faith was better dealt with in the merits stage of the proceedings.

Despite the differences of opinion over jurisdiction, all three members of the tribunal signed on to the final award. The dissenting arbitrator explained that if jurisdiction existed, then the claim should fail for the reasons described by the tribunal in the merits stage.

Expropriation and FET

Turning to the merits, the tribunal considered Vannessa's claim that Venezuela had breached the BIT's provisions on expropriation and fair and equitable treatment.

Vannessa argued that contractual rights could be considered expropriated when "the State has gone beyond its role as a mere party to the contract and relied on its superior governmental power." However, tribunal added that "in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt."

Turning to the facts of this case, the tribunal concluded that CVG has responded legitimately to contractual breaches. The tribunal emphasised that Placer Dome was required to cooperate with CVG in selecting a new investor, but instead the firm "engaged in secret negotiations and share transfers with Vannessa, only to 'inform' CVG after the fact ..."

The tribunal emphasised that CVG had carefully selected Placer Dome for its expertise and resources. In contrast, Vannessa lacked experience, and failed to put in place a plan for developing the Las Cristinas mine.

The tribunal also had little difficulty in dismissing claims that Venezuela had breached the BITs provisions on 'fair and equitable treatment' and 'full protection and security.' These standards have been interpreted in different ways, noted the tribunal, but they have not been formulated in in terms that would support Vannessa's claim.

Costs

The tribunal ruled that each party should bear its own legal costs, and share the arbitration fees, noting that Vannessa had succeeded on jurisdiction while failing on the merits.

The parties spent considerable, albeit considerably different, sums on their legal fees—more than $20 million for Venezuela, and less than half of that by Vannessa. The tribunal commented that the expense is "regrettable," for what should have been "an efficient and reasonable expeditious procedure."

The arbitrators in the case are Vaughan Lowe (president), Charles N. Bower (claimant's nominee), and Brigitte Stern (respondent's nominee).

The award is available here: http://italaw.com/sites/default/files/case-documents/italaw1250.pdf

Tribunal accepts jurisdiction in claim by Spanish investors over investment in Argentine airlines *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction*

Larisa Babiy

In a decision rendered on December 21, 2012, an ICSID tribunal gave the green light to hear a case brought by Spanish claimants against Argentina. The tribunal's decision, however, was not unanimous and Argentina's nominee, Kamal Hossain, accompanied the award with his separate opinion.

The claimants, acting under the Spain-Argentina BIT, alleged that Argentina expropriated their investment in two local airlines. In particular, the investors denounced various disagreements with the Republic, starting in 2004 or earlier, including disputes on the imposition of airfare caps, which culminated in the 2008 nationalization of the airlines. According to the claimants, Argentina's conduct amounted both to a "formal" and to a "creeping" expropriation.

Argentina objected to the tribunal's jurisdiction on several grounds. First, it maintained that the claimants failed to meet the pre-arbitration requirements set forth in the BIT. Second, it objected that the claimants lacked legal standing in the dispute. Third, it claimed that the tribunal lacked jurisdiction over certain claimants' allegations since the conduct invoked was not attributable to the Republic. Finally, Argentina stated that the investment at stake was not an investment protected under the BIT because it was tainted by illegality.

Parties clash over pre-arbitration requirements and MFN clause.

The first of Argentina's objections regarded the claimants' failure to fulfill the procedural requirements set forth in Article X of the BIT. In particular, Argentina asserted that the investors neglected the obligation to give a formal notice of the existence of a dispute under the BIT to the competent Argentine authorities. Moreover, Argentina submitted that none of the documents provided by the claimants proved that they undertook amicable negotiations for six months, as mandated by the BIT. Finally, Argentina argued that the investors disregarded the requirement to submit the dispute to local courts for 18-months before commencing the arbitration.

Conversely, the claimants maintained that they complied with all pre-arbitration requirements and that, in any event, any negotiation or local court litigation would have been futile at this stage of the proceedings. Moreover, the investors invoked the most favored nation (MFN) clause of the BIT to circumvent such procedural requirements.

The tribunal sided with the claimants. It first held that the ordinary meaning of Article X did not suggest any obligation upon the investor to formally notify the host state of the existence of a dispute under the BIT. The tribunal then looked into the jurisprudence of the International Court of Justice (ICJ) to determine when exactly the dispute had arisen between the parties and recalled that "for a dispute to exist, it must have crystallized in an actual disagreement".

While it was clear that the dispute over the airfare caps arose at least 6 months before the filing of the arbitration, the same was less clear with regard to the disagreement on the expropriation of the claimants' shares in the airlines. The tribunal, however, considered that the two disagreements were "sufficiently related" and thus, the consultations conducted with regard to the first disagreement were enough to satisfy the negotiation requirement under the BIT.

With regard to the local courts requirement, the claimants pointed at an expropriation lawsuit initiated by Argentina before national courts. The tribunal noted that the BIT allowed "either party" to initiate local court proceedings for the purpose of Article X. Looking again into the ICJ jurisprudence, it stated that it was enough for the local court proceedings to have centered on the "essence" of the BIT claim. Therefore, the tribunal concluded that the local courts requirement had been fulfilled.

Although the tribunal already found that all pre-arbitration requirements had been fulfilled, it decided to address the claimants' controversial argument on the MFN clause. The investors claimed that this provision allowed them to rely on the Australia-Argentina BIT, which contained no pre-arbitration requirements. The tribunal found that the broad language of the MFN clause and the absence of any limitation as to its scope allowed the claimants to invoke the dispute resolution provision contained in the Australia-Argentina BIT.

BIT deemed to cover derivative and indirect claims.

Argentina argued that the claimants lacked legal standing because they only had indirect shareholdings in the airlines. In fact, they held their shares through a subsidiary, Air Comet S.A. The tribunal, however, dismissed Argentina's argument, finding that the broad language of the BIT (which refers to investments as "any kind of asset") "implicitly permits the kinds of claims that Claimants have advanced" and "suggests that shares held through subsidiaries" is not excluded from the coverage of the BIT.

Third-party funding and reorganization proceedings

Argentina further objected to the claimants' legal standing, pointing to their recent reorganization proceedings in Spain and at the existence of a third-party funder. The tribunal, however, stressed that international case law consistently found that jurisdiction shall be assessed at the date the case is filed. Since all the events cited by Argentina post-dated the filing of the case, they were irrelevant for the tribunal's jurisdiction.

In addressing Argentina's last objections, the tribunal decided that those relating to the attribution of certain acts to Argentina were too fact-intensive to be decided at the jurisdictional stage. Finally, the tribunal dismissed Argentina's argument on the illegality of claimant's investment, since none of Argentina's allegations referred to illegalities in "entering" into the investment.

The separate opinion

Argentina's nominee, Kamal Hossain, first criticized the majority decision to take a stand on the claimants' invocation of the MFN clause. He stated that since the jurisdictional issues could have been resolved by simply relying on an express provision, Article X of the BIT, a further ruling on the MFN was unjustified. All the more so, since the interpretation and application of this clause is subject to ongoing controversy.

Dr. Hossain then expressed his reservation on the legal analysis of the MFN clause conducted by his co-arbitrators, quoting extensively from recent investment law publications and from Prof. Brigitte Stern's dissenting opinion in the *Impregilo v. Argentina* case.

Dr. Hossain also disagreed with the majority finding that indirect shareholdings constituted a protected investment under the BIT. He considered that on a plain reading of the BIT "shares held in a company means shares directly held, unless indirectly held shares are expressly included." To state otherwise would widen the scope of the BIT "without limit".
The arbitrators in the case are Thomas Buergenthal (President), Henri Alvarez (claimants' nominee) and Kamal Hossain (Argentina's nominee).

The decision on jurisdiction is available here: http://www.italaw.com/sites/default/files/case-documents/italaw1090.pdf

Dr. Hossain's separate opinion is available here: http://www.italaw.com/sites/default/files/case-documents/italaw1092_0.pdf

US investor wins ICSID claim against Ecuador on grounds of expropriation *Burlington Resource Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5*

Yalan Liu

In a December 14, 2012, decision on liability, an ICSID tribunal ruled that Ecuador expropriated a US oil and gas company's investment in violation of the US-Ecuador bilateral investment treaty (BIT). The quantum of damage was left for future decision.

Background

Burlington Oriente, a subsidiary of the claimant Burlington Resource Inc. (Burlington), entered into Production Sharing Contracts (PSCs) with Ecuador to explore and exploit oil reserves in several Blocks in Ecuador. Under these agreements, the contractor assumed the entire risk of exploitation in exchange for a share of the oil produced.

As international oil prices soared in 2002, Ecuador attempted to renegotiate the terms of PSCs with Burlington. When those renegotiations failed, Ecuador adopted a number of measures to "restore the economic equilibrium" of the PSCs. Ecuador first imposed a windfall tax on Burlington's excess profits. When Burlington refused to pay the tax, Ecuador initiated proceedings to seize and auction Burlington's share of oil production so as to collect the overdue payment.

Burlington subsequently suspended operations on the grounds that the investment had become unprofitable. In response, Ecuador took the possession of Burlington's Blocks and eventually terminated the PSCs.

Jurisdiction declined over the umbrella clause claims

In an earlier decision on jurisdiction, the tribunal ruled that it had jurisdiction over the expropriation claim, but lacked jurisdiction over claims of fair and equitable treatment, full protection and security, and arbitrary impairment. However, the claimant's claim related to the BIT's umbrella clause—in which Burlington argued that Ecuador's alleged breaches of the PSCs and the Ecuadorian law also amounted to treaty violations—was left to be decided in the merits phase.

Due to the fact that Burlington's subsidiary was the signatory to the PSCs rather than Burlington itself, Ecuador argued there was no privity of contract between itself and Burlington. As a result, Ecuador insisted that Burlington could not rely on the umbrella clause to enforce contractual rights that did not belong to it.

In deciding whose right was correlated to the obligation under the umbrella clause, the tribunal resorted to the law governing the PSCs (in this case Ecuadorian law) which stipulates that a non-signatory parent of a contracting party is not allowed to directly enforce its subsidiary's rights. The majority also noted that the majority of ICSID case law requires privity between the investor and the host state. The majority therefore decided that Burlington could not rely on the umbrella clause to enforce its subsidiary's rights under the PSCs, and as such jurisdiction over Burlington's umbrella clause claim in relation to the PSCs was declined.

However, Prof. Orrego Vicuña (claimant's nominee) dissented in this regard. He agreed that privity was widely accepted in domestic contract law; however, here he viewed the decisive issue as whose rights were protected under treaty. He emphasised that the US-Ecuador BIT expressly protected both direct and indirect investments, and therefore the "obligations" referred to by the umbrella clause also covered indirect investments.

With respect to Burlington's allegation that Ecuador's failure to observe its obligation under Ecuadorian law amounted to a treaty violation via the umbrella clause, the majority found that Ecuadorian law merely reiterated Ecuador's contractual obligations under the PSCs rather than providing independent obligations.

In his dissenting opinion, Prof. Orrego Vicuña asserted that Ecuador's obligation under the Ecuadorian law was specific enough to be regarded as separate from Ecuador's obligation under the PSCs.

The object of expropriation

Burlington alleged the expropriated investment was the contract rights under the PSCs, as it possessed these rights "through its ownership of Burlington Oriente." Ecuador did not disagree that this was the object of expropriation under dispute, and also noted that "the investment Burlington alleges is precisely the value of those contract rights."

In the tribunal's view, however, the claimant could not claim expropriation of "discrete parts of the investment," but rather the analysis must focus on "the investment as a whole."

The tribunal explained that the "whole investment" consisted of the rights of its subsidiary under the PSCs, the shares in its subsidiary, the production facilities, other tangible property, the monetary and asset contributions made to carry out operations, and the physical possession of the Blocks.

The majority decides the windfall tax did not amount to expropriation

Burlington argued that several measures, both individually and in the aggregate, amounted to expropriation. These included Ecuador's imposition of the windfall profits tax without, as it argued was contractually required, "absorbing" the impact of the tax increase so as to stabilise the economic equilibrium of the project; the proceedings to seize and auction Burlington's share of oil production; the takeover of its Blocks; and eventually the termination of the PSCs.

The tribunal decided to deal with the claims by first analyzing each of the challenged measures separately, and in the event of no expropriation being found, it would go on to examine the cumulative effect of those measures.

To ascertain expropriation, the tribunal applied both the 'effect test' and the police powers doctrine. In terms of the effect test, the tribunal required permanent and substantial deprivation of the investment in order to amount to an expropriation. The tribunal also considered if the measures could be justified under the police power doctrine (i.e. as a legitimate use of governmental authority to restrict private rights for the public good).

The tribunal first considered if the windfall tax amounted to an expropriation. Here it found that the participation formulas in the PSCs to allocate the oil production were not linked to oil price, and as such the increase in oil prices could not be considered as a disturbance to the "economy" of the PSCs. The tribunal also noted that the PSCs contained mandatory tax absorption mandatory tax absorption clauses, requiring that, in the event of tax modification, Ecuador was obliged to take measures to compensate Burlington for the resulting impact on the "economy" of its investment. Due to the fact that Ecuador failed to do so, the tribunal decided that the imposition of the windfall profits tax in conjunction with Ecuador's failure to absorb the effect thereafter breached the PSCs.

Nevertheless, the majority considered that the windfall tax, while breaching the PSCs, did not amount to an expropriation because it did not make Burlington's investment "unprofitable and worthless."

The proceedings to seize and auction Burlington's share of oil production shared the same fate, in that the 'effect' of these measures was not deemed grave enough to amount to expropriation.

However, the tribunal viewed Ecuador's move to take possession of Burlington's Blocks differently. Ecuador contended that this measure was a legitimate response to avoid the significant economic risk arising from the envisaged suspension of operations by Burlington. However, the tribunal dismissed this argument on the grounds that the takeover did not comply with Ecuadorian law and the risk was not significant enough. Turning to the effect test, the tribunal considered that the takeover resulted in Burlington losing "effective use and control" over its investment without compensation. Therefore, the tribunal concluded the takeover of Burlington's Blocks constituted an unlawful expropriation.

In light of this conclusion, the majority considered it irrelevant to consider the termination of the PSCs within its expropriation analysis, because it merely formalized a prevailing state of affairs, i.e. the takeover of Burlington's Blocks.

Owing to one of the measures being confirmed as expropriation, the tribunal also found it unnecessary to examine the cumulative effect of all measures complained of by Burlington.

In his dissenting opinion, Prof. Orrego Vicuña argued that the other measures—not only the takeover of Burlington's Blocks—also constituted expropriation. He held that substantial deprivation was a matter of reasonableness rather than a mathematical exercise. He asserted that the windfall tax was beyond any standard of reasonableness and therefore reached the level of substantial deprivation.

In respect of the termination of the PSCs, he considered that it constituted an aggravating factor to the unlawfulness of expropriation. Overall, he was of the opinion that all the challenged measures were interlinked and amounted to expropriation as a whole. He argued that it was a shortcoming that the majority isolated these measures and therefore narrowed down the expropriatory effects by finding only one measure amounted to expropriation.

The tribunal comprised Prof. Gabrielle Kaufmann-Kohler (president), Prof. Francisco Orrego Vicuña (claimant's nominee), and Prof. Brigitte Stern (respondent's nominee).

The award was available here: http://italaw.com/sites/default/files/casedocuments/italaw1094_0.pdf

Prof. Orrego Vicuña's dissenting opinion is available here: http://www.italaw.com/sites/default/files/case-documents/italaw1095_0.pdf

Canada loses NAFTA arbitration over R&D performance requirements *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4*

Damon Vis-Dunbar

In a decision signed in May 2012, and published six months later, the majority of a 3-person ICSID tribunal has found Canada in breach of the North American Free Trade Agreement (NAFTA) for imposing prohibited performance requirements on two U.S. oil companies.

The claim by Mobile Investments Canada and Murphy Oil Corporation against the government Canada stems from requirements on research and development expenditure (R&D) in the province of Newfoundland and Labrador.

Background

The claimants have stakes in two oil fields in the North Atlantic. For both projects, the oil companies have been obligated to submit "benefits plans," which include planned expenditure on R&D and education and training. A board is responsible with approving those plans.

The dispute hinges on a new set of guidelines introduced in 2004. In contrast to earlier guidelines, the 2004 rules required a fixed amount of expenditure on R&D, using average expenditures by industry as a benchmark. The 2004 guidelines were introduced in response to declining expenditure in R&D, and were recommended by a public commissioner.

The 2004 guidelines were challenged in Canadian courts, but the court found them to be consistent with the board's responsibility to monitor R&D expenditures. The claimants sent a request to ICSID to arbitrate the dispute in late 2007.

Minimum standard of treatment

The claimants asserted breaches of two NAFTA articles: Article 1105, which accords investors the minimum standard of treatment under customary international law; and Article 1106, which deals with prohibited performance requirements.

With respect to Article 1105, the claimants argued that Canada had frustrated their "legitimate expectations" by changing the regulatory framework governing R&D expenditures.

Canada countered that it had not failed to provide a stable legal environment, and even if it had, the minimum standard of treatment under customary international law does not obligate governments to ensure such stability.

After reviewing NAFTA case-law, the tribunal concluded that NAFTA governments could change the rules governing an investment "to a high or modest extent." To breach to Article 1105, changes to the regulatory environment would need to be "arbitrary or grossly unfair or discriminatory."

Turning to this case, a central question for the tribunal was whether federal or provincial governments "made a series of express promises—in the form of representations—which they then broke." On the facts, the tribunal failed to see any evidence of a promise that regulations governing R&D would not change. The tribunal therefore found no breach of Article 1105.

Performance requirements

The claimants also argued that Canada had breached Article 1106, which restricts governments from imposing various performance requirements. This includes a prohibition on requirements "to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory."

In the claimants view, the 2004 guidelines required them to purchase goods and services in the Province of Newfoundland, and thus violated the restrictions set out in Article 1106.

Canada responded that R&D was "outside the scope" of Article 1106. Canada later added that even if R&D was considered a "service" under Article 1106, the guidelines did not require those services to be local.

The tribunal rejected Canada's arguments. It decided the research, development and education could rightly be considered a "service" for the purposes of Article 1106. The tribunal also considered that those services would largely need to be purchased in the province—despite Canada's efforts to highlight potential exceptions.

Next, the tribunal considered whether the 2004 guidelines should be considered exempt from Canada's obligations under Article 1106, due to the country's list of reservations under Article 1108.

Canada's exceptions to Article 1108

NAFTA's Article 1108 allows the NAFTA parties to maintain, and in certain circumstances amend, measures that do not conform to their NAFTA obligations. Therefore, if a NAFTA government imposed performance requirements on investors prior to NAFTA, these could be maintained post-NAFTA if listed as a reservation. In addition to the non-conforming measure, an annex to NAFTA states that "any subordinate measure" is also considered exempt.
In this case, Canada listed the federal statute (the Federal Accord Act) in its reservations, and explained that the accord requires benefit plans to ensure that expenditures on research, development and training are provided in the province.

A key point of contention, however, was whether the 2004 guidelines could be considered a "subordinate measure" that was covered by Canada's reservation. In coming to a decision on that question, the tribunal considered several questions: whether subordinate measures must be introduced prior to the commencement of NAFTA, whether they were "under the authority" of the reserved measure (i.e. the Federal Accord Act), and whether they were "consistent" with the reserved measure.

On the first question, the tribunal concluded that subordinate measures introduced after the commencement of NAFTA formed part of the reserved measure. This view was supported by submissions from Canada, the United States and Mexico.

On the second question, the tribunal determined that whether a subordinate measure is "under the authority" of the reserved measure is a matter of national law. Here the majority found little difficulty in concluding that the 2004 guidelines were under the authority of the Federal Accord Act.

On the third question, the tribunal decided that the issue of "consistency" needs to be viewed through both national and international law. It noted that a measure could provide different and additional burdens on an investor, and still be considered consistent. However, it concluded that the 2004 guidelines passed an appropriate threshold.

Key to that conclusion was the fact that the majority required consistency with both the principal reserved measure—the Federal Accords Act—and other subordinate measures, such as earlier benefit plans and board decisions. The principal reserved measure, together with its subordinate measures formed the "legal framework" against which consistency was to be judged. On this point, Philiippe Sands issued a dissenting opinion.

Judged from that perspective, the majority found that the 2004 guidelines inconsistent with other subordinate measures. The majority noted that the board had earlier recognized that it was difficult to provide fixed plans for expenditure on R&D over the life of a project, and therefore the earlier benefits plans had not been so stringent. By later introducing mandatory spending at prescribed levels, the 2004 guidelines introduced a "fundamentally different approach to compliance," stated the majority.

In the majority's view "the effect of the 2004 Guidelines bespeaks a set of requirements to purchase, use or accord a preference to local goods and services that have undergone a substantial expansion as compared with the earlier legal framework." The 2004 guidelines could therefore not be considered "consistent" with Canada's NAFTA reservations.

Philippe Sands' dissent

In a dissenting opinion, Professor Sands rejected the majority's decision that the 2004 guidelines must be consistent with the Federal Accord Act *and* subordinate measures. He countered that a new subordinate measure – such as the 2004 guidelines – must be consistent and under the authority of the measure excluded in NAFTA – in this case the Federal Accord Act.

In Professor Sands' opinion, the majority's decision to include subsequent subordinate measures was inconsistent with the ordinary meaning of Article 1108. It also led to practical problems by creating "a continually evolving standard, as new subsidiary measures are adopted."

Professor Sands stated that over time this will make it difficult for investors to determine the benchmark for 'authority' and 'consistency,' with implications for transparency given that new subordinate are not added to a country's NAFTA list of non-conforming measures.

Damages

Having diverged with Professor Sands in finding that Canada had breached its obligations under NAFTA, the majority went on to consider damages.

The parties disagreed on whether damages could be awarded for future losses. Canada argued that only actual losses could be compensated, while the claimants argued that their obligation to make future R&D payments is a "loss incurred."

The majority concluded that it had jurisdiction to decide on future damages. The next question, therefore, was how to assess damages for future losses. Here the majority noted that Canada had not yet demanded payment under the 2004 guidelines, and as such the claimants had not yet incurred actual losses. As such, the claimants were given 60 days to provide further evidence of actual damages.

With respect to the future payments under the 2004 guidelines, the majority found those were too uncertain. The claimants would need to need to initiate a new NAFTA claim to seek compensation for those losses, ruled the majority.

The tribunal decided that the allocation of costs of the arbitration and legal fees would be determined in the final award, to be issued after the claimants have been given 60 days to submit further evidence on damages.

Arbitrators in the case are Hans van Houtte (president), Merit Janow (claimants' nominee) and Philippe Sands (Canada's nominee).

The decision on liability and on principles of quantum is available here: http://italaw.com/sites/default/files/case-documents/italaw1145.pdf

The partial dissenting opinion by Professor Sands is available here: http://italaw.com/sites/default/files/case-documents/italaw1146_0.pdf

resources and events

Resources

Chinese Outward Investment: An Emerging Policy Framework
Nathalie Bernasconi-Osterwalder, Lise Johnson, Jianping Zhang, IISD, 2012

This book is an English-language compilation covering over 80 primary texts relevant to Chinese outward investment issued from January 2000 to January 2012. The compilation makes these primary sources easy to access and understand, in an effort to facilitate a broader and deeper understanding of Chinese outward investment and the policies supporting it, and, importantly, will facilitate more and improved discourse on and analysis of the relationship between Chinese outward investment and sustainable development. The report is available here: http://www.iisd.org/publications/pub.aspx?id=1720

Transparency
UNCTAD, March 2013

This report addresses transparency provisions in international investment agreements (IIAs), and offers practical policy guidance and drafting suggestions for IIA stakeholders. Entitled *Transparency*, the study is the most recent sequel to UNCTAD's Pink Series of papers on IIAs. It examines the way in which transparency is addressed in IIAs, and how the thinking on transparency provisions has evolved since the publication of UNCTAD's 2004 volume on the topic. Among the new developments cited is the expansion of transparency requirements to investors. A further trend is the emergence of transparency provisions within investor-state dispute settlement (ISDS). The study focuses in particular on the emergence of transparency as a consideration in ISDS. It reviews the implications of this conceptual shift for dispute resolution. A key feature of the analysis is a focus on a new tendency in IIAs to incorporate transparency and public-participation provisions in dispute settlement procedures. The report also considers the sustainable development implications of this approach. The report is available here: http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=415&Sitemap_x0020_Taxonomy=Investment

FDI Perspectives: Issues in International Investment, 2nd Edition
edited by Karl P. Sauvant and Jennifer Reimer, Vale Columbia Center on Sustainable International Investment, November 2012

This second edition of *FDI Perspectives* provides an overview of important contemporary issues relating to foreign direct investment and multinational enterprises for all those who are interested in this subject, but are not always in a position to follow diverse perspectives and what is being written in the various corners of this field. The contributions are grouped under the following headings: attracting FDI and its impact; the rise of emerging market investors; national policies; sustainable international investment; and international investment treaties and arbitration. The volume brings together all Perspectives published since the inception of this series. The ebook is available here. http://www.vcc.columbia.edu/books

GVCs and Development: Investment and Value Added Trade in the Global Economy
UNCTAD, February 2013

This report focuses on the ever-more complicated webs of investment and trade, by which raw materials extracted in one country may be exported to a second country for processing, then exported again to a manufacturing plant in a third country, which may then export to a fourth country for final consumption. Entitled *GVCs and Development: Investment and Value Added Trade in the Global Economy* estimates that the value chains administered in various ways by transnational corporations (TNCs) now account for 80 per cent of global trade. The report is a launch publication for a new UNCTAD database that maps the distribution of value added in global trade. The UNCTAD-EORA GVC Database—part of UNCTAD's FDI-TNCs-GVC Information System—provides new perspectives on trade links between economies in the trade–investment nexus. Among other things, the database focuses on the distribution of value added, on income and employment resulting from trade, and on how global investment drives patterns of value-added trade. The database covers 187 countries, including nearly all developing economies. It provides statistics on a broad range of industries of relevance to developing countries. UNCTAD intends to build on the preliminary analyses of the new data presented in this publication in its forthcoming World Investment Report 2013, which will examine the mechanisms through which GVCs can contribute to development, as well as the risks involved for developing countries. The report is available here: http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=411&Sitemap_x0020_Taxonomy=Investment

The History of ICSID
Antonio R. Parra, Oxford University Press, August 2012

This is the first book to detail the history and development of the International Centre for Settlement of Investment Disputes (ICSID) and its constituent treaty, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, covering the years from 1955 to 2010. The author, Antonio Parra, was first Deputy Secretary-General of ICSID. He traces the immediate origins of the Convention, in the years 1955 to 1962, and gives a stage-by-stage narrative of the drafting of the Convention between 1962 and 1965. He recounts details of bringing the Convention into force in 1966 and the elaboration of the initial versions of the Regulations and Rules of ICSID adopted at the first meetings of its Administrative Council in 1967. The three periods 1968 to 1988, 1989 to 1999, and 2000 to June 30, 2010, are covered in separate chapters which examine the expansion of the Centre's activities and changes made to the Regulations and Rules over the years. There are also overviews of the conciliation and arbitration cases submitted to ICSID in the respective periods, followed by in-depth discussions of selected cases and key issues within them. A concluding chapter discusses some of the broad themes and findings of the book, and includes several suggestions for further changes at ICSID to help ensure its continued success. The book is available to order here: http://ukcatalogue.oup.com/product/9780199660568.do

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Events 2013

March 24-25
ART AND HERITAGE DISPUTES, Maastricht University, Maastricht, The Netherlands, http://www.maastrichtuniversity.nl/web/faculties/fl/theme/researchportal/conferences/artandheritagedisputes1.htm

April 4
MAINTAINING STANDARDS IN INTERNATIONAL INVESTMENT ARBITRATION, Vale Columbia Center on Sustainable International Investment, New York, United States, http://www.vcc.columbia.edu/content/maintaining-standards-international-investment-arbitration

April 8
THE DOG THAT DID NOT BARK: THE MYSTERY OF THE MISSING DISPUTE SETTLEMENT CHAPTER IN NAFTA, Vale Columbia Center on Sustainable International Investment, New York, United States, http://www.vcc.columbia.edu/content/dog-did-not-bark-mystery-missing-dispute-settlement-chapter-nafta

April 21-23
CONVERGENCE AND DIVERGENCE IN INTERNATIONAL ARBITRATION PRACTICE, the Atlanta International Arbitration Society, Atlanta, Georgia, United States, http://arbitrateatlanta.org/events/convergence-and-divergence-in-international-arbitration-practice/

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

May 22-24
THE ROLES OF PSYCHOLOGY IN INTERNATIONAL ARBITRATION, Brunel Centre for the Study of Arbitration and Cross-Border Investment, London, UK, http://www.brunel.ac.uk/law

June 13-14
FIFTH LATIN AMERICAN ARBITRATION CONFERENCE, University of Buenos Aires' Law School, Buenos Aires, Argentina, http://www.clarbitraje.com/v2/?lang=en

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

November 7
SALIENT ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION, American University, Washington College of Law, Washington, DC. United States, https://www.wcl.american.edu/arbitration/symposium.cfm

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