



## Defining an ICSID Investment: Why Economic Development Should be the Core Element

by Omar E. García-Bolívar



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**Also in this issue:** BG Group Plc v Argentina; White Industries Australia Limited v India; Vito G. Gallo v Canada; ICS Inspection and Control Services Limited v Argentina.

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## Defining an ICSID Investment: Why Economic Development Should be the Core Element

Omar E. García-Bolívar

### feature 1

A dispute will only fall within the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID) if it directly arises out of an 'investment', as is provided by Article 25(1) of the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).<sup>1</sup> However, not only does the ICSID Convention fail to provide any definition of what constitutes an 'investment', the drafters of the ICSID Convention, in fact, made an express decision not to include such a definition. This absence has given rise to interesting issues of interpretation as ICSID tribunals have sought to arrive at an understanding of how the term 'investment' should be properly understood for the purposes of the ICSID Convention.

Various elements have been proposed in defining what is and what is not an ICSID investment. This brief essay argues that the most important element is the aim of furthering the economic development of the host state.

#### Intentions of states in international investment law

The regime for the international protection of foreign investment is sustained by two streams. On the one hand, foreign investors and their investments are granted international protection through International Investment Agreements (IIAs). On the other hand, the regime is informed by principles of customary international law and general principles of law that have evolved over time. Differing somewhat from the formation-process of customary international law and general principles of law, IIAs embody the express manifestation of states' intentions.

There are, however, unspoken assumptions contained within these agreements. For example, it is clear that states enter into IIAs with the expectation that this will enhance the chances of attracting capital, and that this will, in turn, promote their economic development.

Indeed, development – generally understood as the general welfare of a people<sup>2</sup> – is a key goal of states, and capital is but a means of financing it. Traditionally, the development trajectories of many states have been self-financed through revenues obtained from either direct exploitation of each country's resources or by collecting duties from those that have conducted business within their boundaries. Over time, the sources of capital have expanded to include the obtaining of credit and the provision of international aid. And more recently, countries have rightly appreciated that foreign investment could also be a significant means of financing and promoting the welfare of their peoples.



Bearing this in mind, it becomes clear that it is important to consider in the interpretation of IIAs the intention of states when entering into those agreements. In some cases, that interpretation is relatively straightforward as the IIA itself identifies the intentions of the state parties, and sets out the object and purpose of the agreement. But in other instances, the states' intentions are not expressly stated. Where this is the case, it is suggested that the approach adopted by the arbitrators should be one of looking at all the surrounding circumstances, not only at the preamble and preparatory work, but also at the *raison d'être* of the states themselves and the reasons for entering into the agreement — in other words, the promotion of the welfare and development of communities within the host state.

#### Economic development as a goal of relevant international instruments

*The International Centre for Settlement of Investment Disputes*

Support for this position can be drawn from a number of international instruments. In particular, the ICSID Convention has addressed the question of the purpose of IIAs by means of textual reference to economic development in its preamble where it states: "Considering the need for international cooperation for economic development, and the role of private international investment therein."<sup>3</sup>

While the report from the Executive Directors states that the primary purpose of the Convention is to stimulate international investment flows, it underlines the body's desire to address the interests of both investors and states:

'12. ... [a]dherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.

13. ... [t]he provisions of the Convention maintain a careful balance between the interests of investors and those of host States.’<sup>4</sup>

There is also a clear link between ICSID and the World Bank, which has strong developmental goals in its lending practices. For example, the purpose of the International Bank for Reconstruction and Development (IBRD), one of the entities that comprise the World Bank, is, among others, to facilitate and encourage international investment for: (a) productive purposes; (b) for the development of the productive resources of countries to increase productivity, standards of living and conditions of labor.<sup>5</sup>

Furthermore, ICSID is, of course, part of the World Bank Group, together with the IBRD and other multilateral institutions. As portrayed by the World Bank Group on its website, ICSID complements the overall mission of the group by helping “[p]eople help themselves and their environment by providing resources, sharing knowledge, building capacity and forging partnerships in the public and private sectors.”<sup>6</sup>

The level of cooperation between ICSID and the World Bank Group exceeds that of merely sharing premises. For one, there is a financial linkage, as any excess in expenditure which the Centre cannot meet shall be borne by the Bank.<sup>7</sup> There is also an operational linkage as the President of the Bank is also the Chairman of the Administrative Council of ICSID,<sup>8</sup> and has the authority, among other things, to appoint arbitrators in given circumstances.<sup>9</sup> More importantly, perhaps, there is also a shared cultural approach. Embedding ICSID within the World Bank framework inherently places it within a context of framing capital flows as a means to an end, rather than as the goal themselves. In particular, this contextual setting necessarily requires an emphasis on the developmental benefits of investment in-flows for recipient states.

In sum, ICSID is not just another arbitration centre. It is a unique arbitration facility with a purpose that goes beyond the resolution of disputes between investors and states. It has an institutional role designed by the parties to the ICSID Convention, but it also has a mission that needs to be consistent with the multilateral entities with which it is associated — and that purpose cannot be detached from the promotion of the economic development of host states.

### *International Investment Agreements*

The preamble to the Energy Charter Treaty,<sup>10</sup> a multilateral treaty which includes provisions on the promotion and protection of investments, expressly states that the Charter’s measures to liberalize the energy sector are meant to spur economic development likened to economic growth: “Wishing to implement the basic concept of the European

Energy Charter initiative which is to catalyse economic growth by means of measures to liberalize investment and trade in energy.”<sup>11</sup>

In contrast to the ECT, however, the majority of IIAs contain either no reference to economic development, use ambiguous language in defining their object and purpose, or limit their purpose to the promotion and protection of foreign investment, requiring those seeking to interpret them to engage in a deeper teleological interpretation.

The issue of interpretation is often further complicated in the case of investment provisions within free trade agreements. For example, Chapter 11 of the North America Free Trade Agreement (NAFTA) deals with investments but does not mention economic development.<sup>12</sup> For this reason, it is suggested that the purpose, objective and preambular statements of NAFTA as a whole should be applicable to the investment chapter. In particular, several statements in the Preamble indicate that the treaty’s obligations are to be considered in a broader context. This is evidenced by the state parties resolving to:

‘CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation; ...

ENSURE a predictable commercial framework for business planning and investment; ...

UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;

PRESERVE their flexibility to safeguard the public welfare;

PROMOTE sustainable development;

STRENGTHEN the development and enforcement of environmental laws and regulations; and

PROTECT, enhance and enforce basic workers’ rights’.<sup>13</sup>

Taken together, these statements point to an overarching approach, intended to inform the implementation of NAFTA, which has a broader focus than solely that of trade and investment promotion.

Similarly, the 2004 US Model BIT also emphasizes the implicit bargain between capital-exporting and host states, recognizing that “agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the parties” and states that signatories agree that “a stable framework for investment will maximize effective utilization

of economic resources and improve living standards.”<sup>14</sup> The interdependence between the provision of protective treatment for investment and the stimulation of economic development has, perhaps, not been spelled out in the clearest of ways, and this lack of express linkage within the operative text of the treaty could give rise to different interpretations. However, the fact that the preamble of the Model BIT refers specifically to economic development should be taken to indicate that the purpose of agreements following this model is to protect foreign investments so as to attract capital and foster the economic development of the state parties involved.

Other BITs also include references to the promotion of economic growth in the economies of the states parties. The BIT between Cuba and the United Kingdom, for instance, highlights the desire of the parties to create favorable conditions for foreign investment while recognizing that the agreement will “contribute to the stimulation of business initiative and will increase prosperity in both States.”<sup>15</sup> Another objective common to many IIAs is the enhancement of economic cooperation. For instance, the stated purpose of the Sweden-Venezuela BIT is the intensification of economic cooperation for the mutual benefit of both countries and for the creation of conditions conducive to investment.

Overall, however, the manner in which IIAs tend to define their purpose leaves significant room for interpretation contrary to the interests and unstated objectives of party states when protecting foreign investments. This is clearly unsatisfactory, but with arbitral interpretations of IIAs that accurately reflect the implicit intentions of host states, the potential negative impact on their economic development could be lessened.

“ Focusing solely on the positive impact of an investment on GDP cannot in itself be conclusive in determining whether an investment has contributed to the economic development of a country. ”

#### **Economic development as considered in the jurisprudence of arbitral tribunals**

Most cases on the relevance of economic development in international investment law have dealt with it in the context of an ICSID protected investment. As the ICSID Convention does not define the term ‘investment’, tribunals have considered whether there are criteria that can be read into its provisions to determine when an investment has been made for the purposes of

the ICSID Convention; this being an issue that, in principle, is very important for jurisdictional reasons.

To date, the most emblematic case has been that of *Salini*, which gave rise to what is now known as the ‘*Salini test*’. In *Salini Costruttori SpA and Italstrade SpA v. Morocco*,<sup>16</sup> the tribunal considered the criteria generally identified by the Convention’s commentators, indicating that those were: “contributions, a certain duration of performance of the contract, and a participation in the risks of the transaction.”<sup>17</sup> The tribunal also noted, after considering the treaty’s preamble, that “one may add the contribution to the economic development of the host State of the investment as an added condition.”<sup>18</sup> The tribunal went on to identify at least two of the criteria needed for an investment to contribute to the economic development of the host state: (a) the investment should be beneficial to the public interest; and (b) there should be some transfer of know-how.<sup>19</sup>

The *Salini test* has been followed by tribunals in many subsequent disputes, some in whole, some in part and some with subtle changes.<sup>20</sup> Others have taken a different approach in connection with the fourth criterion. One such case of significance is *Malaysian Historical Salvors Sdn Bhd v Malaysia (‘MHS’)*.<sup>21</sup> In this award, subsequently annulled by an *ad hoc* Annulment Committee, the sole arbitrator found that a positive and significant contribution to the economic development of the host country was a requirement for the investment to come under the protection of the ICSID Convention. Significantly, the tribunal held that enhancing the Gross Domestic Product (GDP) of the local economy was the factor that determined the criterion of economic development.<sup>22</sup> The tribunal then qualified this, and stated that the enhancement of GDP would have to be by more than a small amount in order for the investment to be protected by the ICSID Convention.

In an earlier case, *Ceskoslovenska obchodni banka, a.s. v Slovak Republic (CSOB)*,<sup>23</sup> it was also concluded that the investment had to have a positive impact on the host state’s development. The tribunal considered that the ICSID Convention’s preamble “permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.”<sup>24</sup>

Thus, if one combines the criteria for determining a contribution to economic development as applied by the ICSID Tribunals in *Salini*, *MHS* and *CSOB*, it can be concluded that the investment must: (a) be made for the public interest; (b) transfer know-how; (c) enhance the GDP of the host state; and (d) have a positive impact on the host state’s development.

In direct contrast, other tribunals considering

the term 'investment' within the meaning of the ICSID Convention have taken a markedly different approach to the element of a contribution to economic development. Most significantly, the majority of these cases have one element in common — they have rejected or downplayed the criterion of economic development due to the perceived difficulty or impossibility of ascertaining its scope.

At one end of the spectrum, the *ad hoc* Annulment Committee in *Patrick Mitchell v. Democratic Republic of Congo* watered down the importance of the criterion, stating that:

[t]he existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad and also variable depending on the case.<sup>25</sup>

A more explicit dismissal of the criterion can be found in *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*. In this award, the tribunal took the view that it did not seem necessary that the investment contribute to the economic development of the country; this was a condition that the tribunal considered to be difficult to establish, and one that was implicitly covered by the other three elements of an 'investment.'<sup>26</sup>

Other tribunals have looked at the purpose of IIAs, not so much to constrain explorations into the definition of economic development, but to consider the goal of protecting the interests of the investors. For example, in *Siemens, A.G. v. Argentina*,<sup>27</sup> the tribunal analysed the purpose of the Germany-Argentina BIT to find that the agreement was meant to promote investment and create conditions favorable to investors. The tribunal ruled that the BIT should be interpreted in this way, stating that: "The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a Treaty 'to protect' and 'to promote' investments ... The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative."<sup>28</sup>

Where investor-state disputes are determined in fora other than ICSID, the so-called economic development defence to object to the jurisdiction of a tribunal is probably not possible, unless the relevant IIA has made references to economic development as the reason for the parties to grant international protection to foreign investments. But in such a hypothetical situation, tribunals would most likely consider the defence on the merits. For now, it seems that cases under ICSID will dominate

the discussion on the analysis of economic development as an outer limit of a protected investment.

### **Economic development: a measurable concept**

The divergence of opinion on the extent to which contribution to economic development is determinative of an investment's entitlement to protection under IIAs seems to stem from the difficulties associated with how to define and measure economic development and in ascertaining what constitutes relevant contributions towards it. However, rather than failing to give effect to this important criterion by placing it in the 'too hard basket,' as several tribunals appear to have done, further intellectual engagement with the concept is, in fact, what is required.

In particular, it is suggested that future tribunals should seek to provide a comprehensive analysis of questions such as: (i) how economic development should be defined within the context of IIAs; (ii) what amounts to a contribution to economic development; (iii) how a positive contribution to economic development can be measured; and (iv) whether any 'negative' factors related to the investment or conduct of the investor (such as breaches of human rights, corruption or harm to the environment) are relevant.

Economic development is certainly a concept that can be very broad and can, potentially, encompass many disparate elements. However, through a review of the relevant documents and cases, several factors have emerged that point to certain non-exclusive criteria for determining when an investment has made a contribution to the economic development of the host country. The jurisprudence indicates that an assessment will be made of the following: (a) the extent to which the investment benefits the public interest; (b) whether any transfer of technological knowledge or 'know-how' from investor to the host state has taken place; (c) the degree to which the investment has enhanced the GDP of the host country; and (d) whether the investment has had a positive impact on the host state's development. A hermeneutic analysis of the ICSID Convention and the World Bank's constitutive instruments also reinforces this approach, emphasising that investments are to be made for: (a) productive purposes as opposed to speculative purposes; and (b) for the development of the resources of countries so as to increase productivity, standards of living and conditions of labor.

The wording of World Bank documents should also be of assistance in delineating what is meant by 'economic development' in the context of IIAs, and in particular the 1992 Guidelines for Treatment of Foreign Investors. Although, not a binding document, it does provide a set of recommendations intended to be incorporated into states' domestic regulations on the treatment of foreign investment. In its preamble, it states that it is recognized that: '[a] greater flow of foreign direct investment brings substantial benefits to ... the economies of developing countries ...

through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade'.<sup>29</sup> This statement provides a useful indication of factors to take into account when assessing the extent to which an investment has contributed to or encouraged the creation of such conditions within the host state.

There are, of course, already very specific tools that can be utilised to assess contributions to the local economy. For example, the impact of the investment on the host state's GDP is one indicator that can be easily measured by comparing the value of the goods or services produced by the transaction with reliable data on the overall value of goods and services produced in the given country in a given period of time (as may be provided by, e.g., the World Bank). It must be borne in mind, however, that economic growth is distinct from economic development. Focusing solely on the positive impact of an investment on GDP cannot in itself be conclusive in determining whether an investment has contributed to the economic development of a country. It is, of course, a *prima facie* indicator of positive contribution. However, an investment might enhance the GDP and yet be detrimental to the economic development of a country as when, for example, human rights standards are violated. It is to take account of such circumstances that a more sophisticated approach needs to be developed to the relationship between contribution to economic development and availability of protection under the treaty — one in which the contribution is assessed *per se* and then, if it suffices on this *prima facie* basis, is examined for any negative factors that may cancel out its apparent positive impact on the economic development of the host state. If, upon analyzing the facts, it is concluded that the investment has not contributed to the economic development of the host state, it should also follow that the investment falls outside the limits of the protection granted by ICSID.

## Conclusion

Although this is still very much a contentious area of international investment law, it is clear that several factors need to be satisfied under the test of whether an 'investment' has contributed to the economic development of the host state. If an investment is contrary to the public interest, has not generated any knowledge transfer to the host state, has not enhanced the economy or its productivity, has not increased the standards of living of the host country or the labor conditions, it almost certainly has not made a contribution to the economic development of that country.

Arbitrators and judges have an important task on defining the economic development of foreign investment and its relevance. Of course, they cannot go beyond the purpose of the agreements as mentioned in the texts, the preambles and the *travaux préparatoire* — that is to the point where negotiators have left the IIAs. Hence, negotiators of IIAs need to be more diligent and understand how important it is to expressly state the real purpose

## Author

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This essay is based on a longer article entitled "Economic Development at the Core of the International Investment Regime", published in *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press (2011).

## Notes

- 1 Convention for the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (ICSID Convention).
- 2 See, e.g., Amartya Sen, *Development as Freedom* (1999) xii: 'Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency. The removal of substantial unfreedoms, it is argued here, is constitutive of development.'
- 3 The full text of the ICSID Convention, Regulations and Rules are available on the World Bank website: <[www.worldbank.org/icsid](http://www.worldbank.org/icsid)> (last accessed 5 November 2010).
- 4 Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, available at <[www.worldbank.org/icsid](http://www.worldbank.org/icsid)> (last accessed 5 November 2010).
- 5 IBRD Articles of Agreement, Article 1, available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049563~pagePK:43912~menuPK:58863~piPK:36602,00.html#1> (last accessed on December 6, 2010).
- 6 See the website of the World Bank at: <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html>> (last accessed 5 November 2010).
- 7 ICSID Convention, Article 17.
- 8 *Ibid.* Art 5.
- 9 *Ibid.* Art 38.
- 10 Energy Charter Treaty, opened for signature 17 December 1994, (1995) 34 ILM 360 (entered into force 16 April 1998) ('ECT').
- 11 *Ibid.* preamble. Article 2 of the ECT reinforces the economic development objective by referring to the Charter's general objectives, stating, 'This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.'
- 12 North American Free Trade Agreement, signed 17 December 1992, United States-Canada-Mexico, 32 ILM 289 (entered into force 1 January 1994) ('NAFTA'), available at <[www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/index.aspx](http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/index.aspx)> (last accessed 5 November 2010).
- 13 *Ibid.* preamble.
- 14 Treaty Between the Government of The United States Of America And The Government Of [Country] Concerning The Encouragement And Reciprocal Protection Of Investment (U.S. BIT Model (2004)), <<http://ita.law.uvic.ca/investmenttreaties.htm>> (last accessed 5 November 2010).
- 15 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Cuba for the Promotion and Protection of Investments, signed on 30 January 1995 (entered into force 11 May 1995), available at <[www.unctad.org/sections/dite/ia/docs/bits/cuba\\_uk.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/cuba_uk.pdf)> (last accessed 5 November 2010).
- 16 *Salini Costruttori SpA and Italstrade SpA v. Morocco* (ICSID Case No ARB/00/4, Decision on Jurisdiction of 23 July 2001).
- 17 *Ibid.* para 52.
- 18 *Ibid.* See also Christoph Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge University Press, 2nd ed, 2009), Article 25, paras. 153-174.
- 19 The Tribunal said: 'It cannot be seriously contested that the highway shall serve the public interest. Finally, the Italian companies were also able to provide the host State of the investment with know-how...': *ibid.* para 57
- 20 E.g., *Joy Mining Machinery Limited v. Egypt* (ICSID Case No. ARB/03/11, Decision on Jurisdiction of 23 July 2001), para 53; *Jan de Nul N.V. v. Egypt* (ICSID Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006), para 91; *Helnan International Hotels A/S v. Egypt* (ICSID Case No. ARB/05/19, Decision on Jurisdiction of 17 October 2006), para 77; *Malaysian Historical Salvors Sdn Bhd v. Malaysia* (ICSID Case No. ARB/05/10, Award on Jurisdiction of 17 May 2007), paras 73-74.
- 21 *Malaysian Historical Salvors Sdn Bhd v. Malaysia* (ICSID Case No. ARB/05/10, Award on Jurisdiction of 17 May 2007).
- 22 *Ibid.* para 123.
- 23 *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4, Decision on Jurisdiction of 24 May 1999).
- 24 *Ibid.* para. 64.
- 25 *Patrick Mitchell v. Democratic Republic of Congo* (ICSID Case No. ARB/99/7, Decision on Annulment of 1 November 2006), para 33.
- 26 *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria* (ICSID Case No. ARB/05/3, Decision of 12 July 2006) para 73(iv).
- 27 *Siemens, A.G. v. Argentina* (ICSID Case No ARB/02/8, Decision on Jurisdiction of 3 August 2004).
- 28 *Ibid.* para 81.
- 29 Guidelines on Treatment of Foreign Investments, World Bank (1992), available at <[www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/11/10/000094946\\_99090805303082/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/11/10/000094946_99090805303082/Rendered/PDF/multi_page.pdf)> (last visited 5 November 2010).

# Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern

Gus Van Harten

## feature 2



Debates about investment treaties often raise questions about fairness and independence in international investment arbitration. Some observers argue that investment arbitration offers a neutral and impartial forum in which to resolve investor-state disputes as a basis for protecting foreign-owned assets and ensuring the rule of law.<sup>1</sup> Others claim that the arbitration mechanism favours investors and Western capital-exporting states at the expense of respondent governments, especially in the developing world.<sup>2</sup> Overall, principles of fairness and independence are integral to the legitimizing role of international arbitration.<sup>3</sup>

A forthcoming study tested hypotheses of potential bias in investment arbitration.<sup>4</sup> In particular, it examined whether there was evidence to support expectations that the resolution of contested legal issues in investment treaty law would be influenced by apparent economic interests of arbitrators or the arbitration industry.

The rationale for the study's hypotheses derived from assumptions about arbitrator incentives, based on the unique make-up of investment treaty arbitration.<sup>5</sup> First, the asymmetrical claims structure and absence of institutional markers of judicial independence could create incentives for arbitrators to favour the class of parties that is able to initiate use of the system.<sup>6</sup> Second, where they have a significant career interest in the field, arbitrators could be influenced by a need to appease actors with power or influence over specific appointment decisions or over the wider position of the relevant arbitration industry.<sup>7</sup>

Such assumptions have been rejected by participants in the system<sup>8</sup> and it is not suggested in the study that they are the only possible factors that may influence arbitrator behaviour. On the other hand, the assumptions reflect the "question of the incentives that so often operate on arbitrators – that is, of their self-interest in trying to secure and expand prospects for future arbitral appointments" and the related expectations that "[a]n arbitrator may perceive that his award is likely to have an impact on his own acceptability, that is, on the probability of his being appointed again... [o]r an award may affect the marketability of the appointing organization, on which the arbitrator depends for future referrals."<sup>9</sup>

Two significant tendencies were observed. First, there was a strong tendency toward expansive resolutions of contested issues of law that enhanced the compensatory

promise of the system for claimants and, in turn, the risk of liability for respondent states. The second was an accentuated tendency toward expansive resolutions where the claimant was from a Western capital-exporting state.

### Outline of the study

The study was based on a systematic content analysis<sup>10</sup> of all publicly-available awards (i.e. decisions) dealing with jurisdictional matters in 140 known cases under investment treaties to May 2010. The awards were coded for resolutions, by each of the arbitrators, of a series of legal issues of jurisdiction that were contested more broadly in awards or secondary literature. These tend to be issues on which the text of an investment treaty is ambiguous or silent, leading to disagreements about the appropriate approach. Expansive resolutions of an issue may be said to favour claimants by expanding the authority of investment treaty tribunals and by allowing more claims to proceed.

In brief, the coded topics and issues were:

1. Corporate person investor – Should a claim be allowed where ownership of the investment extends through a chain of companies running from the host state to the home state via a third state? Expansive approach: yes. Restrictive approach: no.

2. Natural person investor – Should a claim be permissible where brought by a natural person against the only state of which the person is a citizen, or against a state of which the person is a citizen without confirmation of dominant and effective nationality? Expansive answer: yes to either of the two questions. Restrictive approach: no to either of the two questions.

3. Investment – Should the *Fedax* criteria<sup>11</sup> be applied to limit the concept of investment under the *ICSID Convention*; alternatively (regardless of whether under the *ICSID Convention*) should there be a requirement for an actual transfer of capital into the host state as a feature of an investment or should the concept of investment be limited to traditional categories of ownership? Expansive approach: no to any of the three questions. Restrictive approach: yes to any of the three questions.

4. Minority shareholder interests – Should a claim by a minority shareholder be allowed where the treaty does not permit claims by minority shareholders expressly, such as where the treaty does not mention "shares" in the definition of investment, or should it be permitted without limiting the claim to the shareholder's interest in the value and disposition of the shares (as opposed to interests of the domestic firm itself)? Expansive approach: yes to either of the two questions. Restrictive approach: no to either of the two questions.

5. Permissibility of investment – Should there be an evident onus placed on the claimant (or the respondent state) to demonstrate that an investment was (or was not) affirmatively approved or was (or was not) based on corrupt practices? Expansive approach: onus on the respondent state for either issue. Restrictive approach: onus on the claimant for either issue.

6. Parallel claims – Should a claim be allowed in the face of a treaty-based duty to resort to local remedies that clearly was not satisfied by the claimant; in the face of a contractually-agreed dispute settlement clause relating to the same factual dispute; in the face of an actual claim, arising from the same factual dispute, brought via an alternative path of a treaty-based fork-in-road clause; or in the face of an actual claim, arising from the same factual dispute, brought via another treaty where the claim could lead to a damages award in favour of the investor? Expansive approach: yes to any of the four questions. Restrictive approach: no to any of the four questions.

7. Scope of most-favoured-nation treatment – Should the concept of most-favoured-nation treatment be extended to non-substantive provisions of other treaties (such as dispute settlement provisions)? Expansive approach: yes. Restrictive approach: no.

**Results of the study<sup>12</sup>**

*Expansive versus restrictive issue resolutions*

The results supported the hypothesis that arbitrators would tend to adopt an expansive (claimant-friendly) approach to the resolution of the coded issues.<sup>13</sup> Table A summarizes the variation in issue resolutions. As indicated, there were different variations and different amounts of data for each issue.

Table A: Classification of Issue Resolutions by Issue

Issue	No. of issue resolutions	Resolution of issue	
		Expansive	Restrictive
1 - corporate person investor	69	81.94%	18.06%
2 - natural person investor	6	0.00%	100.00%
3 – concept of investment	116	72.27%	27.73%
4 – minority shareholder interest	72	92.00%	8.00%
5 – permissibility of investment	27	66.67%	33.33%
6 – parallel claims	165	82.74%	17.26%
7 – scope of MFN treatment	60	50.00%	50.00%
<b>Cumulative</b>	<b>515</b>	<b>76.09%</b>	<b>23.91%</b>

The results indicated that the strong tendency in favor of an expansive approach was led by resolutions of four issues: corporate person investor; concept of investment; minority shareholder interest; and parallel claims. On one issue, the scope of MFN treatment, arbitrators were split between expansive and restrictive approaches. There was insufficient data to draw conclusions on two other issues: natural person investor and permissibility of investment.

These results provide tentative cause for concern for those who expect the system to deliver a degree of evenness<sup>14</sup> – between the interests of claimants and respondent states – in the resolution of jurisdictional issues, where the text of the treaty is ambiguous or silent on the issue. States have lost across a range of contested issues, sometimes overwhelmingly so, in the litigation of jurisdictional objections to investor claims. If observers expected the coded issues to be resolved restrictively, this has not been the case in practice.

*Role of claimant nationality*

The results also supported the hypothesis that an expansive approach would be accentuated where the claimant was a national of France, Germany, the U.K., or

the U.S.<sup>15</sup> These countries were chosen as an approximate measure of major Western capital-exporting states. The measure was supplemented by analyses of additional groupings associated with Western capital-exporting interests.

Overall, the effect of claimant nationality for these four countries, as a group, was statistically significant. Table B outlines the probability of an issue being resolved expansively in each of the five categories of claimant nationality, when other covariates were held steady.

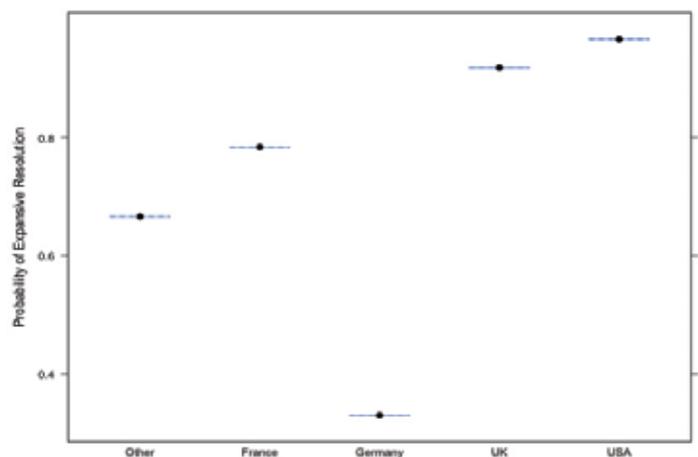
Table B: Effects of Claimant Nationality on the Likelihood of an Expansive Resolution

Claimant nationality	Probability of expansive resolution	Statistical significance
France	.86	p=.005
Germany	.47	p=.38
United Kingdom	.95	p<.001
United States	.98	p<.001
All others	.69	p<.001

Overall, issue resolutions in cases brought by claimants from France, Germany, the U.K., or the U.S. were 84% more likely to be resolved expansively when compared to cases brought by claimants from other states. Besides this overall effect, the analysis indicated that country-by-country variations between claimants from France, the U.K., or the U.S. and claimants from other states were statistically significant, meaning only that it is unlikely they were explained by chance.

Figure B presents the expected probability of an expansive resolution for each category of claimant nationality in this grouping, when other covariates were held steady.

Figure B: Probability of expansive resolution for claimant nationalities in Grouping #1



The results confirmed a more detailed expectation that the greatest accentuation of an expansive approach would occur for U.S. claimants, followed by the other three states. That said, there was limited country-specific data for Germany and France. Of the 100 cases, 30 involved a

U.S. claimant,<sup>16</sup> 9 a U.K. claimant,<sup>17</sup> 6 a French claimant,<sup>18</sup> and 5 a German claimant.<sup>19</sup> Also, the hypothesis was not supported by the isolated results for Germany. There was no statistically-significant difference between German claimants and claimants from other states; moreover, there was an apparent tendency toward a less expansive approach for German claimants, although this finding was not statistically-significant in that it was accompanied by an unacceptable risk (36%) that the variation was explained by chance.

The strongest finding was that claimants from major Western capital-exporting states who bring claims under a bilateral investment treaty or the Energy Charter Treaty (as opposed to the North American Free Trade Agreement [NAFTA]), and that raise one of four of the coded issues before frequently-appointed arbitrators, are more likely to benefit from an expansive approach. By extension, it can be inferred that a respondent state, although at a disadvantage on such issues relative to investors generally, is more likely to benefit from a restrictive approach where the claimant has the nationality of a state other than a major Western capital-exporter, where the claim is under NAFTA, and where the arbitrators are not frequently-appointed.

The robustness of the findings for the primary grouping (France, Germany, the U.K., and the U.S.) was tested further by analyzing other groupings of claimant nationalities associated with Western capital-exporting interests.<sup>20</sup> Additional statistically-significant evidence was found of an accentuated tendency toward an expansive approach in cases brought by claimants from a G-7 state; a Western European former colonial power; or an OECD member state as of 1990 or 2000. Similar tendencies were observed for other groupings based on UN geographic classifications and World Bank income classifications, but the findings were not statistically-significant.

## Conclusions and limitations

The study offers tentative evidence of systemic bias in the resolution of jurisdictional issues in investment treaty arbitration. The tested expectations were that arbitrators would favour legal interpretations that tend to benefit claimants by expanding the authority of tribunals and by allowing more claims to proceed, especially in cases where the claimant is from a Western capital-exporting state. That said, the study also has important limitations. An initial caveat is that the findings do not establish evidence of actual bias on the part of any individual or in any particular case. Even at a systemic level, there is a range of possible explanations for the results, some of which do not entail any inappropriate bias, and further inferences are required to connect the observed tendencies to the underlying rationales for systemic bias. Likewise, there are limitations of the coding process and analytical tools, and of quantitative methods generally, in the examination of adjudicative bias.<sup>21</sup>

The key finding is that the observed tendencies exist in the coded data and are very unlikely to be explained by chance. Notable also is the fact that the observed tendencies reflect variations in the resolution of contested issues arising from ambiguity or silence in investment treaties. Such variations are less likely to be explained by untested factors that may drive case outcomes, such as factual differences among cases or hidden meaning in the text of awards.<sup>22</sup> More broadly, the wider question of possible bias calls for further study, whereas the question of system design should depend ultimately on policy judgments about the system's structure and processes as evaluated against doctrinal and theoretical principles of adjudication.

## Author

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## Notes

- 1 e.g. Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005) at 265; Charles N. Brower and S.W. Schill "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law" (2009) 9 *Chicago Journal of International Law* 471.
- 2 e.g. Olivia Chung "The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration" (2007) 47 *Virginia Journal of International Law* 953; Ibranke T. Odumosu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World" (2007) 8 *San Diego International Law Journal* 345.
- 3 José A.F. Costa, "Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields" (2011) 1(4) *Oñati Socio-Legal Series* at 3; Catherine A. Rogers, "The Vocation of the International Arbitrator" (2005) 20 *American University International Law Review* 957 at 1006-7.
- 4 Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" *Osgoode Hall Law Journal* (forthcoming). A draft version of the study has been posted at [www.ssrn.com/author=638855](http://www.ssrn.com/author=638855) along with the dataset and coding notes.
- 5 See especially Yves Dezalay and Bryant G. Garth, *Dealing in Virtue* (Chicago: University of Chicago Press, 1996) at 8-9, 36, 45, 50, 70, 93, 124, and 194.
- 6 Drahozal, *supra* note 5 at 500 and 503; Nudrat B. Majeed, "Investor-State Disputes and International Law: From the Far Side" (2004) 98 *ASIL Proceedings* 30 at 31.
- 7 Walter Mattli, "Private Justice in a Global Economy: From Litigation to Arbitration" (2001) 55 *International Organization* 919 at 921-2; Rogers, *supra* note 4 at 968.
- 8 e.g. William W. Park, "Arbitrator Integrity: The Transient and the Permanent" (2009) 46 *San Diego Law Review* 629 at 651-3 and 657-66.
- 9 Rau, *supra* note 19 at 521-2.
- 10 Mark A. Hall and Ronald F. Wright, "Systemic Content Analysis of Judicial Opinions" (2008) 95 *California Law Review* 63
- 11 *Fedax NV v. Republic of Venezuela* (Award of 11 July 1997), 5 ICSID Rep 186, 37 ILM 1378. The criteria include duration, regularity of profit and return, assumption of risk, substantial commitment, and significance for the host state's development.
- 12 The results summarized here relate to the first two hypotheses of the study. There was insufficient data to test a third hypothesis of systemic bias in favour of France, Germany, the U.K., and the U.S. as respondent states.
- 13 To confirm this, a statistical model (a one-sample binomial test) was used by a statistician, Heather Krause, who was employed by the author as a research assistant. The model generated a significance level of  $p < 0.001$ . Thus, the likelihood that the variation between expansive and restrictive resolutions was explained by chance was very low.
- 14 Some arbitrators and commentators present the system in these terms (e.g. Federico Orrego-Vicuña, "Arbitrating Investment Disputes" (2008), posted on the International Council for Commercial Arbitration website).
- 15 This was confirmed using a statistical model that controlled for different potential predictors of variances in issue resolutions and that was designed to mitigate the risk of over-statement of the significance or effect of any predictor. These fixed effects were controlled for: claimant's state of nationality, specific issue among the coded issues, treaty or treaty type, total appointments per arbitrator, and total issue resolutions per case.
- 16 As a descriptive finding, in 30 cases brought by a U.S. claimant 47 coded issues were resolved expansively or restrictively (leading to 140 distinct issue resolutions by individual arbitrators in those cases). There were 128 expansive resolutions and 12 restrictive resolutions. The cases were spread among 12 respondent states.
- 17 As a descriptive finding, in 9 cases brought by a U.K. claimant 17 coded issues were resolved expansively or restrictively (leading to 49 distinct issue resolutions by individual arbitrators in those cases). There were 42 expansive resolutions and 7 restrictive resolutions. The cases were spread among 6 respondent states.
- 18 As a descriptive finding, in 6 cases brought by a French claimant 15 coded issues were resolved expansively or restrictively (leading to 45 distinct issue resolutions by individual arbitrators in those cases). There were 36 expansive resolutions and 9 restrictive resolutions. Notably, 5 of the cases were against Argentina; the remaining case was against the Dominican Republic.
- 19 As a descriptive finding, in 5 cases brought by a German claimant 8 coded issues were resolved expansively or restrictively (leading to 24 distinct issue resolutions by individual members of the tribunal in those cases). There were 13 expansive resolutions and 11 restrictive resolutions. The cases were spread among four respondent states (Argentina, Philippines, Russia, and the Ukraine).
- 20 These analyses were not based on any detailed country-specific expectations.
- 21 Hall and Wright, *supra* note 6 at 87-8; Klaus Krippendorf, *Content Analysis: An Introduction to Its Methodology* (Newbury Park: Sage Publications, 1980) at 22.
- 22 Brian Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence" (1997) 76 *Texas Law Review* 267 at 269; Jonathan P. Kastellec, "The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees" (2010) 7 *Journal of Empirical Legal Studies* 202 at 205-6; Hall and Wright, *supra* note 6 at 99.

# Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve

## Sergey Ripinsky

### feature 3



In January 2012, the Bolivarian Republic of Venezuela denounced the ICSID Convention,<sup>1</sup> becoming the third country – after Bolivia and Ecuador – to do so. The exit from the global forum for the settlement of investment disputes signals these countries' apparent loss of faith in the system and raises questions about the Convention's fitness for purpose. This article looks at the possible reasons which prompted Venezuela to take this step, the impact it is likely to have and some broader issues arising from it.

#### Policy context

The Foreign Ministry's 2012 press-release points out that the country acceded to the Convention in 1993 by "a decision of a provisional and weak government, devoid of popular legitimacy, and under the pressure of transnational economic sectors involved in the dismantling of Venezuela's national sovereignty."<sup>2</sup> The current government thus sees itself as correcting the mistakes of the earlier one. Far-reaching economic reforms by President Hugo Chávez's government also indicate that – in the view of those currently in power – joining ICSID was one of many things where the previous regime had gone wrong.

Chávez's economic programme seeks to re-establish the role of the state in the economy, especially in strategic sectors, farmed out to foreign corporations in the 1990s. Over the past few years, Chávez's government has carried out a wave of nationalizations of domestic-and foreign-owned assets in petroleum, steel, agribusiness, construction, tourism, telecommunications, banking and some other industries. Most foreign investors' grievances against the government are the fallout of these claw-back policies; the main issue in dispute is usually whether the amount of compensation offered by the government is sufficient.

#### Impact on pending and future claims

From a purely legal perspective, withdrawal from ICSID does not offer any immediate benefits to Venezuela. Being second only to Argentina in this respect, the country currently has 20 cases pending against it at ICSID<sup>3</sup> (ten of them initiated in 2011) and faces the prospect of having to pay billions to successful claimants. These pending cases are in no way affected by Venezuela's denunciation of the ICSID Convention. Furthermore, disgruntled foreign investors will still be able to initiate new cases during the six months between the notice of denunciation and the date when it becomes effective (25 July 2012).

The question whether investors would have a right to continue bringing claims *after* 25 July 2012 has been a subject of some debate due to the unclear formulation of Article 71 of the ICSID Convention. The predominant view is that such claims, when

they are based on a bilateral investment treaty (BIT), will *not* be registered, despite the fact that Venezuelan BITs remain in force and retain a reference to ICSID arbitration. This is because BITs are understood to record a country's unilateral *offer of consent to arbitration* which must be "perfected" by an investor (by submitting a request for arbitration) *before* the country ceases to be a member of ICSID.<sup>4</sup> (By contrast, where consent to ICSID arbitration has been given by the country, for example, in a concession agreement with an investor, ICSID proceedings could be started even after the denunciation takes effect. This is because, unlike BITs, *both* parties to the contract give their advance consent to arbitration.)

However, of the 26 BITs in force for Venezuela,<sup>5</sup> only two (with Chile and with Germany) name ICSID as the *sole* arbitral venue available to investors. All other BITs provide, in addition to ICSID, an opportunity to arbitrate under UNCITRAL Arbitration Rules and ICSID's Additional Facility Rules.<sup>6</sup> This means that even after the withdrawal from ICSID becomes effective, investors from the covered countries will still be able to sue Venezuela outside its domestic courts.

#### ICSID v. UNCITRAL

What is special about arbitration under the ICSID Convention by comparison to the UNCITRAL or ICSID Additional Facility rules? The most important difference is that ICSID arbitral awards are equivalent to "a final judgment of a court"<sup>7</sup> in all of the ICSID Contracting States (i.e., they do not require internal judicial procedures to enable enforcement), and are therefore directly executable in most countries around the world. (This reading of the Convention has been opposed by Argentina's lawyers who insist that claimants, who have received an ICSID award against Argentina, must still apply to an Argentine court to have the ICSID award executed in the country.<sup>8</sup>)

In contrast, arbitral awards rendered under the UNCITRAL Arbitration Rules (or the ICSID Additional Facility Rules) do require additional domestic enforcement procedures. This process, however, is greatly facilitated by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which (1) contains only very limited grounds for refusing recognition and enforcement, and (2) enables enforcement in any state party to the New York Convention (currently, 146 states). Even if the enforcement procedures are thus more cumbersome than under the ICSID Convention, it is still feasible to execute these awards in countries around the world where Venezuela has assets.

#### Ideological battleground over enforcement

If exiting from ICSID does not solve Venezuela's problem with foreigners bringing international claims against it, what is its main purpose? The reasons appear to be more political than legal. By denouncing the Convention, the government seems to be sending a political message: *we think this system is unfair, we disavow it and refuse to cooperate with it in future*. The part about the future is very important because it relates to the collection of damages to be ordered by ICSID tribunals against Venezuela.

Interesting to note in this connection is the government's view, or at least its portrayal, of ICSID as pandering to transnational corporations. According to the Foreign Ministry's 2012 press-release, ICSID tribunals have "ruled 232 times in favor of transnational interests out of the 234 cases filed throughout its history." While a gross misrepresentation of ICSID's record (in fact, so far states have won more cases in ICSID than they have lost<sup>9</sup>), it nevertheless reveals the Venezuelan government's view of this forum.

Accusing ICSID of bias gives ideological backing to President Chávez's statement that the Republic "will not recognize any ICSID decisions."<sup>10</sup> The government has already moved its gold reserves from foreign banks to Caracas (160 tons valued at nearly US\$9 billion);<sup>11</sup> it was also reported as preparing to transfer US\$6 billion in cash reserves held in European and U.S. banks to Russian, Chinese and Brazilian banks.<sup>12</sup> The latter, presumably, are seen as less likely to accommodate freezing orders and to facilitate the enforcement of arbitral awards against Venezuela. Experience has shown that it can be a challenge to enforce an award (be it ICSID or non-ICSID) outside the territory of the respondent country as a lot of state assets are protected by the sovereign immunity doctrine.<sup>13</sup>

### Is ICSID the one to blame?

ICSID is a dispute resolution forum; arbitrators apply the rules, which are created by states and enshrined in bilateral investment treaties. Venezuela's discontent with ICSID seems to go beyond the remit of this forum and concerns a much broader issue regarding the ability of BITs to deal with economic and political reforms. This issue is not limited to Venezuela; it has universal significance in light of the general trend towards increasing state intervention in the economy<sup>14</sup> and especially in countries undergoing regime change.<sup>15</sup>

Venezuela's disputes primarily concern nationalizations. The government has confirmed its commitment to pay "fair compensation [...] in accordance with Venezuelan law"<sup>16</sup> which it understands as the book value of an investment (i.e., determined by reference to the amounts invested) as opposed to the market value (based on the present value of future cash flows). The latter will often be significantly higher than the former, especially if an enterprise has good business prospects.

BITs routinely require compensation equal to the "fair market value" of the expropriated investment, even if the expropriation is in the public interest, non-discriminatory and carried out in accordance with due process of law. Commentators have pointed out that a rigid rule for full compensation (i.e. calculated on the basis of the market value of investment) would in reality render any major economic or social programme impossible.<sup>17</sup>

The amount of compensation for assets lawfully expropriated, especially as part of a broad economic reform, should take into account *equitable* factors, unrelated to a strict business valuation exercise. For example, was the original "deal" agreed by an investor with the (earlier) government a reasonable bargain or was it granted on terms unfavourable to the country and against its national interests? Was there a change in circumstances (such as an increase in oil prices) that benefits one party only? Has the investor recouped its sunk costs and has it enjoyed a lengthy period of (highly) profitable operations by the time of the nationalization?

The law, as it currently stands in most BITs, practically wipes out the differences in compensation for lawful and unlawful expropriations.<sup>18</sup> The rigid compensation rule in most BITs and a high risk of arbitrators rigidly enforcing it, thereby leading to outcomes perceived as unacceptable, unfair and unsustainable financially at home, push countries like Venezuela to look for ways to get out of the system.

### Dealing with the BIT regime

To fully dismantle the system of arbitration under BITs, Venezuela would need to terminate – in addition to the ICSID convention – all of its BITs. After such termination it would have to wait for the expiry of the additional period of 10-15 years (depending on a treaty), during which the agreements will continue to apply to investments established prior to the treaty's termination. All of Venezuela's BITs have such a "survival" clause.

In 2008, Venezuela gave notice to terminate its BIT with the Netherlands thus triggering the sunset period, which will end in 2023. The Dutch BIT must have been a source of particular annoyance to the country as it has served as a basis of at least ten ICSID cases against Venezuela (the Netherlands is often used by firms from other countries for incorporating holding companies and structuring investments). Aside from the Dutch treaty, Venezuela has not moved to terminate any of its other BITs.

Withdrawals from ICSID by Bolivia, Ecuador and now Venezuela, and termination of BITs<sup>19</sup> are a radical expression of a much broader trend to revisit key aspects of an international investment regime. In recent times, a significant number of countries have been reviewing their model investment treaties and renegotiating existing agreements in order to make them clearer, more balanced and conducive to fair outcomes. There is a pronounced need for further collective thinking and constructive engagement on these issues.

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### Notes

1 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

2 "Gobierno Bolivariano denuncia convenio con Ciadi", 25 January 2012, <http://www.mre.gov.ve>.

3 This number includes 16 ICSID arbitrations proper and 4 arbitrations under the ICSID Additional Facility Rules. See <http://icsid.worldbank.org>. According to UNCTAD's information, there are no (publicly known) IIA-based claims pending against Venezuela in other international fora.

4 For a fuller analysis, see UNCTAD "Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims" (IIA Issues Note, No.2, December 2010).

5 Most of these BITs were concluded in the 1990s, and only three in recent years – with Iran in 2005, Belarus in 2007 and Russia in 2008.

6 ICSID's Additional Facility (AF) Rules can be used when only one of the relevant States (either the host State or the home State of the investor) is a party to the ICSID Convention. In AF cases, the ICSID Convention does not apply to the dispute; the Centre simply serves as an institution administering the proceedings.

7 Article 54(1) of the ICSID Convention.

8 "Argentina Rejects Azurix Claims on ICSID Award in Letter to Geithner", Inside U.S. Trade, 16 September 2011, <http://www.embassyofargentina.us/v2011/files/20110825-geithnerazurix9.pdf>.

9 According to UNCTAD's statistics, by the end of 2011 states won 55 IIA-based ICSID cases and lost 36; 34 cases were settled.

10 K. Vyas, "Venezuela's Chávez: Won't Accept Rulings by ICSID Court", 8 January 2012, <http://online.wsj.com/article/BT-CO-20120108-703460.html>.

11 Central Bank of Venezuela, "BCV completó histórica repatriación del oro monetario de la República", 30 January 2012, <http://www.bcv.org.ve/c4/notasprensa.asp?Codigo=9662&Operacion=2&Sec=False>.

12 J. De Córdoba, "Chávez Takes Steps to Exit Global Forum", 13 September 2011, <http://online.wsj.com/article/SB10001424053111903285704576560760106674594.html>.

13 One example is Franz Sedelmayer's near 15-year enforcement saga against Russia in various countries of a relatively small award. See Y. Kryvoi, "Chasing the Russian Federation", 13 July 2011, <http://cisarbitration.com/2011/07/13/chasing-the-russian-federation/>.

14 See UNCTAD, *World Investment Report 2011*, p. 94 *et seq.*, [www.unctad.org/wir](http://www.unctad.org/wir).

15 See, for example, H. El-Kady, "Egypt's Bilateral Investment Treaties: A Straitjacket in a New Era of Foreign Investment Re-regulations?", *Transnational Dispute Management*, 12 December 2011.

16 "Gobierno Bolivariano denuncia convenio con Ciadi", 25 January 2012, <http://www.mre.gov.ve>.

17 I. Brownlie, *Principles of Public International Law* (6th edn, Clarendon Press, Oxford, 2003) p. 513; E. Paasivirta, *Participation of States in International Contracts and Arbitral Settlement of Disputes* (Finnish Lawyers' Publishing Company, Helsinki, 1990) p. 265.

18 Minor distinctions do exist, but they can make a difference in rare circumstances only. For details, see S. Ripinsky with K. Williams, *Damages in International Investment Law* (BIICL, London, 2008), pp. 86-88.

19 Note that in 2008, Ecuador terminated nine BITs - with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay.

# The White Industries Arbitration: Implications for India's Investment Treaty Program

Prabhash Ranjan

## feature 4



In November 2011, an arbitral tribunal found the Republic of India guilty of violating the India-Australia bilateral investment treaty (BIT). It is the first known investment-treaty ruling against India, despite the fact that the country has a mammoth portfolio of BITs with more than 70 countries. News of the award broke only in February 2012.<sup>1</sup> As is often the case with investment-treaty disputes, the award was kept confidential. This is despite the fact that the dispute is squarely in the public interest. Indeed, the award is an indictment of India's sovereign function, having ramifications both for the executive and the judiciary.

This note wishes to unravel the implications of this ruling on two issues. First, the nuances related to the interpretation of the Most Favoured Nation (MFN). Second, the implications of the interpretation of the expropriation provision for the Indian judiciary, particularly in light of the on-going debate in India on enforcement of foreign arbitral awards.

### Essential facts of the case

White Industries obtained an arbitral award in its favour in a contractual dispute with Coal India, an Indian public sector company, and sought enforcement of the award before the Delhi High Court. Simultaneously, Coal India approached the Calcutta High Court to have the award set aside, and the request was granted. White Industries appealed to the Supreme Court in 2004 and the final decision is still pending.

In 2010, White Industries took the matter to arbitration on the grounds that the inordinate delay in Indian courts to enforce the arbitration award violates the India-Australia BIT. White Industries argued that the delay violated the provisions on fair and equitable treatment (FET), expropriation, MFN treatment, and free transfer of funds.

The tribunal dismissed White Industries allegations related to violation of FET, expropriation and free transfer of funds. However, the tribunal ruled that India violated the MFN provision of the India-Australia BIT, and awarded White Industries 4 million Australian dollars.

### Most Favoured Nation

The tribunal found India guilty of violating the India-Australia BIT because the Indian judicial system has been unable to deal with White Industries' jurisdictional claim in over nine years. The tribunal held that the delay by Indian courts violated India's obligation to provide White Industries with an "effective means" of asserting claims and enforcing rights." This is despite the fact that the India-Australia BIT does not mention or include such a duty for host states. The tribunal got around that by holding that White Industries could borrow the 'effective means' provision present in the India-Kuwait BIT<sup>2</sup> by relying on the MFN provision of the India-Australia BIT.<sup>3</sup>

The tribunal overruled India's objection that such borrowing will "fundamentally subvert the carefully negotiated balance of the BIT."<sup>4</sup> The tribunal held that this balance can be subverted only if the MFN provision is used to borrow a beneficial dispute resolution provision from another BIT.<sup>5</sup> The tribunal held that borrowing beneficial substantive provision from a third-party treaty does not subvert the negotiated balance of the BIT, but rather achieves the result intended by the incorporation of the MFN provision.<sup>6</sup>

It is important to note that of the MFN provision in the India-Australia BIT recognises certain exceptions, such as not extending any treatment, preferences or privileges arising from a) customs union, economic union or a free trade agreement; b) the provisions of a double taxation agreement; and c) any legislation relating wholly or mainly to taxation.<sup>7</sup> The BIT also has a general exception to the entire treaty, and hence to MFN provision as well, which states that the host country can deviate from its BIT obligations in order to adopt measures necessary for the protection of its own essential security interests or for the prevention of diseases or pests.

None of these exceptions were applicable to India in this case, and hence White Industries was permitted to benefit from the broadly worded MFN provision. In light of this ruling, it is pertinent that India reviews the MFN provisions in its BITs, which are often defined in an expansive manner without adequate exceptions. Furthermore, an important implication of this ruling is that inordinate delays in Indian courts in disposing matters related to a foreign investor can, potentially, violate India's BIT obligations not due to the violation of 'denial of justice,' but due to a violation of the 'effective means' standard, which requires a lower threshold than 'denial of justice.' Further, a tribunal can find a violation of the 'effective means' standard even when the concerned BIT does not contain such a provision as long as it contains a broad MFN provision, which some tribunals will use to import investor guarantees from other BITs.

## Expropriation

For reasons specific to this case, the tribunal did not agree with White Industries that India had expropriated its investment. However, the tribunal made two important points. First, the tribunal disagreed with India that “the only form of contractual rights that are capable of being expropriated are those that are a form of intangible property.”<sup>8</sup> The tribunal stated that all contractual rights, whether tangible or intangible, are capable of being expropriated.<sup>9</sup> Second, and more importantly, the tribunal said that the expropriation claim is unfounded because Indian courts had yet to rule on Coal India’s application to set aside the foreign arbitral award, and, therefore, the award has not been “taken.”<sup>10</sup> Thus, the tribunal clearly indicated that a foreign arbitral award is an ‘investment’ under the BIT and that the setting aside of such valid foreign awards could constitute expropriation under the BIT.

This observation has implications for the debate in India over the role of the judiciary in enforcement of ICA awards. India’s higher judiciary has been expansively interpreting the Arbitration and Conciliation Act of 1996 (A&C Act) to set aside or not enforce ICA awards in India.<sup>11</sup> The expansive interpretation of the A&C Act by the Indian judiciary implies that an award rendered anywhere can be set aside by an Indian court if it goes against: (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality or it patently violates Indian law.<sup>12</sup> It is important for India to understand the ramification of this aspect of the ruling, as it potentially turns India’s judiciary’s interpretation of the A&C Act into a breach of international law.<sup>13</sup>

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The ruling clearly demonstrates how sovereign functions of the Indian judiciary could amount to violation of India’s BITs.

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## Conclusion

India has been entering into BITs without fully understanding their implications. The sanguine belief in the Indian official establishment is that Indian BITs adequately balance investment protection with India’s ability to exercise sovereign powers. This erroneous belief has been strengthened over the years because India’s regulatory actions have so rarely been challenged under BITs. It is a mistake, however, to believe that all is well with Indian investment treaties.

The White Industries award draws attention to the fact that BIT provisions like the MFN clause are often vague and broad. This enabled White Industries to indulge in treaty shopping and arrive at a result that India did not anticipate. The ruling also clearly demonstrates how sovereign functions of the Indian judiciary could amount to violation of India’s BITs. Hence, one expects that this ruling should trigger a critical review of India’s BIT program. Such a review is imperative in light of India’s deepening integration with the global economy and increasing number of new trade and investment agreements, such as the India-EU free trade agreement.

## Author

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## Notes

1 See L E Peterson, ‘India is held Liable for Investment Treaty Breach Due to Protracted Judicial Delays Suffered by Foreign Investors’, 7 February 2012, Investment Arbitration Reporter available at [http://www.iareporter.com/articles/20120207\\_2](http://www.iareporter.com/articles/20120207_2)

2 Article 4(5) of the India-Kuwait BIT provides that ‘each contracting party shall...provide effective means of asserting claims and enforcing rights with respect to investments...’.

3 Article 4(2) of the India-Australia BIT provides the MFN provision according to which, ‘a contracting party shall at all times treat investments in its territory on a basis no less favourable than that accorded to investments or investors of any third country’.

4 See para 11.2.1, White Industries v India

5 Id, para 11.2.2

6 Id, para 11.2.3 and 11.2.4

7 See Article 4(4) of the India-Australia BIT.

8 Paras 12.3.1 and 12.3.2, White Industries v India

9 Id.

10 Para 12.3.6, White Industries v India

11 For more on this issue see A. P. Rebello “Of Impossible Dreams and Recurring Nightmares: The Set Aside of Foreign Awards in India” (2010) 6 (1) *Cambridge Student Law Review*, 274; A. N. Jain “Yet Another Misad-Venture by Indian Courts in Venture Judgement” (2010) 26 *Arbitration International*, 251; S. Sattar, “National Courts and International Arbitration: A Double Edged Sword?” (2010) 27 *Journal of International Arbitration* 51, 64-65; P Ranjan and D Raju “The Enigma of Enforceability of Investment Treaty Arbitration Awards in India” (2011), 6 (1) *Asian Journal of Comparative Law*, Article 5.

12 See the following cases on enforcement of arbitral awards in India - *Bhatia International v. Bulk Trading S.A.* AIR 2002 SC 1432; *Venture Global Engineering v. Satyam Computers*, (2008) 4 SCC 190; *ONGC v. Saw Pipes*, AIR 2003 SC 2629.

13 On this issue also see *Saipem S.p.A v The People’s Republic of Bangladesh* ICSID Case No ARB/05/7, 30 June 2009.

# Negotiations on UNCITRAL Transparency Provisions Reach Critical Juncture

Nathalie Bernasconi-Osterwalder and Lise Johnson

## feature 5

Negotiations over transparency in investor-state arbitrations have reached a critical juncture heading into an October 2012 meeting in Vienna. During the last meeting in February 2012, a large number of countries, developed and developing, strongly supported options to ensure transparency in investor-state disputes that are settled under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) – the second most popular set of rules applied to investment disputes, after the World Bank's rules. However, some delegations continue to block progress on these important efforts to improve UN arbitration rules.

### Transparency, four years in the making

UNCITRAL put the issue of transparency in investor-state arbitrations firmly on its agenda in 2008, at a time when the arbitration rules were undergoing a broader revision. It decided that once renovations to the “generic” UNCITRAL arbitration rules were completed, the working group responsible for updating those rules should focus on the specific issue of how to ensure transparency in investor-state arbitrations.

Since 2010 the working group has met four times to hammer out new rules that would ensure transparency in investor-state arbitrations. Significant progress has been made, but two critical issues remain unresolved. One relates to how the new transparency rules will apply to disputes arising under *future* treaties. The second relates to how the new rules will apply to disputes arising under *existing* treaties.

How these two issues are resolved will determine whether the new rules actually have any significant impact on the transparency of investor-state arbitrations.

“ How these two issues are resolved will determine whether the new rules actually have any significant impact on the transparency of investor-state arbitrations. ”

### The “opt-in/opt-out” debate

The debate on the rules' application to disputes arising under future treaties is often labeled the “opt-in” versus “opt-out” issue. Both the “opt-in” and “opt-out” approaches allow the treaty parties to retain the discretion to decide whether to include the new transparency rules in their future treaties. However, under the “opt-in” approach, states would need to explicitly state in their future treaties that the UNCITRAL transparency rules apply. The transparency provisions would thus effectively function as a separate

UNCITRAL instrument in addition to the arbitration rules. Arbitrations under the general UNCITRAL arbitration rules would be left as they currently are, with the disputing parties and the tribunal having significant freedom to close off investor-state disputes to public view.

In contrast, under the “opt-out” approach, a reference to UNCITRAL Rules, or a reference to the UNCITRAL Rules in effect at the time of the dispute, would include the new transparency rules, except where the treaty parties explicitly stated otherwise in the treaty. The default rule being transparency, this would increase transparency in practice while the treaty parties would retain their ability to exclude the new transparency rules.

### Existing treaties, future disputes

A number of countries support that the new rules on transparency should apply to future disputes arising under existing treaties (treaties already in force at the time the new transparency rules are introduced). However, several delegations are opposed. Given that there are approximately 3000 existing investment treaties, this proposal would fatally undermine the relevance of the new UNCITRAL transparency rules.

Applying the new transparency rules to the majority of future disputes under existing treaties is legally feasible. Indeed, it is not uncommon for procedural rules that govern international arbitrations to change over time, and when they do change, the version of the procedural rules in force when the case is initiated will apply unless the arbitration rules, the applicable treaty or the parties to the dispute, state otherwise. The arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the International Chamber of Commerce, for example, both reflect that principle. The applicability of the new 2010 SCC Rules to the roughly 50 member-state Energy Charter Treaty, which refers to the SCC Arbitration Institute, has not been controversial. Thus, if provisions on transparency were incorporated as amendments to the UNCITRAL arbitration rules, those transparency provisions could apply even to disputes arising under existing treaties.

It is with this in mind that a number of delegations prefer to leave the matter of application to existing treaties open, rather than explicitly closing the door. This way, the application of new rules would depend on the applicable treaty and the case at issue, but would not be barred as a starting position.

### Conclusion

When the working group meets again in Vienna in October 2012, it will revisit these two issues. When doing so, members should stay firm to their mandate to ensure transparency in investor-state arbitration, and adopt an approach that enables, rather than hinders, the new rules' use in disputes under future and existing treaties.

### Author

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## Case note: How *Chevron v. Ecuador* is pushing the boundaries of arbitral authority

Lise Johnson

### feature 6

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The arbitral tribunal in *Chevron v. Ecuador*<sup>1</sup> has taken a series of steps in recent months suggesting that it has a broad view of its authority. But while it may have been unwilling to tie its own hands, other national courts and international tribunals who are currently being asked to review the legitimacy and enforceability of the tribunal's various awards may do the job. Consequently, one impact of *Chevron v. Ecuador* may be to raise caution for more arbitral restraint in future disputes.

#### The anomalies of the Chevron-Ecuador investor-state arbitration

The *Chevron v. Ecuador* arbitration under the US-Ecuador bilateral investment treaty (BIT) is just one piece of a multi-forum saga involving diverse stakeholders and with billions of dollars at stake. In this arbitration, Chevron and Texaco Petroleum Company (TexPet) are asking the tribunal for a broad form of relief that would effectively excuse Chevron from having to pay a roughly US\$18 billion judgment Ecuadorian courts rendered against the US company in favor of Ecuadorian citizens as damages for environmental and other harms arising out of Chevron's affiliates' oil operations in Ecuador.

Chevron's pleas to the tribunal are unique in investment-treaty arbitration. What in particular sets them apart is that Chevron seeks orders from the tribunal that would directly impact the rights of non-parties to the arbitration: the private plaintiffs in the underlying lawsuit against Chevron who currently hold a judgment against Chevron. Chevron argues that fraud and legal and procedural errors in the conduct of the underlying dispute have left Chevron on the hook to the plaintiffs in breach of the BIT. But rather than claiming damages from Ecuador in the form of litigation expenses incurred, or indemnification or compensation for amounts paid to the Ecuadorian plaintiffs, Chevron is aiming directly at the plaintiffs' judgment, seeking to use the tribunal to strip that award from those non-parties to the BIT arbitration.

In decisions on 9 January 2011 and 25 January 2012, the tribunal issued orders that evidenced an unprecedented willingness to insert itself into the ongoing domestic litigation between the Ecuadorian plaintiffs and the US oil company, and to shut down any judgment obtained by the plaintiffs. Those two decisions – one framed as an order and the other as an interim award, and both taken before the tribunal had even determined that it had jurisdiction over the dispute – directed Ecuador to “take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio case.”<sup>2</sup> The tribunal, however, stopped short of granting the full set of relief requested by Chevron, and softened the force of its directions to some degree by clarifying that Ecuador

was only obligated to take those measures “at its disposal.”<sup>3</sup> According to Ecuador, this language clarified that the tribunal was not purporting to direct it to take any measures that would be inconsistent with Ecuador's domestic laws.

#### The tribunal's bold moves and notable disregard of the Ecuadorian plaintiffs' claims

In a string of recent “awards,” however, the tribunal has grown bolder in its directives to Ecuador and its disregard of the Ecuadorian plaintiffs' rights and interests. First, and still without having determined that it had jurisdiction over the dispute, the tribunal on 16 February 2012 issued a Second Interim Award that deleted the “at its disposal” language and replaced it with stronger text. The tribunal ordered “the Respondent (whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments” rendered in favour of the Ecuadorian plaintiffs.<sup>4</sup>

Second, on 27 February 2012, the tribunal issued a Third Interim Award on Jurisdiction and Admissibility in which it rejected Ecuador's argument that because Chevron's claims and requests for relief involved the rights of non-parties to the arbitration, the tribunal should not exercise jurisdiction over the dispute. The tribunal's decision on this point is notable for the cursory and unconvincing manner in which it dismissed the notion that the Ecuadorian plaintiffs' rights and interests have been and will continue to be impacted by the dispute.

In what is a glaring omission, the tribunal did not discuss the fact that the Ecuadorian plaintiffs currently possess a legal right – a court judgment enforceable under Ecuadorian law – and that the tribunal's orders to date have directly sought to interfere in the plaintiffs' enjoyment of that right.

In another equally glaring omission, the tribunal did not mention the fact that on 9 February 2012, the Ecuadorian plaintiffs filed a petition for precautionary measures with the Inter-American Commission on Human Rights explaining the various ways in which relief requested by the Chevron and orders of the tribunal would violate the human rights of the Ecuadorian plaintiffs.<sup>5</sup> The plaintiffs' legal representatives argued that the investor-state proceedings presented serious threats to the Ecuadorian plaintiffs' “enjoyment of core rights to life, physical integrity, health, as well as their rights to a fair trial, to judicial protection..., and to equal protection under the law.”<sup>6</sup> They stated that, “[f]or the Republic to allow, much less instigate, any delay in the implementation of the lawfully determined and ordered remedy that the [Ecuadorian plaintiffs] have achieved in Ecuadorian

courts would be a flagrant violation of Ecuador's binding commitments under the American Convention and the San Salvador Protocol."<sup>7</sup> As relief, they requested the Inter-American Commission to order measures to assure that, irrespective of any orders by the investor-state tribunal, Ecuador would not interfere with the Ecuadorian plaintiffs' judgment in violation of their human rights.

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Chevron seeks orders from the tribunal that would directly impact the rights of non-parties to the arbitration.

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### The limited force of the awards

The tribunal's awards have prompted backlash and questions regarding the scope of the arbitrators' authority. For one, a human rights claim was brought before the Inter-American Commission on Human Rights to put boundaries on Ecuador's obligations to comply with the investor-state tribunal's awards. Second, an Ecuadorian appellate court has issued two decisions declaring that the *Chevron-Ecuador* tribunal does not have the power to compel Ecuador's courts to violate Ecuador's human rights obligations by interfering with the plaintiffs' judgment against Chevron.

Finally, outside of Ecuador, it seems highly questionable that the tribunal's awards will be able to achieve the effect desired by the Chevron – i.e., that it will prevent the Ecuadorian plaintiffs' from enforcing their judgment against Chevron in countries where the company has assets. Most importantly, under the BIT and the applicable arbitration rules, the tribunal's awards are only binding on the parties to the investor-state dispute – Ecuador and Chevron, not the Ecuadorian plaintiffs.<sup>8</sup> Should the Ecuadorian plaintiffs seek to enforce their judgment against Chevron in courts outside of Ecuador, the tribunal's awards should not have mandatory legal force in those enforcement actions. Moreover, even assuming that the tribunal had authority to review the merits of the underlying judgment and its correctness or legitimacy in the investor-state dispute to which the Ecuadorian plaintiffs are not party, the tribunal has not yet done so. Consequently, any award issued by the tribunal should have no *res judicata* impact or legal bearing on the enforceability of the underlying judgment.

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### Notes

1 Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23.

2 See Chevron v. Ecuador, Interim Award, Jan. 15, 2012, at pp. 11 & 16.

3 Id.

4 Chevron v. Texaco, Second Interim Award, February 16, 2012, para. 3 (emphasis added).

5 The Ecuadorian plaintiffs reportedly later withdrew their request for precautionary measures, stating that rulings of an Ecuadorian court seemed to address the plaintiffs' concerns and minimize their need for precautionary measures. See "Ecuadorian Plaintiffs Withdraw Request for Protective Measures, After Sparring with Chevron over Need for Human Rights Authorities to Intervene," Investment Arbitration Reporter, vol. 5, no. 5, March 14, 2012.

6 Request for Precautionary Measures submitted to the Inter-American Commission on Human Rights, February 9, 2012, at 1.

7 Id.

8 See, e.g., UNCITRAL Arbitration Rules, Art. 32(2); US-Ecuador BIT, Art. VI(6).

# news in brief

## **Australia to reject investor-state dispute resolution in TPPA**

The Australian government will not sign on to investor-state dispute resolution provisions in the Trans-Pacific Partnership Agreement (TPPA), according to an Australian government official.

“We have made it clear that we will no longer be seeking investor-state dispute settlement provisions in trade agreements,” said the Australian Minister for Broadband, Communications and the Digital Economy to the Australian Senate on March 13<sup>th</sup>.

The Australian government first committed to rejecting investor-state dispute resolution in April 2011 in a document titled “Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity.”

The government justifies the policy on the basis of not allowing “greater rights” to foreign investors and maintaining its “ability to impose laws that do not discriminate between domestic and foreign businesses” to protect the public interest.

Australia’s position on investor-state dispute resolution hardened last year when the country was developing legislation that strictly limits branding on tobacco products. That legislation spurred the tobacco company Phillip Morris to file for arbitration claiming a breach of Hong Kong-Australia BIT. Philip Morris argues that the legislation amounts to an expropriation of its investment in Australia.

Australia’s refusal to include investor-state dispute resolution in the TPPA – an ambitious free trade agreement being negotiated by Brunei, Chile, New Zealand, Singapore, Australia, Malaysia, Peru, Japan, United States, and Vietnam – will likely complicate the negotiations.

“Differential treatment in ISDS could also open the door to demands for exceptionalism in other parts of the TPPA, undermining the ‘gold standard’ ambitions,” wrote Professor Kelsey, University of Auckland, in the January 2012 edition of ITN.<sup>1</sup>

Australia’s position has drawn criticism from the U.S. corporate lobby for exactly that reason. Thirty-one U.S. corporate groups, representing different economic sectors, wrote to President Obama in February this year, warning that “Australia’s rejection of investor-state dispute settlement is not only thwarting the ability of the TPP negotiations to produce strong enforcement outcomes, it is also having a corrosive effect on the level of ambition and other key aspects of the TPP negotiations. If Australia were able to extract such a major exemption, other countries would press forward to seek their own major exemptions from core commitments.”

## **Governments call for limited interpretation of Fair and Equitable Treatment under DR-CAFTA**

The governments of Honduras, El Salvador and

the United States say that tribunals should take a restricted view of the Fair and Equitable Treatment (FET) standard in the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA).

The three governments made written submissions in the context of the *Railroad Development Corporation (RDC) v. Republic of Guatemala* arbitration, which is the first arbitration under DR-CAFTA to reach the merits stage.

DR-CAFTA Article 10.5 states that investments should be treated “in accordance with customary international law, including fair and equitable treatment and full protection and security.” Guatemala has argued that this standard is equivalent to the minimum standard of treatment under customary international law. The Governments of the Honduras, El Salvador and the United States support this view.

In its submission, the United States explains it was the intent of the CAFTA-DR Parties “to incorporate the minimum standard of treatment required by customary international law as the standard for treatment in CAFTA-DR Article 10.5.”

El Salvador states that the FET standard in DR-CAFTA is a “‘floor’ or ‘bottom’ to acceptable treatment of investors.” It goes on to clarify that “international arbitral awards that refer to ‘Fair and Equitable Treatment’ as an autonomous standard, as well as international investment treaties that refer to ‘Fair and Equitable Treatment’ without reference to customary international law, are not relevant for the purposes of the interpretation of the standard under CAFTA Article 10.5.”

Railroad Development Corporation’s dispute with Guatemala relates to an agreement between its Guatemalan subsidiary Compañía Desarrolladora Ferroviaria (FVG) and a state owned-company responsible for managing Guatemala’s railway services. In 2005, FVG initiated arbitration proceedings in Guatemala for alleged breaches of contract. Guatemala subsequently terminated its agreement with FVG, declaring it injurious to the state. The American company is seeking some US\$65 million in lost profits and damages in its DR-CAFTA claim.

## **Canadian pharmaceutical company launches new NAFTA case against the United States**

A Canadian pharmaceutical company has initiated a new NAFTA case against the United States.

Apotex sells generic drugs through an indirectly held company in the United States. In 2009, the US Food and Drug Administration prevented Apotex from selling drugs to its American subsidiary (under a so-called import alert), which was eventually lifted in 2011.

The import alert followed an FDA inspection of Apotex’s Canadian facilities, in which the agency

noted some deviations from its manufacturing standards. While Apotex claims these issues were promptly addressed, the FDA moved to bar imports from Apotex's facilities into the US.

In its February 2012 Request for Arbitration under the ICSID Additional Facility Rules, Apotex claims it lost "hundreds of millions of dollars of sales and was prevented from bringing any new drug to the US market." The request also states that "during the relevant time period, FDA accorded more favorable treatment to US investors and US-owned investments in like circumstances ..."

Apotex claims breaches of NAFTA Chapter Eleven's provisions on National Treatment, Most-Favoured Nation Treatment, and Minimum Standard of Treatment.

Apotex is already locked in arbitration with the United States in a separate NAFTA claim. This dispute relates Apotex's efforts to sell the generic version of the antidepressant medication commonly known as Zoloft. Apotex argues that the U.S. courts "misapplied" statutory and constitutional law in multiple decisions, in what amounts to a violation of NAFTA commitments on National Treatment, Minimum Standard of Treatment, and Expropriation and Compensation.

The Request for Arbitration in Apotex Holdings Inc. and Apotex Inc. v. the Government of the United States is available at: <http://italaw.com/documents/Apotex-Requestforarbitration.pdf>

### German law firm eyes case over sovereign debt restructuring

In the wake of the biggest sovereign debt restructuring recorded in history, a German law firm is seeking to challenge the Greek state for breaching the German-Greece BIT.

According to a report in the *Financial Times*, the law firm Gröpper Köpke intends to file a class action suit on behalf of small investors who have been forced to take part in the recent €206 billion debt swap, arguing that the bond swap amounts to expropriation.<sup>2</sup>

A collective action clause forces all bondholders to undertake the swap, in which investors are required to exchange the old bonds with new ones worth less in face value.

The German law firm states that the case will be dropped if the Greek government exempts small investors.

If pursued, however, the claim faces a considerable hurdle, in that the German-Greece BIT, signed in 1961, does not contain a provision on investor-state dispute settlement. Thus the claimants would need to argue that they can use the Most-Favoured Nation provision to access dispute settlement provisions in more recent Greek BITs.

This would not be the first time that holders of sovereign debt have turned to investment treaties in response to sovereign debt restructuring. When Argentina restructured its debt in 2005, thousands of Italian bondholders filed a claim under the Italy-Argentina BIT for approximately \$4.3bn (*Abaclat v. Argentina*).

In a controversial September 2011 ruling, a majority of the *Abaclat v. Argentina* tribunal granted jurisdiction to the claim. That decision drew a strong rebuke by the third arbitrator in the case, Professor Georges Abi-Saab. Professor Abi-Saab challenged the decision to accept Argentine government bonds as a protected investment under the Argentina-Italy BIT and the ICSID Convention. He also countered that an ICSID tribunal cannot accept jurisdiction over mass claims, in the absence of consent by the state party.

### 2011 saw spike in ICSID cases

ICSID registered a record 38 new cases in 2011, according to the latest issue *ICSID Caseload - Statistics*. That's compared to 26 cases in 2010, 25 in 2009, and 21 in 2008.

As with previous years, however, jurisdiction was granted mainly through bilateral investment treaties (63%), followed by investor-state contracts (20%).

Also following the pattern of most previous years, South America saw the largest number of cases (30%), followed by Eastern Europe and Central Asia (23%), and Sub-Saharan Africa (16%).

Similar to past years, the greatest number of cases arose in the oil, gas, and mining sector (25%), followed by electric power and energy sector (13%), and the transportation sector (11%).

Arbitrators, conciliators, and ad hoc committee members appointed in ICSID cases in 2011 were dominated by nationals of Western Europe and North America (Canada, Mexico, US).

ICSID Caseload Statistics are available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>

### Notes

<sup>1</sup> "Investment Developments in the Trans-Pacific Partnership Agreement", Jane Kelsey, Investment Treaty News, 12 January 2012, <http://www.iisd.org/itn/2012/01/12/investment-developments-in-the-trans-pacific-partnership-agreement/>

<sup>2</sup> "Germans seek lawsuits over Greek debt swap", James Wilson and Gerrit Wiesmann, Financial Times, March 12, 2012, <http://www.ft.com/cms/s/0/79ed422c-6c67-11e1-bd0c-00144feab49a.html#axzz1owGOYBS3>

# awards & decisions

## US courts vacates award against Argentina

*BG Group Plc v. Argentina*

Lise Johnson

A US appellate court has vacated an award against Argentina in a decision that may give investors pause before attempting to bypass treaty provisions requiring that they first pursue their claims in the host state's courts.

### *The long course of the dispute*

The January 2012 decision was issued in *BG v. Argentina*, one of the many treaty claims that have been filed against Argentina due to measures it took during the financial crisis it suffered roughly ten years ago.<sup>1</sup> The claimant, BG Group PLC, filed its Notice of Arbitration against Argentina in April 2003 under the Argentina-United Kingdom BIT. In doing so, BG Group leapt over treaty provisions that require investors to first submit their claims to the host state's courts before being able to pursue international arbitration.

BG's decision not to seek court relief before commencing arbitration has remained a contentious issue. Before the tribunal, Argentina had argued that the language of the treaty was clear: Article 8(1) required investors to seek relief in domestic courts, while Article 8(2) added that if 18 months had passed since the dispute was submitted to the courts and the dispute was still unresolved, the investor could then submit its claims to international arbitration. Argentina argued that BG's failure to comply with those provisions meant that the tribunal could not review its treaty claims.

The tribunal, however, rejected that argument, asserting that Article 8(2) could not "be construed as an absolute impediment to jurisdiction."<sup>2</sup> It then proceeded to determine Argentina had breached the fair and equitable treatment obligation in the Argentina-UK treaty and ordered Argentina to pay BG more than US\$185 million in damages, plus some US\$684,000 for fees and expenses incurred by BG and the arbitrators.

Argentina then took steps to vacate the award – a move that, if successful, would effectively nullify it, preventing BG from enforcing it in any of the 146 countries that are party to the New York Convention.<sup>3</sup> BG, in turn, took action to attempt to enforce and collect on the tribunal's judgment. The parties brought their respective claims for relief to the US court with jurisdiction over the matter. Before the US court, Argentina asserted that the 18-month requirement was a condition of its consent to arbitrate disputes, and because that condition was not complied with, it had not consented to arbitrate the dispute. Consequently, Argentina continued, this meant that the tribunal had arbitrated a dispute over which it had no power, which is one of the few grounds on which the US court could vacate the award under the New York Convention and US law.

The US district court rejected Argentina's arguments, and granted BG's motion to enforce the award. Argentina appealed. Again, the parties argued the issue of BG's noncompliance with Articles 8(1) and (2) of the Argentina-UK BIT.

The appellate court, the Court of Appeals for the District of Columbia Circuit, sided with Argentina. In doing so, it made three main proclamations.

First it held that it is the responsibility of courts, not arbitrators, to determine whether the dispute may be arbitrated in cases where: a treaty makes resort to local courts a condition to arbitration; the treaty is silent on whether arbitrators have the

power to determine whether a dispute is arbitrable; and the local remedies condition is not complied with.

Second, the appellate court determined that the lower court erred as a matter of law because it did not determine that there was clear and unmistakable evidence that, contrary to the rule espoused above, the parties to the treaty had wanted the arbitrators to determine whether they had jurisdiction over the dispute.

Finally, the court decided that because "there could be only one possible outcome on the [question of whether] BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," it would reverse the orders of the lower court and vacate the tribunal's award.

The appellate court's ruling has drawn critique from some who assert that it is inconsistent with the fundamental principle that tribunals have the power to determine their own jurisdiction. Nonetheless, it remains that under the New York Convention and US law, courts do have power to vacate arbitral awards in certain limited circumstances, including when the arbitrators decided a matter that the parties had not consented to arbitrate.<sup>4</sup>

## India in breach of BIT for court delays *White Industries*

*Australia Limited v The Republic of India, UNCITRAL*

Larisa Babiy

In an award dated 30 November 2011, an UNCITRAL tribunal found that delays by Indian Courts amounted to a breach of the "effective means" standard, in what marks the first known investment-treaty ruling against India.

### *Background*

The Australian claimant, White Industries, concluded a contract in 1989 for the supply of equipment and the development of a coal mine with Coal India, a state-owned and controlled company. A dispute arose between the parties and was submitted to an ICC tribunal seated in Paris, which in 2002 awarded White Industries A\$4.08 million.

Coal India applied to the High Court of Calcutta to have the award set aside, while White Industries applied to the High Court of New Delhi to have the award enforced. The Calcutta High Court rejected White Industries' application to have Coal India's petition to set aside the award dismissed. White Industries appealed this decision in front of the Supreme Court. With the aim of avoiding conflicting decisions, in 2006 the New Delhi High Court decided to stay the enforcement proceedings until the decision of the Supreme Court was rendered. White Industries did not appeal to the stay. As a result, nine years after the ICC tribunal rendered its award in White Industries' favor, the investor was still waiting for the Indian Courts to decide upon its jurisdictional claims.

On 27 July 2010 White Industries filed a claim against India under the Australia-India BIT. It contended that the Indian government, by the actions of its courts and of Coal India, breached its obligations to grant fair and equitable treatment (Article 3(2)) and effective means of asserting claims (Article 4(2)).

### *ICC award considered part of the investment*

The tribunal considered that the broad definition of investment contained in the BIT encompassed the claimant's contractual rights. In relation to White Industries' rights under the ICC award, the arbitrators concluded that the award per se could

not be considered an investment, but the “rights under the award constitute part of the original investment” being a crystallization of its rights under the contract, and as such “are subject to such protection as is afforded to investments by the BIT.”

#### *Court delays don't breach FET provision*

In addressing White Industries' claim on the violation of the fair and equitable treatment provision, the tribunal considered that none of its allegations met the standard required to establish the frustration of legitimate expectations. In particular, White Industries knew, or ought to have known, that Indian courts regularly entertain applications to set aside foreign awards and could not have relied on any belief as to how India would apply the New York Convention. Moreover, the claimant ought to have known that India's domestic court system is overburdened and thus it could not have expected a timely enforcement of its award.

The tribunal found that a violation of fair and equitable treatment through a denial of justice was also not proven. It stated that “while the duration of the proceedings overall as well as the delay by the Supreme Court (...) is certainly unsatisfactory in terms of efficient administration of justice, neither has yet reached the stage of constituting a denial of justice.” In deciding on this issue, the tribunal considered that the question of whether Indian courts can entertain an application to set aside a foreign award is hotly debated in the country, thus it was not particularly surprising that the Supreme Court had not disposed of the claimant's appeal.

#### *Tribunal imports 'effective means' standard via the MFN clause and finds breach*

White Industries relied on the most favored nation clause to benefit from the obligation to “provide effective means of asserting claims and enforcing rights” contained in the India-Kuwait BIT. In its analysis, the tribunal considered the enforcement and the set-aside proceedings separately. In relation to the former, it stated that although the procedural history has been “less than ideal”, the three and a half years of delay of the Indian courts did not violate the BIT, in particular because White Industries decided not to appeal the order to stay the proceedings.

Conversely, with regard to the set aside proceedings, the tribunal found that the claimant had done “everything that could reasonably be expected of it to have the Supreme Court deal with its appeal in a timely manner”. As a consequence, the tribunal stated that it had “no difficulty in concluding [that] the Indian judicial system's inability to deal with White Industries jurisdictional claim in over nine years, and the Supreme Court's inability to hear White Industries jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White Industries with 'effective means' of asserting claims and enforcing rights.”

The tribunal considered the grounds advanced by Coal India to resist the enforcement of the ICC award and found that the award was enforceable under the laws of India. It concluded that “had India not failed to provide White Industries with 'effective means' of asserting its claims, the Indian courts ought by now to have determined the Award to be enforceable in India”.

For these reasons, the tribunal awarded White Industries some A\$4 million, plus interest, costs and legal fees.

The tribunal was formed by J. William Rowley QC (chair),

Charles Brower (investor's nominee) and Christopher Lau SC (Respondent's appointee).

#### **Tribunal declines jurisdiction over claimant's failure to litigate in Argentina's courts** *ICS Inspection and Control Services Limited v The Argentine Republic, UNCITRAL* **Damon Vis-Dunbar**

In a 10 February 2012 ruling, an UNCITRAL tribunal has declined jurisdiction in a claim against Argentina because the claimant neglected to first take its complaint to Argentina's courts for 18 months.

The decision is part of a growing number to interpret provisions that call for disputes to be litigated in domestic courts before they can be tried in international arbitration under investment treaties. Arbitrators have reached diverging conclusions, and jurisdictional decisions have swung both directions as a result.

The claimant, ICS Inspection and Control Services, won a contract to inspect goods bound for import into Argentina before they left port. In its claim, ICS outlines a number of grievances in its dealings with Argentinean authorities, and these were compounded when Argentina entered an economic crisis and severed the link between the Argentine Peso and the US dollar.

ICS lodged an administrative claim in 2002, and eventually received payment for outstanding invoices in 2006, albeit for less than it claimed to be owed. The claimant sought relief under the UK-Argentina BIT in 2009, seeking some US\$25 million in damages.

#### *Jurisdictional issues*

Argentina offered a number of arguments as to why the tribunal lacked jurisdiction:

- The claimant failed to abide by a provision in the UK-Argentina BIT that requires claims to be brought first to domestic courts for a period of 18 months, or until a decision has been made by the court, but the parties remain in dispute;
- The claim is essentially a contractual dispute, and should be settled under the terms of the contract, rather than under an international investment treaty;
- The claim is barred for reasons of “acquiescence” and “prescription”: essentially, that the claimant's long wait of 4 years to bring its complaint to arbitration “extinguished” the claim or made it inadmissible.
- The contract was not directly with the claimant, but between Argentina and a company incorporated in the Cayman Islands, and thus ICS lacked standing to bring to the claim.

However, the case turned on the issue of the 18-month domestic litigation requirement. Having determined that this is a “mandatory” requirement, the tribunal considered whether it was a matter of admissibility or jurisdiction matter. The tribunal noted that while it enjoyed discretion in terms of how it dealt with issues of admissibility, it could not alter the rules to uphold its jurisdiction. Ultimately, the tribunal considered the requirement part of Argentina's consent to arbitration, and therefore a matter of jurisdiction.

The tribunal did not accept the claimant's argument that the domestic court requirement is futile, given that it only

delayed the arbitration. The tribunal noted that a majority in another recent jurisdictional decision, *Abaclat and Others v. Argentina*, accepted a similar line of argument. In the *Abaclat* arbitration, the tribunal is considering a claim by thousands of claimants, and it based its decision in part on a conclusion that Argentina's court system was not prepared to adequately address the claims.

In contrast, the ICS tribunal stated that it "could not create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question, having no basis in either the treaty text or in any supplementary interpretative source, however desirable such policy considerations might be seen to be in the abstract."

The tribunal also discarded the claimant's argument that it could by-pass the domestic litigation requirement by means of BIT's Most Favoured Nation (MFN) clause, given that not all of Argentina's BITs have similar domestic litigation requirements. The tribunal concluded, however, that Argentina and the UK most likely did not intend for the MFN provision to apply to dispute settlement. It noted, for instance, that the treaty was drafted before the debate on the scope of the MFN clause – and in particular whether it encompasses elements of investor-state dispute resolution – opened up.

"The Treaty was concluded by Argentina and the UK late in 1990 ... This was long before *Maffezini* brought treaty-based questions concerning the MFN clauses and international investor-State dispute resolution into focus; indeed, these issues remained entirely unexplored."

On the issue of costs, the tribunal stated that "there was clearly a successful party, the Respondent, and a clearly unsuccessful party, the Claimant." That outcome led the tribunal to order the claimant to pay the full cost of the arbitration, while each party bears the cost of their legal representation.

The tribunal was formed by Pierre-Marie Dupuy (presiding arbitrator), Santiago Torres Bernardez (Respondent's appointee) and Marc Lalonde (claimant's appointee).

The decision on jurisdiction is available here: [http://italaw.com/documents/ICS\\_v\\_Argentina\\_AwardJurisdiction\\_10Feb2012\\_En.pdf](http://italaw.com/documents/ICS_v_Argentina_AwardJurisdiction_10Feb2012_En.pdf)

### **Tribunal declines jurisdiction in Gallo v Canada** *Vito G. Gallo v the Government of Canada, NAFTA, UNCITRAL, PCA Case No. 55798* **Larisa Babiy**

An UNCITRAL tribunal has declined jurisdiction in a case against Canada under the North American Free Trade Agreement's investment chapter, having determined that the American claimant failed to prove the date when he acquired a Canadian company.

The claimant, Mr. Gallo, claimed to be the owner of a Canadian company that on 6 September 2002 purchased an abandoned mine in Ontario to use as a waste disposal site. On 5 April 2004 the Ontario government passed the *Adams Mine Lake Act* (AMLA), which prohibited the use of the mine as a waste disposal site and revoked the existing environmental approvals. The AMLA acknowledged that the company was entitled to limited compensation; however, it also stated that its actions did not constitute expropriation.

Following these developments, Mr. Gallo filed a claim against Canada on behalf of the company for alleged

violation of NAFTA's articles on Minimum Standard of Treatment, Expropriation and Compensation, and Customary International Law.

Canada objected to the tribunal's jurisdiction, arguing that the claimant must prove that he owned the company before the enactment of the AMLA "through reliable and contemporaneous documents." It was Canada's case that the tribunal would have jurisdiction only if the claimant was able to prove ownership of the company at the time AMLA was introduced.

Mr. Gallo considered that the burden of proof should be shifted to Canada, on the grounds that Canada was accusing him of "fraudulent conspiracy. However, Canada replied that it was not advancing allegations of fraud, prompting the tribunal to decide there had been no shift in the burden.

#### *Tribunal's analysis*

In its 15 September 2011 decision on jurisdiction, the tribunal found that the claimant had not been able to demonstrate that the acquisition of the ownership of the company predated the AMLA. It then addressed the question of whether that finding implied a lack of jurisdiction *ratione temporis* (temporal jurisdiction).

Here the tribunal sided "without hesitation" with Canada. "For Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership and control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained".

Since claimant failed to prove the date of the acquisition of the ownership, "the necessary consequence is that his claim must fail for lack of jurisdiction *ratione temporis*," ruled the tribunal

The tribunal unanimously concluded that it lacked jurisdiction and condemned the claimant to pay Canada's arbitration costs.

The tribunal consisted of Prof. Juan Fernandez-Armesto (Chair), Laurent Levy (Canada's appointee), and Prof. Jean-Gabriel Castel O.C. Q.C. (investor's nominee).

Canada's original nominee, Mr. J. Christopher Thomas Q.C., resigned from his appointment as an arbitrator in October, 2009 after ICSID's Deputy Secretary-General determined that Mr. Thomas could not continue to provide legal advice to Mexico and serve as an arbitrator in the case, given that Mexico is a party to NAFTA and could have made a submission as a non-disputing party.

The decision is available at: [http://italaw.com/documents/Gallo\\_v\\_Canada\\_Award15Sep2011.pdf](http://italaw.com/documents/Gallo_v_Canada_Award15Sep2011.pdf)

#### **Notes**

<sup>1</sup> See *BG Group PLC v. Republic of Argentina*, Award, Dec. 24, 2007; *Republic of Argentina v. BG Group PLC*, 714 F. Supp. 2d 108 (D.D.C. June 7, 2010); *Republic of Argentina v. BG Group PLC*, 764 F. Supp. 2d 21 (D.D.C. 2011); *Republic of Argentina v. BG Group PLC*, No. 11-7021 (D.C. Ct. Jan. 17, 2012).

<sup>2</sup> *BG Group PLC v. Republic of Argentina*, Award, Dec. 24, 2007, para. 147.

<sup>3</sup> *Convention on the Recognition and Enforcement of Arbitral Awards*, June 10, 1958 (entry into force June 7, 1959).

<sup>4</sup> See *New York Convention*, art. V(1)(e); *Federal Arbitration Act*, § 10(a)(4).

# resources and events

## Resources

### Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II

*UNCTAD, March 2012*

This paper explores how the concept of Fair and Equitable Treatment (FET) has been defined in international investment agreements (IIAs) and how different formulations have been interpreted by arbitral tribunals. The substantive content of the FET standard has been framed by arbitral tribunals on a case-by-case basis. This is a continuing development, which is reinforced by the practice of tribunals to refer to, and discuss, earlier awards. Although each tribunal interprets a FET provision from the investment treaty applicable in that specific case, there has been a certain convergence in terms of the elements that the FET standard includes. At the same time, arbitral practice has revealed important differences in the application of the standard, which depend on the type of FET formulation used. Against this background, the last section of the paper offers policy options for negotiators. They include FET clauses with or without reference to sources and qualifications (e.g. minimum standard of treatment under customary international law), an option to replace the general FET obligation with more specific substantive requirements, and an option to omit the FET clause, as well as additional clarifications designed to provide more legal certainty and ensure that the right of States to regulate in the public interest is not compromised. The paper is available at: [http://www.unctad.org/en/docs/unctadaddiaeia2011d5\\_en.pdf](http://www.unctad.org/en/docs/unctadaddiaeia2011d5_en.pdf)

### Recent Developments in International Investment Disputes: Investment Treaty Cases from September 2010 to October 2011

*International Institute for Sustainable Development, October 2011*

This brief highlights the relevant developments in international investment disputes in an attempt to outline some of the wider policy implications of the arbitral awards between September 2010 and October 2011. Through a case analysis of some of the most significant awards on jurisdiction and liability, this brief provides an overview of the substantive issues that arose in the various arbitral awards. It outlines how tribunals have defined the term “investment” and how they have interpreted the provisions on most-favoured nation treatment, expropriation, fair and equitable treatment, and dispute resolution under investment treaties and foreign investment laws. The brief is available at: [http://www.iisd.org/pdf/2012/investment\\_treaty\\_cases\\_2010\\_2011.pdf](http://www.iisd.org/pdf/2012/investment_treaty_cases_2010_2011.pdf)

### Regulating Global Capital Flows for Development

*Task Force on Regulating Global Capital Flows for Long-Run Development, March 2012*

This report posits that there is a clear rationale for capital account regulations (CARs) in the wake of the financial crisis, that the design and monitoring of such regulations is essential for their effectiveness, and that a limited amount of global and regional cooperation would be useful to ensure that CARs can form an effective part of the macroeconomic policy toolkit. The protocol for deploying capital account regulations in developing countries that is put forth in this report stands in stark contrast to a set of guidelines for the use of capital controls endorsed by the board of the International Monetary Fund (IMF) in March 2011. The report is from the Task Force on Regulating Global Capital Flows for Long-Run Development, a group of scholars and policy makers engaged committed to preventing and mitigating financial crises in the developing world. The report is available at: [http://www.ase.tufts.edu/gdae/policy\\_research/RegulatingGlobalCapitalFlows.html](http://www.ase.tufts.edu/gdae/policy_research/RegulatingGlobalCapitalFlows.html)

### Farms and Funds: Investment Funds in the Global Land Rush

*International Institute for Environment and Development, January 2012*

Investment funds show a growing interest in farmland and agriculture. They are buying up land and agribusinesses in developing countries with the expectation of high long-term returns linked to rising land prices, growing populations and increasing demand for food. While the media has reported extensively on the involvement of these funds in the global land rush, the mechanics remain little understood by the broader public. This policy brief looks at the following questions: What is the interest and what is driving it? Who are the players and what processes do their investment decisions go through? What are the impacts in recipient countries? And what action can be taken to promote investments that genuinely support local people? The brief is available at: <http://pubs.iied.org/17121IIED.html?c=agric/food>

## Events 2012

**April 6**

**REFERENCE TO WTO LAW IN INTERNATIONAL INVESTMENT ARBITRATION: A PROMISING TREND OR A SEPARATENESS TO BE MAINTAINED?**, Columbia University, New York, <http://www.vcc.columbia.edu/content/reference-wto-law-international-investment-arbitration-promising-trend-or-separateness-be-ma>

**April 21 - 26**

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

**April 23**

**NAVIGATING EU LAW AND THE LAW OF INTERNATIONAL ARBITRATION**, Columbia University, New York, <http://www.vcc.columbia.edu/content/navigating-eu-law-and-law-international-arbitration>

**May 24 - 27**

**INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION SYMPOSIUM**, Salzburg, Austria, <http://cils.org/conferences/conference.php?ConferenceID=251&/>

**June 10 - 13**

**21ST INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION CONGRESS (ICCA)**, Singapore, <http://www.iccasingapore2012.org/site/>

**June 18**

**EU AND INVESTMENT AGREEMENTS - OPEN QUESTIONS AND REMAINING CHALLENGES**, Vienna, Austria, contact [titi@recht.wiwi.unisiegen.de](mailto:titi@recht.wiwi.unisiegen.de)



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