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Will investor-state arbitration send restrictions on tobacco marketing up in smoke?

By Matthew C. Porterfield & Christopher R. Byrnes

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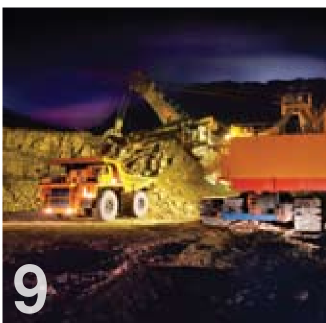
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feature 1

Philip Morris v. Uruguay:
Will investor-state arbitration send restrictions on tobacco marketing up in smoke?

Matthew C. Porterfield & Christopher R. Byrnes

For nearly two decades, the tobacco industry has used international investment rules to challenge government restrictions on cigarette marketing. In 1994, R.J. Reynolds Tobacco Company threatened to bring a claim under the North American Free Trade Agreement's (NAFTA) investment chapter as part of its successful lobbying campaign against Canada's proposed "plain packaging" legislation, which would have required that all cigarettes be sold in standardized packaging without logos or trademarks. More recently, Philip Morris has brought an investor-state claim challenging Uruguay's restrictions on cigarette packaging, and formally threatened the government of Australia with an arbitration claim in response to its packaging rules.[1]

Philip Morris's challenge to Uruguay's tobacco regulations raises a number of fascinating (although not entirely new) issues concerning international investment law, including the scope of fair and equitable treatment, the use of most favored nation (MFN) provisions to invoke more lenient procedural standards, and the availability of injunctive relief in investment arbitration. The legal basis of Philip Morris's notice of claim against Australia has not yet been publicly disclosed, but the case promises to be closely watched in Australia and abroad.

Perhaps even more interesting, however, will be the response of governments to this use of investor-state arbitration in the politically sensitive context of tobacco regulation. Philip Morris has lobbied the United States Trade Representative (USTR) to include strong investment protections for tobacco trademarks in the proposed Trans-Pacific Partnership Agreement (TPPA). Australia, in turn, has announced that it will oppose the inclusion of investor-state arbitration in its future free trade agreements, including the TPPA, due in part to the threat of challenges to its proposed plain packaging rules. The reaction to Australia's stance by the United States government, which is legally prohibited from promoting tobacco exports or seeking the removal of non-discriminatory tobacco regulations, will merit particular attention.

Threat of investment arbitration used against Canada's plain packaging proposal

Canadian parliamentarians first seriously considered plain packing as a regulatory option in early 1994. The tobacco industry had just won a lengthy campaign to roll back high

tobacco taxes, and Parliament sought to offset the health effects of lower taxes by implementing plain packaging regulations.[2]

Given the widespread concern for tobacco's negative health effects, the tobacco industry was wary of debating plain packaging as a health issue. The industry saw trade and investment rules, especially those included in the recently enacted NAFTA, as an effective way to frame plain packaging as a legal issue divorced from health concerns.[3] Relying on NAFTA's investment chapter, R.J. Reynolds Tobacco Company sent a memorandum to the House of Commons Standing Committee on Health arguing that plain packaging would constitute an illegal expropriation of a legally protected trademark, requiring Canada to pay hundreds of millions of dollars in compensation.[4]

The mere threat of investment arbitration had a powerful impact on Parliament's deliberations on plain packaging. Although it was the Canadian Supreme Court's invalidation of Canada's Tobacco Products Control Act in 1995 that ultimately put the plain packaging debate to rest, the NAFTA threat is widely believed to have deterred the government from taking legislative action on plain packaging prior to the Court's ruling.[5]

Philip Morris v. Uruguay

On 19 February 2010, Philip Morris filed a request for arbitration against Uruguay with the International Centre for Settlement of Investment Disputes (ICSID). Philip Morris alleges that recent tobacco regulations enacted by Uruguay violate several provisions of the Switzerland-Uruguay bilateral investment treaty (BIT).[6] Specifically, Philip Morris is challenging three provisions of Uruguay's tobacco regulations: (1) a "single presentation" requirement that prohibits marketing more than one tobacco product under each brand,[7] (2) a requirement that tobacco packages include "pictograms" with graphic images of the health consequences of smoking (such as cancerous

lungs),[8] and (3) a mandate that health warnings cover 80% of the front and back of cigarette packages.[9]

All three measures, Philip Morris argues, violate Article 3(1) of the BIT, which prohibits subjecting investments to "unreasonable" measures, because they are overbroad and bear no rational relationship to their purported public health objectives.[10] Philip Morris further alleges that the single presentation requirement constitutes an expropriation of Philip Morris's trademarks by prohibiting their use on multiple brands.[11]

The scope of fair and equitable treatment

Philip Morris's most interesting claims implicate one of the more persistent areas of debate in international investment law: the scope of the rights provided under the "fair and equitable treatment" provisions of investment treaties. The most restrictive interpretation of this language (and the position that the United States has taken since 2002) is that it merely reflects the customary international law standard of protection that is already guaranteed to foreign investors under the right to the "minimum standard of treatment" under international law.

Philip Morris, however, asserts some of the more expansive interpretations of fair and equitable treatment, including a right to a "stable and predictable regulatory framework." This right, Philip Morris argues, was violated by Uruguay's single presentation and pictogram requirements, which frustrated its "legitimate expectations" concerning its investment in Uruguay.[12] Philip Morris also argues that Uruguay has denied it fair and equitable treatment by violating the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), implicitly adopting the controversial position that fair and equitable treatment includes rights under treaties in addition to customary international law.[13]

Philip Morris's request for arbitration also raises interesting procedural questions concerning the use of MFN clauses to avoid procedural obligations and the availability of injunctive relief in investment arbitration.

Injunctive relief as a remedy in investor-state arbitration

In addition to monetary damages, Philip Morris is requesting that the tribunal order Uruguay to suspend the application of the challenged regulations.[14] Investor-state tribunals typically provide relief in the form of monetary damages; there has been relatively little discussion of the availability of injunctive relief. At least one prominent commentator, however, has concluded that "the [ICSID] Convention's drafting history indicates that an ICSID tribunal has the power not only to award monetary damages, but also to order a party to perform a specific act or to desist from a particular course of action."[15]

Using MFN provisions to bypass procedural requirements

Prior to bringing an investor-state claim, Article 10 of the Switzerland-Uruguay BIT requires an investor to attempt to negotiate a resolution of a dispute with the host country for at least six months, and then to attempt to litigate the dispute through the domestic courts of the host state for at least eighteen months. Philip Morris argues, however, that it need not comply with either requirement because the BIT contains an MFN provision that entitles it to the standard of treatment that Uruguay provides to investors from other countries under BITs that permit investors to proceed directly to arbitration.

A similar strategy was used in the well-known Maffezini v. Spain arbitration to bypass a provision in the Argentina-Spain BIT that requires an investor to pursue available domestic remedies for at least eighteen months before bringing an arbitration claim.[16] Other tribunals have rejected attempts to use MFN clauses in investment treaties to gain access to more favorable dispute settlement provisions in other agreements.[17]

Tobacco regulations and the Trans-Pacific Partnership Agreement

The potential use of investment arbitration to challenge tobacco regulations has also become a source of controversy in the negotiations on the TPPA, a free trade agreement being negotiated by Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States and Vietnam. Philip Morris has moved aggressively to use the TPPA negotiations to limit restrictions on tobacco marketing. In comments submitted to USTR, Philip Morris argued that Australia's plain packaging regulations would be "tantamount to expropriation" of its intellectual property rights, and complained of the broad authority delegated to Singapore's Minister of Health to restrict tobacco marketing.[18] In order to address these "excessive legislative proposals," Philip Morris urged USTR to pursue both strong protections for intellectual property and inclusion of the investor-state dispute settlement mechanism in the TPPA.

More recently, Philip Morris served the government of Australia with a notice of claim, setting in motion a three-month period of negotiation before arbitration proceedings can be commenced. Philip Morris is relying on the Australia-Hong Kong BIT, as its Australian operations are owned by the Hong Kong-based Philip Morris Asia Limited. Announcing the notice of claim on 27 June 2011, a spokesperson for the company said "damages may amount to billions of dollars".

Australia renounces investor-state arbitration and greater rights for foreign investors

Even before its notice of claim was sent in June, Philip Morris's aggressive use of investment law to challenge tobacco regulations may have backfired. In April, Australia's government announced that it would no longer support the inclusion of investor-state arbitration in its free trade agreements, explicitly linking its new position to the attempts to "limit [Australia's] capacity to put health warnings or plain packaging requirements on tobacco products . . ."[19]

Significantly, Australia also indicated that it would support equal treatment for foreign and domestic investors, but would oppose provisions in future agreements that would

provide foreign investors with greater rights. This stance echoes the Calvo Doctrine that many Latin American governments once espoused, as well as the United States Congress's mandate that U.S. investment agreements should not provide foreign investors with greater substantive rights than those enjoyed by domestic investors.[20]

Australia's initiative on plain packaging is consistent with its status as a Party to the World Health Organization Framework Convention on Tobacco Control (FCTC), the world's first global public health treaty. Article 11 of the FCTC requires all signatories to enact strong packaging and labeling regulations, consistent with those enacted in Uruguay and proposed in Australia.[21] Another prospective member of the TPPA and signatory to the FCTC, New Zealand, has indicated that it may also impose plain packaging regulations on tobacco products,[22] further heightening tension over the issue in the TPPA negotiations.

Conflict between investment rules and U.S. law supporting tobacco regulations?

The controversy over plain packaging regulations and investor-state arbitration puts the United States in an awkward position in the TPPA negotiations. Since 1997, an amendment to the annual appropriations bill sponsored by Congressman Lloyd Doggett has prohibited USTR from using government funds—

> to promote the sale or export of tobacco or tobacco products, or to seek the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type.[23]

Executive Order 13193, signed by President Clinton in 2001, similarly prohibits U.S. agencies from promoting the sale or export of tobacco or seeking to reduce or remove foreign governments' advertising restrictions on tobacco products.[24]

Arguably, USTR routinely violates these restrictions by negotiating provisions in U.S. trade agreements that potentially restrict the ability of governments to regulate the marketing of tobacco products. U.S. FTAs typically include many of the same provisions that Philip Morris is currently invoking in its arbitration against Uruguay, including protection for intellectual property rights, investor-state dispute settlement, a prohibition on uncompensated expropriation, and a guarantee of "fair and equitable treatment." Nevertheless, in light of the significant media coverage that Australia's stance on plain packaging and investor-state arbitration has received, it appears likely that USTR's compliance with the Doggett Amendment and Executive Order 13193 in the TPPA negotiations will attract substantial scrutiny.

Conclusion

The tobacco industry's aggressive use of investment rules could prove to be an effective strategy for opposing restrictions on tobacco marketing. Yet given the widespread support for tobacco regulations, it seems just as plausible that this strategy could result in a backlash against investor-state arbitration. Accordingly, the growing tension between tobacco regulations and investor-state arbitration should be a subject of interest not only for tobacco companies and public health advocates, but also for anyone interested in the future of investor-state arbitration. also for anyone interested in the future of investor-state arbitration.

Authors

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Notes

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6 Request for Arbitration, FTR Holdings S.A. (Switzerland) v. Oriental Republic of Uruguay, ICSID case no. ARB/10/7 (February 19, 2010), available at http://www.smoke-free.ca/eng_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf. FTR Holding S.A. is a subsidiary of Philip Morris International Inc. (PMI) and PMI has its Operation's Center in Switzerland.

7 See id., para. 3.

8 Id., para. 4.

9 Id., para. 5.

10 See id., paras. 77(a), 78-81.

11 Id., para. 82-83.

12 Id., para. 84.

13 Id., para. 85.

14 Id., paras. 87-95.

15 Christoph Schreuer, Non-Pecuniary Remedies in ICSID Arbitration, 20 Arb. Int'l 325, 326 (2004). Some investments agreements explicitly limit the availability of non-pecuniary relief.

16 See Maffezini v. Spain, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/97 (Jan. 25, 2000).

17 See, e.g., Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), para. 204 ("the intention to incorporate dispute settlement provisions [through an MFN clause] must be clearly and unambiguously expressed.")

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21 See Framework Convention on Tobacco Control art. 11, Feb. 27, 2005, 2302 U.N.T.S. 166 (requiring health warnings covering 30% of packaging and encouraging warnings covering 50% or more, including in the form of pictograms), available at http://www.who.int/fctc/en/.

22 New Zealand Likely to introduce plain tobacco packets, NEW ZEALAND HERALD (April 7, 2011), available at http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10717788.

23 Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 (H.R. 3288), Div. B § 510, Div. F § 7082 (effective through 2011 fiscal year under H.R. 3081, 111th Cong. § 101(7)).

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feature 2

Australia's rejection of investor-state dispute settlement: Four potential contributing factors

Kyla Tienhaara & Patricia Ranald

In April of this year, as a part of a broader rethink of Australia's approach to international trade negotiations, the Gillard Government vowed that it will no longer include provisions on investor-state dispute settlement (ISDS) in bilateral and regional trade agreements.[1] The new policy is justified by reference to the principles of 'no greater rights' for foreign investors and the government's 'right to regulate' to protect the public interest. These principles have long been advocated by non-governmental organizations (NGOs) but have generally only been paid lip service by governments.

For many observers, both within and outside the country, this policy development came as a surprise. Earlier in the decade, Australia had famously rejected ISDS with the United States in the Australia-US Free Trade Agreement (AUSFTA). However, since then successive governments have negotiated and concluded trade agreements that include ISDS. Furthermore, Australia has very little in common with the states that have been leading the charge against ISDS (mainly left-leaning Latin American countries). Perhaps most puzzling is that this bold policy has emerged in a country that has never been involved in an investor-state dispute.

In this article we speculate that four factors might provide some insight on how and why this policy shift came about.

1. Trade relations with the United States: from AUSFTA to the TPPA

In 2003, a conservative Liberal-National coalition government led by John Howard commenced trade negotiations with the United States. The AUSFTA, which came into force in 2005, did not include a standard provision on ISDS. The official line taken by both governments was that ISDS was unnecessary because each country has a "robust" legal system for resolving disputes.[2] However, this justification glosses over the substantial concerns that were raised about ISDS by both NGOs and elected officials in Australia over the course of the negotiations.

The AUSFTA "prompted the biggest critical public debate ever held in Australia about a trade agreement" and ISDS was "a major target of community campaigning".[3] Negotiators have acknowledged that this debate had an impact on the position taken by the government.[4] Furthermore, it strongly influenced the decision of the Australian Labor Party (ALP) to adopt a policy which was critical of some aspects of the AUSFTA, including ISDS. The Greens and the Democrats also opposed certain elements of the agreement. Because these parties held a majority of Senate seats, they had the option of blocking the implementing legislation for the AUSFTA. It seems likely that the Howard Government removed ISDS from the agreement in the hope that this would assist passage for the implementing legislation through the Senate. Despite intense internal debate over the agreement within the ALP, the implementing legislation was eventually approved, albeit with some amendments.[5]

Five years later, with the ALP in power (at that time led by Prime Minister Kevin Rudd), the government again sat down at the negotiating table with the US. This time the talks concerned a regional trade agreement known as the Trans Pacific Partnership Agreement (TPPA). The TPPA builds on the Trans-Pacific Strategic Economic Partnership Agreement between Brunei, Chile, New Zealand and Singapore, adding to the mix Australia, Malaysia, Peru, Vietnam, and the US (other countries are also contemplating joining). The TPPA has been described as a building block for a free trade area covering the entire Asia-Pacific region.[6]

At the start of the negotiations in March 2010, Trade Minister Simon Crean suggested that Australia was taking a comprehensive approach to the trade deal and that "everything was on the table".[7] Academics and NGOs expressed alarm that the government was re-opening all of the issues that they (and the ALP) had fought against during the AUSFTA negotiations. The government quickly backtracked on the issue of ISDS, with Mr. Crean noting that he had "serious reservations about the inclusion of investor-state dispute settlement provisions" in the TPPA.[8]

As is the case in many developed countries, very little notice was taken when the Australian government signed agreements containing ISDS provisions with developing countries (e.g. the Australia-Chile FTA), despite consistent campaigning on this issue by some NGOs. Most of the public and government concern with ISDS is focused on the threat to Australian public policy. This threat is obviously most potent when the US—the single largest source of FDI in Australia—is involved. However, whether the negotiation of the TPPA provided the impetuous for the trade policy review remains a matter of speculation.

2. An economic approach: the role of the Productivity Commission

The Australian Productivity Commission is an arms-length advisory body set up in 1998 to conduct independent research on a range of economic, social and environmental issues. On 27 November 2009, the government requested that the Productivity Commission undertake a study into the impact of bilateral and regional trade agreements on Australia's economic performance.

Over the course of its year-long study, the Commission consulted the business sector, government agencies and other interested parties and invited submissions from the public. Several NGOs, trade unions and academics made submissions that were highly critical of ISDS.[9] A submission by academics Jonathan Bonnitcha and Dr Emma Aisbett that dismantled the traditional economic arguments used to justify State participation in ISDS (e.g. the claim that it will result in greater inflows of FDI) appears to have made a particularly strong impression on the Commissioners.[10]

The Commission's final report was released in December 2010.[11] One of the Commission's recommendations was that the government should "seek to avoid" the inclusion of ISDS provisions in its trade agreements.[12] Three key conclusions led to formulation of this recommendation.[13] First, the Commission found no evidence of the existence of a market failure relating to sovereign risk. Although it was acknowledged that the domestic court systems in some countries might not be as robust as Australia's, the Commission reasoned that in most instances the desire on the part of governments to retain a good reputation with foreign investors was sufficient to quell any impulse to expropriate.[14] The Commission also argued that there is no evidence that regulation (in Australia or abroad) is systematically biased against foreign investors—in fact the reverse may be true.[15] Despite having found no evidence of a market failure, the Commission went on to assess whether, if such a market failure did exist, there were other options for addressing it. Their second key conclusion was that insurance and investor-state contracts were more appropriate mechanisms for dealing with political risk than ISDS.[16] Finally, the Commission assessed the issues of regulatory chill and the cost of arbitration to governments. Their third key conclusion was that "Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions".[17]

The Gillard Government was not obligated to adopt the Commission's recommendations. However, one could speculate that the new Trade Minister—Dr Craig Emerson, a trained economist not supportive of the idea that the role of government is to create additional legal rights to protect investors—was likely to be persuaded by the Commission's economic reasoning on ISDS.

3. No champion for ISDS: the absence of a strong business lobby

ISDS is generally supported by two main groups: investment lawyers/ arbitrators and businesses (particularly multinational corporations). During the Productivity Commission study neither group rallied to defend ISDS. The absence of a strong business lobby on this issue seems particularly significant.

Australian businesses have apparently never utilized the ISDS provisions in Australian treaties, which may explain their lack of interest.[18] n this respect, it may be relevant that large (and politically influential) Australian mining corporations are accustomed to guarding themselves against political risk through investor-state contracts, which often include provisions on ISDS, when they operate abroad.

What is perplexing is that foreign businesses with interests in Australia did not get involved in the debate, when clearly some have a very strong interest in accessing ISDS (see next section). Perhaps they reasoned that interfering in Australia's policy process would be counterproductive. However, it is also conceivable that some foreign business groups were simply unaware of the Productivity Commission's study or the impact that it would have on government policy. Since the announcement of the new policy, the US Council for International Business has been in contact with the Australian Chamber of Commerce and Industry in an attempt to bolster domestic support for ISDS (with the particular aim of ensuring Australian support for its inclusion in the TPPA).[19]

4. A viable threat: Big Tobacco's assault on plain packaging legislation

During the period that the Productivity Commission was studying the risks and purported benefits of ISDS, Australia was developing legislation that would require tobacco products to be packaged in plain paper (with graphic health warnings, but no branding). This legislation, based on a World Health Organisation recommendation, is set to pass through both houses of government in the next few months.

Although most of the discussion has surrounded the viability of either a constitutional case in the courts of Australia, or an intellectual property dispute in the WTO, the government was not ignorant of the possibility of an investor-state dispute. In fact, the policy statement on ISDS explicitly noted that the government "has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products".

Less than three months after the release of the policy statement, the ISDS threat has become far more palpable—on 27 June, Philip Morris (one of the world's largest tobacco companies) notified the government of its intention to launch a dispute under the Australia-Hong Kong Investment Promotion and Protection Agreement (1993). The ostensibly American company is engaged in a similar dispute with Uruguay, although in that case it claims to be a Swiss investor.

The government has vowed to stand its ground on the issue and is confident that Philip Morris doesn't have a case.[20] Nevertheless, some commentators, including the Australian Medical Association, have already begun to call for the Hong Kong treaty to be terminated. This would be fairly straightforward as the treaty has reached the end of its first term (15 years) of enforcement, although such a move would have no impact on this particular case.

Conclusions

Australia's new policy on ISDS has been described by some as 'naïve', 'backwards', 'overkill', and by others as 'reasonable', 'progressive' and 'worth emulating'. However, most of these reactions have occurred outside the country. A few local law firms have decried the government's decision and a few NGOs have praised it—but (in Australian terms) there hasn't been a great deal of 'argy-bargy' on the topic domestically.

However, we will conclude with two key points of caution. First, it may be difficult for Australia to maintain its position against ISDS in the TPPA negotiations, particularly given the pressure that is likely to come from the US. Then again, it is also possible that Australia's stand against the ISDS will encourage countries like New Zealand and Vietnam, which have in the past claimed exemptions from ISDS provisions (in the ASEAN-New-Zealand Australia Free Trade Agreement), to take a similar position. Second, it should be noted that the ALP has a minority government and is reliant on the support of some independents and Greens. On the one hand, the need to retain this support is likely to strengthen the position against ISDS. On the other hand, the Liberal-National Coalition has come out ahead of the ALP in recent opinion polls and could win an election if one were called in the near future. The shadow trade minister, Julie Bishop, has made it clear that the Coalition believes that ISDS is important both to protect Australian business interests and to attract FDI to Australia.[21]

Although the future of the new policy on ISDS is, therefore, subject to these political uncertainties, one can hope that the greater legacy of this episode in Australian politics will be that it inspires governments in other parts of the world to examine their own investment policies more critically.

Authors

Kyla Tienhaara is a Research Fellow at the Regulatory Institutions Network, Australian National University, and the author of The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy (Cambridge University Press, 2009).

Patricia Ranald is a Research Associate at the University of Sydney and Convenor of the Australian Fair Trade and Investment Network (AFTINET). She has written a number of articles on the AUSFTA and recently contributed a chapter on this topic to the book No Ordinary Deal: Unmasking the Trans-Pacific Partnership Agreement (Allen and Unwin, 2010).

Notes

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19 "In Trans-Pacific Trade Talks, USCIB Seeks Neutral Forum for Dispute Settlement", 5 May 2011, USCIB website: http://www.uscib.org/index.asp?documentID=4086

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21 "US wants policy protection", Weekly Times Now, 5 May 2011. http://www.weeklytimesnow.com.au/article/2011/05/05/327341_politics-news.html

Investment arbitration and the Canada-EU Comprehensive Economic and Trade Agreement:

Time for a change?

feature 3

Craig Garbe

With the seventh round of negotiations between Canada and the European Union over the Canada-EU Comprehensive Economic and Trade Agreement (CETA) completed this April, and the eighth round scheduled for July, the involved nations are closer than ever to being subject to the investment arbitration provisions of another free trade agreement. Canadian critics of CETA have taken aim at the draft CETA arbitration provisions, arguing that the investment chapter is poised to become the next NAFTA Chapter 11—more burdensome on the government than beneficial to investors. But is this criticism justified?

The short answer is yes. Canadians should be concerned about committing their federal government to another slough of investor-initiated arbitrations, especially with investors from the developed European member states. While Canada has no shortage of commitments to investment arbitration under the country's network of bilateral investment treaties (BITs, known domestically as Foreign Investment Protection Agreements or FIPAs), the number of claims that Canada can expect to face under these FIPAs is negligible compared to what it should expect to face under CETA. One reason for this is that investors bringing arbitration claims tend to come from developed nations, and Canada's FIPAs are primarily with the developing world. NAFTA Chapter 11 has generated more investor claims against Canada than all the FIPAs combined, and while empirical studies have shown that US investors are the most common claimants, investors from European member states combined have initiated almost as many claims as those from the US.[1]

Canada must also recognize the growing international concern about investment arbitration, especially from economically similar nations like Australia. The recent Australian policy shift against pursuing arbitration clauses in future free trade agreements expressly recognizes the danger that arbitration imposes on a nation that wishes to regulate in areas of social or environmental policy.[2] There is little indication that Canada's desire to attract European investment is great enough to warrant the tighter regulatory space that these treaty provisions will imply.

But while the concerns are legitimate, governmental burdens must be weighed against the prospective gains for Canadian investors from the inclusion of these provisions. There are several reasons for investors to prefer arbitration; one of the strongest is that it saves them from the perils of domestic courts. While traditionally a justification for investment arbitration with developing nations, there are European nations whose court systems should be a cause for concern. Italian courts, for example, are so notoriously slow that litigants may purposely 'torpedo' actions they know they will lose, but want to delay, by commencing them in Italy.[3] An arbitration system also saves investors who wish to work with a number of European governments from needing to familiarize themselves with the intricacies of what could be several very different legal systems. While provincial legal differences may pose something of a burden for prospective European investors in Canada, the lure of arbitration for Canadian investors, at least because it provides a more familiar system, may be greater.

In the end, however, it may not make a difference whether investment arbitration is shown to be more or less advantageous than its alternatives: arbitration provisions may be included in CETA because they are the accepted status quo and negotiators face a swarm of other issues. Already Canada has six FIPAs with members of the European Union, all of which contain provisions for investor-state arbitration, and these form just a small part of the hundreds of investment treaties concluded between European member states and third parties that include investor-state arbitration. This demonstrated acceptance of investment arbitration by both parties means that dispute resolution is not an issue that is likely to be hotly disputed. Add to this that CETA is poised to become the most ambitious trade agreement ever signed by Canada, with unprecedented offers in government procurement, enforcement of geographic indicators, and the elimination of huge numbers of tariff barriers, and it is easy to see why negotiators are not likely to make a fuss over investment arbitration. Indeed this is exactly what members of Canada's negotiating team indicated in a forum on the status of CETA talks held in Toronto this May.[4]

But despite the size of the task before negotiators, investment arbitration provisions should not be included simply because they are common. The claims that Canada could face from European investors need to be carefully weighed against the benefits for Canadian investors. At the very least, Canada and the EU should discuss domestic courts as an alternative to arbitration and seek input from prospective investors on the issue. With the exchange of offers between the two parties set to occur this summer, and the potentially final round of talks to occur in October, time is running out to examine this critical part of the agreement.

Author

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Notes

1 Data based on total number of EU member state investors involved in a sample of 82 arbitration cases compared to US investors, Susan D. Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration" (2007) 86 N.C. L. Rev. 1 at 29. Note that while Franck's classification of nations by OECD status and classification of arbitrators by nationality is criticized, this data is weak only in that the sample of cases used is relatively small.

2 Government of Australia, Department of Foreign Affairs and Trade Policy Statement, "Trading our way to more jobs and prosperity", available online at: <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>.

3 Isabella Betti, "The Italian torpedo is dead: long live the Italian torpedo" (2008) 3 J. Intell. Prop. Prac. 6.

4 Comments delivered by Steve Verheul and members of Canada's negotiating team at the Canada-EU Trade Negotiations Roundtable Discussion (26 May 2011, Toronto, Canada).

feature 4

Foreign investment contracts and sustainable development: The new foundations begin to emerge

Howard Mann

Two international projects relating to foreign investment and sustainable development (SD) were completed in the past two months. These two projects individually and together show the emerging pathways to properly considering the linkages between new investments and SD in the host state and community.

The first of these projects to be launched, on 4 April 2011 in Rio de Janeiro, is the International Bar Association Mining Law Committee's Model Mining Development Agreement (MMDA). The Mining Law Committee began work on the project in April 2009. In October 2009, I and Luke Danielson of the Colorado-based Sustainable Development Strategies Group joined the project at the invitation of the Committee President, Peter Leon, and project coordinator, Bob Bassett. Multiple consultations were held with business, civil society and governments. Several drafts were produced for web-based comments and over 100 comments received. The final document and history is found at www.mmdaproject.org

The second contract-specific project comes from Prof. John Ruggie's work and the United Nations Special Representative to the Secretary General (UNSRSG) for Business and Human Rights. This is the "Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators", which was endorsed by the Human Rights Council on 16 June 2011.[1] The project was led by Prof. Ruggie' legal advisor Andrea Shemberg.

The MMDA takes a broad approach to SD, but from a mining sector perspective. It essentially asks: what would a mining contract look like if the project's goal is to contribute equitably to sustainable development in the host community and state while also being a viable business for the investor. The MMDA proposes a new negotiating paradigm, one that replaces a traditional win-lose rents-based approach, with an interest-based approach that seeks solutions for the mutual benefit of the investor, community and government. In comparison, the UN "Principles for responsible contracts" takes a broad approach to integrating human rights considerations, part of any SD paradigm, into contract considerations for all sectors.

Both documents recognize the need for a holistic approach to investor-state contracts. The notion of a social contribution as a voluntary add on to an otherwise business as usual model is rejected in favour of a fully integrated contracting model where social and economic development within the host community are integral components, based on preliminary human rights and social impacts assessments, as well as environmental assessment and management components.

Moreover, both approaches essentially recognize that the anticipated benefits of foreign investment hinge on sound, cogent and coherent policy decisions backed up by well designed laws, regulations and, where used, contracts. In other words, the benefits do not accrue by accident but by design.

But where the UN document stays at a broader level of principles and objectives, the MMDA gets into the details of draft model text. It recognizes, however, that investor-state contracts must be tailored to the unique circumstances of each negotiation, and for this reason, the model agreement provides a range of options for negotiators to choose from. And in many instances, particular legal provisions will already be addressed in domestic law and hence not be subject to contracts all.

A key issue for both processes was that of stabilization provisions. The results appear to be similar in both products. The MMDA deals with the issue in contractual terms and divides itself between fiscal and non-fiscal issues. The "Principles for responsible contracts" paper remains more general, but comes to largely the same place. On fiscal issues, where they are regulated by the contract, a stabilization provision is put in place. For non-fiscal issues, such as environmental standards, human rights-related measures, and health and safety regulations, no stabilization provision is contemplated in the MMDA. Rather, a provision against arbitrary and discriminatory measures is set out, much as in the "Principles for responsible contracts" paper, with an awareness that this should always allow for the raising of such standards to international levels. Both documents directly or implicitly call for investors to ensure the best available technology for the project is used and for ongoing management systems to include an allocation for upgrading technologies as time and opportunity require, ensuring best practices are maintained. Thus, it is recognized that stabilization clauses should not be about rent sharing, but only, when used, about what is truly "necessary" (the term used in the "Principles for responsible contracts" paper) to protect a business from nefarious actions rather than from foreseeable good business practices.

There is no excuse today—as confirmed in both documents—for investors to use anything less than best available technologies for the location, type of project, etc, or for social and environmental review and management processes not to account for ongoing expenditures as part of the project cost estimates of the investor from the beginning. Nor is there any sound basis for any investor to expect the regulatory environment not to change during the 50 and more years of a project. Stabilization provisions should not be about rent capture, as they largely have been to date. Rather, the full contract should be about designing a framework that is needed to ensure a project is viable and equitable for all stakeholders over the longer term, making stabilization provisions as they have previously been known obsolete.

Finally, both documents recognize the fundamental gap in negotiating capacity that many developing country governments face in investment contract negotiations. This needs addressing through both immediate capacity provision and more developed capacity building. This gap is not only in terms of legal capacity, but also finance, environmental and other. This poses a long-term challenge for many governments and development agencies.

Author

Howard Mann is the Senior International Law Advisor to IISD. He was a member of the Administrative Committee for the IBA's MMDA project and the final drafting committee; and a participant in multiple consultation processes related to the development and completion of the Responsible Contracting project. His comments reflect his own views and not those of any other persons or organizations engaged in these projects.

Note

1 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators, 25 May 2011, http://www.business-humanrights.org/media/documents/ruggie/report-principles-for-responsible-contracts-25-may-2011.pdf

feature 5

Federalism and international investment disputes

Lawrence L. Herman

One of the more politically controversial aspects of international investment protection treaties is the liability of a State when political sub-divisions are found to have breached that State's treaty obligations to foreign investors.

This issue is particularly significant in federal States, such as Canada, the United States, Australia or Germany, among others, where sub-national governments exercise internal jurisdiction in many areas of economic regulation. But the issue is not confined to federal States. Regional and municipal governments in unitary States also exercise considerable power over local economic activity and can equally bring that State into conflict with its multilateral or bilateral treaty obligations.

As sub-units increasingly enter into the regulatory domain in matters such as environmental protection, consumer safety, public health, and land use, they can find themselves up against foreign investors that have treaty rights protecting those investments. These investment treaties typically give foreign investors the right to invoke binding arbitration against States for measures that fail to meet accepted international standards, or are discriminatory or where expropriation occurs without full compensation[1].

The State's national government bears the legal responsibility toward outside investors under these treaties. However, it is the laws, regulations and policies of sub-national governments (provinces, states, regional and municipal governments) that are increasingly engaging the full responsibility of the State.

Growing international disputes

Some of these issues have been around for a while in the GATT/WTO context, where disputes were brought by member States as a result of sub-national measures that offended another State's trade obligations. Included were GATT challenges launched against Canada's provincial liquor board practices by the European Union and the United States in the 1980s and early 1990s[2]. While these involved provincial laws, Canada as a whole, as the GATT Contracting Party, was held to account. With the possibility of Canada's trading partners withdrawing trade benefits, liquor board practices were brought into line by the various provinces and the offending measures were eventually corrected.

In the investment field, NAFTA panels have made it clear that the national governments of the State bear responsibility for actions of their sub-national units. This was confirmed in an early NAFTA arbitration proceeding brought by American investors against Mexico for regulatory measures enacted by a local government[3]. Currently there are ongoing NAFTA investment disputes against Canada involving measures enacted, not by the federal government, but by various Canadian provinces[4]. As well, recent NAFTA arbitrations brought by investors against the United States involved state and local, rather than national, measures[5].

The trend in these NAFTA investment disputes—as in investment agreements in other parts of the world—is increasingly about challenges over sub-national, regional and even local measures as opposed to national laws and regulations of the State concerned. As the legal embodiment of the State, national governments are bound internationally by actions of their political sub-units and are thus exposed to investor challenges against measures they had nothing to do with. It is anticipated that local measures will be an increasing source of investor-State disputes in the years ahead.

This phenomenon was brought home in Canada in 2009 when the Province of Newfoundland and Labrador expropriated the local assets of Abitibi-Bowater, a U.S. forest products company. While the expropriating measure was entirely provincial, the company launched arbitration proceedings against the federal government of Canada under NAFTA Chapter 11, alleging various breaches of investor-State obligations under the treaty. Eventually the case was settled with the Canadian government paying C$130 million in compensation to Abitibi[6].

The Province was not involved in the settlement and, so far as is known, has paid nothing. There has been no information as to whether or indeed how Ottawa will seek to recover the settlement money from the Province, notwithstanding that it was the Province's law that led to the investor's claim. One could fairly say that by rights the Province should be responsible for reimbursing the federal treasury.

The case illustrates the tensions between local interests and those of the State as a whole when investment disputes arise. What happens when political sub-units take actions that put national governments off-side their foreign investment obligations? How large is the exposure of national governments to investor claims in an era where increasingly widespread sub-national and local regulation—environmental, health, consumer protection, etc. —runs up against the rights of foreign investors guaranteed by the State under international investment protection agreements?

Global proliferation of foreign investment agreements

The NAFTA provisions at issue in the Abitibi-Bowater case mirrored the same kinds of obligations contained in countless bilateral investment treaties (BITs), foreign investment protection agreements (FIPAs) and international investment agreements (IIAs). Regardless of their title, the standard model ensures that foreign investors are guaranteed against unfair, inequitable or discriminatory treatment and have assurances that, when expropriation occurs, they can get full and prompt payment to compensate for the value of the expropriated assets[7].

"In the investment field, NAFTA panels have made it clear that the national governments of the State bear responsibility for actions of their sub-national units."

These treaties typically contain provisions requiring national governments to take "necessary measures" to ensure sub-national compliance with treaty obligations[8]. Even where this requirement is met as an internal matter, the sub-units are not treaty parties and are not subject to the international legal obligations placed on the State at large[9].

Growing controversy

While good faith might suggest that sub-national units will normally comply with the decision of an international tribunal (for example, by withdrawing a law or regulation or bringing it into conformity with the treaty), they might not do so willingly or completely or on a timely basis. It is unclear how far that kind of disagreement might go and whether the national government might have to pursue internal legal proceedings to enforce an arbitration award. In Canada, for example, it's doubtful if recourse to domestic courts could successfully enforce such an investment tribunal's decision requiring changes to local laws to comply with Canada's treaty obligations.

Similar tensions apply in the United States, where some commentators have been critical the erosion of the States' constitutional power as foreign investors have challenged state measures that, while within their constitutional realm, are exposed to being found to be inconsistent with the bilateral and multilateral treaty obligations of the United States[10].

Some thoughts for the future

It seems reasonable to conclude that investment disputes are more and more likely to involve challenges by foreign parties to sub-national and local regulation under these bilateral and regional agreements. To better understand the extent of this phenomenon, further research on the number and types of investment arbitrations involving sub-national measures around the globe would be desirable. That would be an important first step in further understanding the nature and depth of the issue explored in this article.

It seems reasonable to conclude that investment disputes are more and more likely to involve challenges by foreign parties to sub-national and local regulation under these bilateral and regional agreements.

Even without a firm set of empirical data, the challenge for States with or without federal systems is to be cognizant of these issues and to settle—at minimum—some kind of internal agreements or protocols whereby state, regional and local governments are held to account and accept responsibility for compliance when the State at large is found in breach of investment treaty obligations through those sub-national actions.

The problem in the Canadian and U.S. contexts, and possibly others, is that there are no internal, constitutional provisions that allow the federal government to seek reimbursement where compensation is paid to an investor but where the province or state is responsible for the impugned measure. In Canada, Ottawa cannot constitutionally turn around and bring legal action to force a province to reimburse the federal treasury for arbitration awards made against Canada for actions of that particular province.

This is a conundrum and poses a difficult issue for federal States. It merits further consideration whether it is possible to move toward some kind of direct form of engagement between foreign investors and the relevant political sub-units in these investment treaties. No doubt this raises difficult issues of State responsibility and sovereignty. Nonetheless, in light of the increasing involvement of sub-units in areas that directly affect foreign investment, this is a subject that needs exploring.

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Notes

1 This is a shorthand description for carefully-formulated standards of protection in these treaties, normally involving the right of foreign investors to national and most-favoured-nation (MFN) treatment and "fair and equitable treatment and full protection and security" recognized under international law. See NAFTA Articles 1102, 1103 and 1105.

2 Canada – Provincial Liquor Boards (EEC): Panel Report, Canada — Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies, BISD 35S/37 (1989), adopted 22 March 1988; Canada – Provincial Liquor Boards (US) Panel Report, Canada — Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, BISD 39S/27 (1993), adopted 18 February 1992.

3 Metalclad Corporation v. Mexico (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2000, at para. 73 (http://icsid.worldbank.org).

4 These arbitrations include investor disputes involving provincial health regulations banning pesticides in Dow AgroSciences v. Canada (now settled by agreement on compensation) and provincial environmental regulations in Bilcon v. Canada and Gallo v. Canada: http://www.international.gc.ca/trade-agreements-accords-commerciaux.

5 See, for example, Methanex v. United States, Award, 3 August 2005 (http://www.state.org); Glamis Gold v. United States, Award, 30 June 2009 (http://www.state.org); ADF Group Inc. v. United States (ICSID Case No.ARB(AF)/00/1), Award, 9 January 2003 (http://www.state.org).

6 "Williams unrepentant as taxpayers on hook for NAFTA deal with Abitibi", Globe & Mail Report on Business (Toronto), 25 August 2010.

7 The NAFTA provisions are close to those in various model investment agreements and which, in turn, are replicated in possibly hundreds of bilateral treaties. See: IISD Model International Agreement on Investment: www.iisd.org.

8 NAFTA Article 105. At the multilateral level, the WTO Agreement contains similar obligations.

9 Spector, David, "Trade Treaty Threats and Sub-National Sovereignty: Multilateral Trade Treaties and Their Negligible Impact on State Laws", 27 Hastings Int'l & Comp. L. Rev 367 (2004-2004).

10 Bottari, M. and Wallach, L., "Federalism and Global Governance", Public Citizen Global Trade Watch (2008).

feature 6

European Parliament calls for reform of European investment policy, but EU member states insist on the status quo Marc Maes

The Lisbon Treaty, in force since 1 December 2009, added Foreign Direct Investment (FDI) to the exclusive common commercial policy of the European Union, without foreseeing any transition measures. Today the European institutions[1] are still wrangling over the scope and content of the new EU policy and the status of the more than 1200 existing bilateral investment treaties (BITS) of the member states.

The discussions turn around three sets of texts produced by the European Commission: a 7 July 2010 draft European legislation (regulation) that deals with the status of the existing BITs and the possibilities that the member states will have to (re-)negotiate BITs in the future[2]; a Communication released on the same date to the European Council and the European Parliament about the content of the new EU investment policy[3]; and the draft mandates for the first EU negotiations for investment protection chapters in EU free trade agreements.

The Council and Parliament are sharply divided on these three texts, placing the Commission in a difficult situation. According to the Lisbon Treaty the Council and the Parliament are co-legislators but it is the Council that gives negotiating mandates to the Commission, not the Parliament. However, since the consent of the Parliament is required to conclude negotiations, it has consistently warned the Commission that its views need to be reflected in the negotiated outcome.

Competing visions for an EU international investment policy

The Council's 25 October 2010 response to the Commission's Communication did not address the Commission's suggestions for reform (rebalancing of rights, transparency, corporate social responsibility, etc) but called instead for an EU investment policy that would be based, as much as possible, on the existing practice of the member states.

The European Parliament, however, adopted a resolution on 6 April 2011 that at least recognised some of the flaws in the member states' current practice, including the use of imprecise language which "allows international arbitrators to make broad interpretations of investor protection clauses, leading to the ruling out of legitimate public regulation" (§24). The Parliament also stressed that the "future agreements concluded by the EU must respect the capacity for public intervention" (§23) and it noted that for investment agreements to benefit developing countries "they should […] be based on investor obligations in terms of compliance with human rights and anti-corruption standards…"(§37).

In addition, the European Parliament:

- stated that speculative forms of investment shall not be protected (§11);
- expressed its deep concern regarding the level of discretion of international arbitrators (§24) and
- called on the Commission to produce clear definitions of investor protection standards;
- proposed more precise wording with regard to non-discrimination and fair and equitable treatment (§19);
- stated with regard to expropriation that a clear and fair balance must be established between public and private interests (§19, 3rd indent);
- stressed the right to regulate, inter alia, for the protection of national security, the environment, public health, workers' and consumers' rights, industrial policy and cultural diversity (§25).

EU FTA negotiations add to pressure

The European Commission wants to use its new investment competence for the first time to add provisions on investment protection to three free trade agreements that it is currently negotiating with Canada, India and Singapore. To this end it tabled drafts in December 2010, January and February 2011 to alter the existing negotiating mandates for these three negotiations.

In a separate resolution on the EU-Canada free trade negotiations, adopted on 8 June, the Parliament, repeated its call "to respect the right of both parties to regulate, in particular in the areas of national security, the environment, public health, workers' and consumers' rights, industrial policy and cultural diversity" (§12). The Parliament added that it considered that "given the highly developed legal systems of Canada and the EU, a state-to-state dispute settlement mechanism and the use of local judicial remedies are the most appropriate tools to address investment disputes". The Parliament also stressed that it expected the Commission to fully take into account its views while negotiating investment provisions with Canada.

However, the member state representatives in the Council's Trade Policy Committee (TPC) reject all the suggestions of the European Parliament for more precise formulations of the protection standards.

By the second half of June, member states were still discussing three issues. First, many member states want it to be written in the mandate that investment protection is a mixed competence between the members and the union. Second, members want a clear view on how the responsibility of the EU and its members in dispute settlement will be arranged before they give the mandate. However such an arrangement probably requires another legal initiative and thus the consent of the Parliament. Third, several member states, which are the most attached to their own BIT approach, prefer to postpone investment protection negotiations with Canada to avoid that the first EU investment protection text will be modelled after the Canadian investment treaties. It is indeed likely that Canada will not be willing to deviate extensively from its own model text, which is more precise and requires transparency in investor-state proceedings, both characteristics many hard-liner member states wish to avoid. Apparently, those EU member states believe that Singapore and India would be more willing to follow the EU member state type model.

Member states don't want the Commission to interfere with their BITs

As for the draft regulation on the existing BITs of the member states and their possibility to (re-)negotiate BITs in the future, the negotiations between the Council and the Parliament, launched at the end of June promise to be difficult. This is despite the fact that Parliament adopted amendments to the draft regulation on 10 May that already substantially watered down the proposals of its Rapporteur, Carl Schlyter, who subsequently voted against the amendments, together with the Green, Left and Social-Democratic groups. The Christian-Democratic-Liberal-Conservative majority have already rejected a sunset clause, simplified procedures and reduced the grounds on which authorisation could be withdrawn. But this is still unacceptable for many member states, which insist that their BITs do not require any authorisation at all, let alone that it could be withdrawn by the Commission

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Notes

1 Three European institutions are playing a central role in defining the future of the EU's interntational investment policy: 1) the Council, which brings together ministers of every EU member state; 2) the European Commission, which represents the interests of the EU as a whole, drafts proposals for new European laws, and manages the day-to-day business of implementing EU policies; and 3) the European Parliament, which represents the EU's citizens and is directly elected by them.

2 Proposal for a regulation of the European Parliament and of the Council: Establishing transitional arrangements for bilateral investment agreements between Member States and third countries, http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf

3 Communication from the Commission to the Council, the European Parliament, the European Economic and Committee, and the Committee of the Regions: Towards a comprehensive European international investment policy, http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf

news in brief

Canada and Dow Chemical settle claim over pesticide ban

A controversial NAFTA investment dispute between Dow AgroSciences and the government of Canada was settled this May.

The settlement agreement involves no money exchanging hands, and the Province of Quebec will continue to restrict the use the lawn pesticides – the measure that prompted Dow to launch its claim against Canada.

Dow AgroSciences LLC, a subsidiary of the US Dow Chemical Company, filed a request for arbitration under NAFTA Chapter 11 in 2009, complaining that the pesticide, 2,4-D, was banned in the Province of Quebec for political motivations rather than scientific criteria.

Despite the request for arbitration, the dispute stayed in limbo: Dow did not appoint an arbitrator, and the case did not proceed to arbitration.

In return for Dow dropping its case, the Province of Quebec issued a statement saying "products containing 2,4-D do not pose an unacceptable risk to human health or the environment, provided that the instructions on the label are followed."

However, Quebec will continue to restrict the use of lawn pesticides that contain 2,4-D. Other Canadian provinces have also prohibited the use of the pesticide for lawn care.

The settlement agreement has been framed as a victory by both the Canadian government and Dow.

The agreement "affirms the right of governments to regulate the use of pesticides," said Canada's Minister of International Trade. "This right will not be compromised by Canada's participation in NAFTA or any other trade agreement."

For its part, Dow AgroSciences took comfort in the Quebec's acknowledgment of its product's safety.

"Quebec's decision never had a basis in science. And it cast a shadow on the safety of our product," said a spokesperson for Dow, in an interview with the Globe&Mail.

Study addresses question of bias against developing countries in investment-treaty arbitration

A report out of Tufts University's Global Development and Environment Institute adds fuel to the debate over whether the investment-treaty system is biased towards developing countries.[1]

The report offers a critique of the work of Susan Franck, a prominent academic who has undertaken empirical analysis of investment arbitration awards. Franck's research has been used to bolster the argument that the investment-arbitration system performs fairly.

In response, the Tufts study, authored by Kevin Gallagher and Elen Shrestha, suggests "caution when relying on Franck's work to argue that investor-state arbitration is neutral toward developing countries".

Gallagher and Shrestha make three central arguments: first, there is a lack of adequate sample size to conduct rigorous empirical work that would support the bold conclusions on the 'fairness' of investment-treaty arbitration; second, the debate should not discount the fact that developing countries are subject to a disproportionate number of claims; and, finally, relative to government budgets and in per capita terms, developing countries pay significantly more in damages than developed countries do.

On the first point, the authors stress that there are not enough investment-treaty cases to form a dataset for rigorous empirical research (a problem that Franck admits). Similar arguments have been put forth by the Canadian academic Profession Gus Van Harten, who has gone into more detail on the limitations of using statistic evidence to draw bold lessons on the fairness of investment-treaty arbitration. An exchange on the topic between Van Harten and Franck is slated for the forthcoming edition of the Yearbook on International Investment Law and Policy, due out in fall 2011.

Gallagher and Shrestha also note that the average award against a developing country amounts to 0.53 percent of government expenditure, or 99 cents per capita. In contrast, the average damages award against Canada—which the authors claim is a good proxy for developed countries—amounts to 0.003 percent of government expenditure, which is 12 cents per capita.

North American lead producer files claim against Peru

The lead producer Renco Group has initiated arbitration against the government of Peru. Renco, on behalf of itself and its subsidiary Doe Run Peru (DRP), claims that Peru's conduct improperly exposed it to liability for environmental remediation, environmental harms, and personal injuries, causing it to shut down its smelting and refining operations.

In its April 2011 request for arbitration, Renco said it seeks US$800 million for alleged breaches of the US-Peru Trade Promotion Agreement (PTPA).

The dispute centers on a metal smelting and refining business which have left the Peruvian town of La Oroya badly polluted. DRP, which purchased the business in 1997, requested several extensions of the deadline for the environmental management and clean-up work. Those extensions were necessary, argues Renco, because the Peruvian government underestimated the extent of the work.

Following a missed deadline in July 2010 to prove that it had the necessary financing to restart operations and to complete the environmental cleanup, its operations permit was cancelled.

Residents of La Oroya have also lodged a case against Renco in the courts of the state of Missouri, where Renco is based. That claim, which remains ongoing, was initiated in 2008, with the claimants seeking damages for the effects of lead poisoning.

Chevron v. Ecuador tribunal rejects petition to submit an amicus brief in the jurisdictional phase

The arbitral tribunal in Chevron v. Ecuador[2] has rejected the application made by two non-governmental organization petitioners—the International Institute for Sustainable

Development[3] and Fundación Pachamama—to serve as amici curiae in the jurisdiction phase of that investment-treaty dispute.

In a statement, the IISD called the decision "disconcerting", and wrote that "the order heightens concerns that, within the controversial system of investor-State arbitration, tribunals are resolving matters of significant public interest, but are doing so without giving those affected an opportunity to access all relevant information or provide relevant input regarding the disputes."

Chevron, the government of Ecuador and Ecuadorian citizens have been embroiled in multiple legal battles in the United States, Ecuador and international arbitration over environmental damage in Lago Agrio, allegedly caused by Texaco Petroleum (TexPet), which Chevron acquired in 2001.

One of those legal disputes is an investor-state arbitration under the U.S.-Ecuador bilateral investment treaty, in which Chevron charges that the Ecuadorian lower court's handling of the ongoing litigation between the Lago Agrio Plaintiffs and Chevron was unjust. Chevron seeks an order from the arbitral tribunal to prevent enforcement of any judgment issued by its courts in favour of the Lago Agrio plaintiffs against Chevron.

At the time of Chevron's filing, no judgment had been issued by the Ecuadorian court hearing the Lago Agrio case. However, the lower court decision has now been issued, with a finding against Chevron/Texaco and an award of US$8.6 billion in favour of the plaintiffs. Chevron has appealed that judgment, and the proceedings in Ecuadorian court remain ongoing.[4]

The amici curiae petitioners charge that Chevron's claims and requests for relief involve extending the US-Ecuador BIT beyond its intended function and proper boundaries. On 18 April 2011, the tribunal, composed of V.V. Veeder, Horacio A. Grigera Naón and Vaughan Lowe, decided to "exercise its discretion" to reject the petitioners' application to provide input on the issue of whether the tribunal should accept jurisdiction over the dispute. The tribunal did not provide its own reasons for rejecting the petition, but rather relied on statements attributed to the disputing parties (Chevron and the government of Ecuador). The tribunal does not appear to rule out the acceptance of an amicus submission at a later stage of the process.

"In this case, the issue of jurisdiction is key for the scope and meaning of BITs and their relationship with other areas of law, such as domestic environmental law and international human rights, both areas dealt with in submissions by amicus curiae during the substantive phases of other investment arbitration cases," write the IISD. "These issues are of no lesser importance at the jurisdictional phase."

Background documents on the amici curiae petition are available at: http://www.iisd.org/investment/

New guiding principles on business and human rights endorsed by the UN Human Rights Council

The United Nations Human Rights Council endorsed on 16 June 2011 a new set of guiding principles for business and human Rights, designed to provide the first global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.

The guiding principles are the product of six years of research led by John Ruggie from Harvard University, involving governments, companies, business associations, civil society, affected individuals and groups, and investors.

The new standards outline how states and businesses should implement the UN "Protect, Respect and Remedy" Framework in order to better manage business and human rights challenges.

Under the 'State Duty to Protect,' the principles recommend how governments should provide greater clarity of expectations and consistency of rule for business in relation to human rights. The 'Corporate Responsibility to Respect' principles provide a blueprint for companies on how to know and show that they are respecting human rights.

The guiding principles rest on three pillars: 1) the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication; 2) the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; 3) the need for greater access by victims to effective remedy, both judicial and non-judicial.

The guiding principles are described as a starting point, which establish "a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."

In addition to the guiding principles, Prof. Ruggie, and his legal advisor Andrea Shemberg, have also published "Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators", which was endorsed by the Human Rights Council on 16 June 2011.[5] The principles, which are highlighted in an article in this edition of the ITN Quarterly (Howard Mann's "Foreign investment contracts and sustainable development: The new foundations begin to emerge"), focuses on the integration of human rights considerations in State-investor contracts.

The guiding principles are available at: http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf

Notes

1 Gallagher, K.P., and Shrestha, E (May 2011), Investment Treaty Arbitration and Developing Countries: A Re-Appriasal, Medford MA, Tufts University. http://www.ase.tufts.edu/gdae/Pubs/wp/11-01TreatyArbitrationReappraisal.pdf

2 Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador, PCA Case No. 2009-23.

3 The International Institute for Sustainable Development is the publisher of this newsletter, Investment Treaty News Quarterly.

4 Lawsuits were originally launched by Ecuadorian and Peruvian citizens against Chevron in 1993 in US courts; however, Chevron successfully challenged those claims on the grounds that the cases should be heard in Ecuador, not the US.

5 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators, 25 May 2011, http://www.business-humanrights.org/media/documents/ruggie/report-principles-for-responsible-contracts-25-may-2011.pdf

Swiss claimant fails jurisdictional stage for not qualifying as an 'investor' *Alps Finance and Trade AG v. Slovak Republic, UNCITRAL*
Damon Vis-Dunbar

A claim against the government of Slovakia has failed after a three-member tribunal declined jurisdiction. The tribunal determined that the claimant was not an "investor" as intended by the Switzerland-Slovakia bilateral investment treaty.

In a 5 March 2011 ruling on jurisdiction, the tribunal burdened the claimant, Alps Finance and Trade AG, with the full cost of the arbitration proceedings. The claimant was "far from meeting the standard imposed under the BIT," which requires a Swiss claimant to have its "seat" and show "real economic activity" in Switzerland.

The Alps Finance claim was born out of an agreement with a Slovak company, in which the claimant purchased credit owed by a bankrupt debtor. Efforts to enforce the credits were blocked by a Slovakian regional court, in what the claimant argued was a flawed decision. Alps Finance held the Slovakian government responsible for the alleged incompetence of the regional court.

While the tribunal looked dimly on all aspects of the claim, it was the question of whether the claimant qualified as an investor that led it to decline jurisdiction.

Arguing that it was a Swiss investor, the claimant showed evidence of a company incorporated in Switzerland, as well as a tax declaration. But in the eyes of the tribunal, the claimant failed to display evidence of a "seat" in Switzerland, such as telephone, office rental, and staff, or demonstrate that it was engaged in economic activities in that country.

That conclusion sealed the tribunal's decision to decline jurisdiction on the grounds the claimant was not a protected investor.

Many international investment treaties decide the nationality of a company by its place of incorporation, but Swiss investment treaties often take pains to not cover so-called mail-box companies.

Other issues addressed

Having decided to decline jurisdiction, the tribunal nonetheless considered two other aspects of the dispute for the sake "completeness"; namely, did the claimant's business qualify as an "investment" in Slovakia, and second, could the claim, at first sight, plausibly constitute a breach of the BIT.

The tribunal answered no to both questions. On the first, the tribunal considered various attributes given to "investments" under the BIT in question, and under international law more generally. It concluded that the contract in question was a one-off sale-purchase agreement that failed to meet the criteria normally attributed to an "investment" under international investment law.

On the second, the tribunal distinguished between possible errors by the Slovakian courts, which on their own would not constitute a breach of the BIT, and the much more substantial charge of denial of justice, which could constitute the basis of a valid claim. The tribunal predicted that the claimant would not be able to sustain an argument to support a claim of denial of justice, and so would have little success of winning the case if it were to proceed to the merits stage.

The tribunal assigned the full cost of the proceedings to the claimant, arguing that Slovakia should not have to pay costs associated with a "defective claim" that did not come close to passing the jurisdictional test. This is still rare in investment arbitrations, which typically split the costs independent of who wins the case.

The arbitration was conducted under the UNCITRAL rules of arbitration. The tribunal was formed by Antonio Crivellaro (Chair), Hans Stuber (claimant's appointee) and Bohuslav Klein (respondent's appointee).

The award in *Alps Finance and Trade AG v. Slovak Republic* is available in two parts.

Part one: http://ita.law.uvic.ca/documents/AFTvSlovakRepublic_5Mar2011_Part1.pdf

Part two: http://ita.law.uvic.ca/documents/AFTvSlovakRepublic_5Mar2011_Part2.pdf

Majority tribunal defends decision in Lemire v. Ukraine
Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18
Lise Johnson

In a split decision, two members of the arbitral tribunal in *Lemire v. Ukraine* have ordered Ukraine to pay the claimant roughly US$8.7 million in damages, plus costs and expenses. The tribunal, however, unanimously rejected the claimant's claim for US$3 million in moral damages in its 28 March 2011 decision.

This award followed a January 2010 decision on jurisdiction and liability in which the majority of the tribunal concluded that Ukraine violated the fair and equitable (FET) obligation in the governing US-Ukraine BIT.

The majority opinion was signed by Juan Fernández-Armesto, president of the tribunal, and Jan Paulsson. The third arbitrator, Dr. Jürgen Voss, wrote a lengthy separate dissenting opinion in which he took issue with the majority's analysis of and conclusions regarding the breach of the FET standard, and the amount of damages owed.

"Swiss investment treaties often take pains to not cover so-called mail-box companies."

Background on jurisdiction and liability decision

Mr. Lemire had invested in the radio broadcasting business in Ukraine in 1995, after the government opened that sector to private participation. Although his company had obtained some radio frequencies for that business,[1] Mr. Lemire alleged that from 1999 through 2008, the government improperly and repeatedly denied his bids for additional frequencies, awarded broadcasting licenses to other companies, and thereby thwarted his plans of developing several nationwide radio networks.

Among its arguments in defense on the merits, the government asserted that the state entity responsible for the tender processes justifiably awarded frequencies to other applicants. The government explained that Mr. Lemire's company lacked the necessary resources and capabilities to prevail in its applications, and those other bidders were more qualified. Additionally, it noted that in one of the tenders at issue, Mr. Lemire's company did not even participate. According to Ukraine, even if the tender processes suffered from some irregularities, Mr. Lemire could not establish he would have been successful in his applications "but for" those issues.

In its January 2010 decision on jurisdiction and liability, the majority of the tribunal concluded that the tender process was irregular, arbitrary, and discriminatory, and amounted to a breach of the FET obligation. That decision, however, left unresolved the amount of damages owed, including whether Mr. Lemire should be able to recover on his claim for moral damages.

The dissenting opinion and award

In the award issued in March 2011, the tribunal tackled the issue of damages that had been left outstanding after the 2010 decision; yet the 2011 award also devoted space to revisiting issues of jurisdiction and liability in response to the dissenting opinion to the award filed by Dr. Voss.

The dissenting opinion took issue with various aspects of the first decision and award that ranged from jurisdiction to damages. On jurisdiction, the dissent asserted that the BIT did not grant Mr. Lemire the right to bring a claim, as a shareholder, based on harms allegedly done to the company, Gala. The majority rejected that contention, stating that Dr. Voss's arguments on this point were inadmissible because they had not been raised by Ukraine. The majority also made clear that even if Ukraine had raised those arguments, it would have rejected them.

On the merits, the dissenting opinion criticized the majority's application of the FET standard as being overly broad and having harmful consequences for host states, particularly as applied to review tender processes. Dr. Voss also argued that a reservation taken by the state parties to the agreement should have prevented liability. The United States and Ukraine had specifically included a provision in the annex to the BIT reserving their rights to deviate from the national treatment obligation in circumstances relating to certain activities, including radio broadcasting. According to the dissent, this provision should have informed the tribunal's interpretation of the agreement and resulted in a finding that Ukraine had not breached the FET obligation.

The majority retorted that it had not applied the FET standard in the overly broad manner suggested by Dr. Voss. It also rejected Dr. Voss's arguments regarding the reservation to the national treatment obligation, asserting that the national treatment reservation could not protect Ukraine because (1) the reservation applied to national treatment and was flatly "irrelevant" to the scope of the FET obligation; and (2) for the exception to apply, Ukraine was required to, but apparently did not, give prior notice of its intent to deviate from the obligation.

"On the merits, the dissenting opinion criticized the majority's application of the FET standard as being overly broad and having harmful consequences for host states."

Another issue on which the dissenting opinion and award notably diverged was on the issue of damages. For Dr. Voss, even assuming there was a breach of the BIT, the link between Ukraine's wrongful conduct in the tender process and Mr. Lemire's failed nebulous future plans to expand his radio broadcasting business was too weak to support an award of lost profits. The dissent asserted that if damages were to be awarded, they should, as is done in some domestic law systems, be based on the amount expended in the improper tenders, rather than the value of speculative lost profits.

However, the majority did not adopt this approach; it based its award on what it calculated Mr. Lemire's company would have earned had Mr. Lemire been able to proceed with the plans to expand it that he had when he made the investment in 1995. The majority included in its reasoning language suggesting that the nature of the investment—e.g., Mr. Lemire's "courage to venture into a transitional State and to create from scratch a completely new business"[2]—was relevant to assessing the amount of damages owed.

On the issue of moral damages, the three arbitrators were generally in agreement.[3] The majority stated, and Dr. Voss concurred, that such damages would only be available in "exceptional circumstances." It added that such "exceptional circumstances" were limited to those in which the state's actions implied "physical threat, illegal detention or other analogous situations," and "cause[d] a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position". Both "cause and effect," the award added, would have to be "grave or substantial."[4]

Applying that standard, the award stated that Ukraine's conduct did not warrant payment of moral damages. It further noted that one factor supporting its decision was the claimant's not "consistently adroit" behavior in the course of his dealings with the Ukrainian government.

Notably, the majority stated that Ukraine should bear the burden of paying the full portion of the costs and expenses that were incurred as a result of Ukraine's challenge of one of the arbitrators due to the fact that the challenge had been unsuccessful. There is no indication in the award, however, that this challenge was frivolous or otherwise improper.

Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18 (US/Ukraine BIT), is a available at: http://ita.law.uvic.ca/documents/LemireVUkraine_Award_28March2011.pdf

The dissenting opinion of arbitrator Dr. Jürgen Voss is available at: http://ita.law.uvic.ca/documents/LemireVUkraine_DissentOfJurgenVoss_1March2011.pdf

Ukraine cleared of claim by German investor over stolen fuel

GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16

Damon Vis-Dunbar

A three-member ICSID tribunal has rejected a claim by a German firm that sought to hold Ukraine liable for losses incurred in a failed agreement with a financially troubled chemical company. The dispute is rooted in an agreement between a German firm, New Klöckner, and a Ukraine chemical company, Oriana, in which New Klöckner was to provide fuel to Oriana for conversion. New Klöckner underwent a number of name changes and mergers, before being acquired by the claimant, GEA Group Aktiengesellschaft.

The conversion agreement began to unfold in the late 1990s when 125,000 tons of fuel went missing. The parties subsequently entered into a settlement and repayment agreement for the missing fuel, which also stipulated that disputes would be settled at the International Court of Arbitration (ICC).

A dispute was eventually lodged with the ICC, which found Oriana liable for some US$30 million. However, efforts to enforce the award failed, when Ukrainian courts determined that the repayment agreement had been improperly authorized.

In 2008 GEA filed a request against Ukraine with ICSID under the German-Ukraine bilateral investment treaty, claiming that Ukraine failed to honor its "repeated promises" to ensure that GEA was paid for its products.

The question of defining 'investment'

The claimant argued that its investment consisted of the original agreement to convert fuel, the subsequent settlement and repayment agreement, as well the ICC award.

The tribunal agreed that the conversion agreement constituted an investment, noting that in addition to a substantial amount of fuel delivered to Oriana for conversion, the arrangement also involved "the contribution of the Claimant's know-how on logistics, marketing, and the mobilization of repairs and other services". However, the settlement and repayment agreements were not deemed an investment. The first was considered "merely an

inventory of undelivered goods and recorded the difference as a debt …" and the latter "merely established a means for repayment …". To the tribunal, neither agreement could be equated with the original conversion agreement.

The tribunal would also reject the argument that the ICC award should be viewed as an investment. According to the tribunal, "the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself", noting that the "Award itself involves no contribution to, or relevant economic activity…".

The decision diverges somewhat from a jurisdictional ruling in *Saipem S.p.A. v. The People's Republic of Bangladesh*, in which a tribunal found Bangladesh liable for the failure of its courts to enforce an arbitration award. The *GEA v Ukraine* tribunal dismisses that decision on the grounds that it "made statements that are difficult to reconcile…" —specifically, that Saipem tribunal decides at one point that the arbitration award was not part of the investment, and later that it was not necessary to determine whether the award was an investment.

Claims dismissed, costs of proceeding left with claimant

While conceding that GEA had a protected investment in the form of the conversion agreement, the tribunal would nonetheless reject the claim that Ukraine was liable for a long list of various breaches of the BIT, including expropriation, full protection and security, fair and equitable treatment, arbitrary and discriminatory measures, national treatment, and most favoured nation treatment.
At the heart of the tribunal's decision on these matters was the claimant's failure to convince the tribunal that Ukraine government was responsible for the missing fuel, or that it negligently failed to pursue the thieves.

On the question of whether Ukraine was liable for not enforcing the ICC award, the tribunal referred back to its conclusion that the award cannot be considered an investment. But even if it had been considered an investment, the tribunal rejected the claim that GEA was discriminated against by the Ukraine courts; rather, "the Ukrainian courts came to a conclusion different to what which GEA had hoped."

The claimant was ordered to bear the full cost of the arbitration, having failed partially on jurisdiction, and fully on liability. In addition to its own costs, GEA must reimburse Ukraine some US$1.6 million.

The arbitral tribunal was formed by Albert Jan van den Berg (President), Toby Landau (claimant's appointee) and Brigitte Stern (respondent's appointee).

The award in GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, is available at: http://ita.law.uvic.ca/documents/GEA_v_Ukraine_Award_31Mar2011.pdf

Mongolia not in treaty-breach over windfall tax on gold

Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia, UNCITRAL

Damon Vis-Dunbar

Mongolia's 2006 windfall tax on gold was not in breach of the Russia-Mongolia bilateral investment treaty, according to an April 2011 award on jurisdiction and liability.

The challenge to Mongolia's 68 percent tax on gold, which was repealed this year, was one of several complaints by three Russian claimants in connection with a troubled mining operation in Mongolia. The claimants, Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company, owned KOO Golden East-Mongolia (GEM), one of Mongolia's largest gold mining companies.

Windfall tax may be 'excessive', but not in breach of Treaty

The claimants argued that the windfall tax, levied on gold sales at prices over US$500 an ounce, ran afoul with Mongolia's obligations to provide 'fair and equitable treatment' and 'full legal protection and security', and amounted to expropriation, under the terms of Russia-Mongolia BIT. The claimant would also argue that the tax breached the international minimum standard of treatment under customary international law.

To support these allegations, the claimant argued that the tax was "extraordinary" in scale, and rushed through parliament in haste. The claimants also complained that the tax was discriminatory, as it did not apply to other industries, such as copper.

The tribunal conceded that the windfall tax "was generally considered excessive … and, from the evidence submitted, it appears that Mongolia paid a heavy price fiscally and economically …" However, it would not agree that it went so far as to breach the Treaty.

The tribunal explained that "to conclude from this that it was arbitrary and unreasonable under the terms of the Treaty is a step that the Tribunal is not ready to take, especially when it comes to dealing with fiscal legislation which on its face is not targeting Claimants in particular or foreign investors in general."

The question of whether the wind-fall tax on gold was discriminatory was broken into two parts: i) should it have applied to other sectors other than the mining industry; and ii) did it discriminate between gold and copper?

On the first part, the tribunal acknowledged that governments routinely apply different fiscal treatments to various industries. Nor are there provisions in the BIT that oblige Mongolia to apply the same rates of taxation across industries.

"Many will argue that this is not wise economic policy but this does not mean it would constitute a breach of a BIT, particularly in the area of taxation, in respect of which States jealously guard their sovereign powers," stated the tribunal.

The tribunal reached the same conclusion with respect to whether Mongolia was in breach of the BIT for applying different levels of taxation to gold and copper.

"The tribunal would also reject the argument that the ICC award should be viewed as an investment."

Foreign workers fee challenged by claimant

Under Mongolia's 2006 Minerals Law, a 10 percent quota was placed on foreign workers; for each foreign worker hired in excess of the quota, mining companies were obliged to pay a fee equal to ten times the minimum salary in Mongolia.

The claimants argued that the foreign workers fee was arbitrary, discriminatory and contrary to their legitimate expectations. A shortage of skilled workers in Mongolia meant that GEM had little choice but to use workers from outside the country, they claimed. However, the tribunal doubted that is was impossible for GEM to reduce its dependence on foreign workers. Indeed, the tribunal noted evidence that suggests that GEM's preference to work in the Russian language was a barrier to hiring Mongolian workers, rather than a shortage of skilled local labour. It would also note that it is not uncommon for countries to impose restrictions of foreign workers.

Ultimately, the tribunal would find no evidence to support the claimant's argument that the foreign workers fee was arbitrary, discriminatory and unreasonable.

Stability agreements form part of claim

Unlike its main competitor in Mongolia, the Canadian mining company KOO Boroo Gold, GEM did not have a so-called stability agreement to shield it from the tax hike. Stability agreements freeze

aspects of the regulatory environment for a set period of time, such as tax rates.

The claimants would argue that granting a stability agreement to Boroo Gold, but not to GEM, amounted to a violation of the BIT. Mongolia countered that, under its mining act, stability agreements are available to investors who pledge to invest at least US$2 million—a commitment it argued that GEM was unwilling to make. The parties disagreed over what GEM had actually committed to invest going forward.

Given the uncertainty as to what future investment commitments had been made by GEM, the tribunal settled on the question: "Was Mongolia obligated to reach with GEM an agreement on the same terms as the once concluded with Boroo Gold …?" It concluded that Mongolia was not obligated for two reasons: Mongolia is granted a degree of administrative discretion in awarding such agreements; and second, Boroo Gold represented a major new investor, and it was understandable that Mongolia would want to afford it exceptional concessions.

Actions of Mongolia central bank breaches treaty

The claimant had sought to delay payment of the windfall tax through an agreement with Mongolia's central bank, MongolBank. In a complex arrangement, gold was deposited with the bank, in exchange for a partial payment of the value of the gold.

GEM charged the bank with exporting and selling the gold prematurely, in breach of their agreement. Having determined that the state could be held accountable for the actions of the bank—which the tribunal determined excised governmental authority in certain respects—the tribunal concluded that GEM had been deprived of its ownership of the gold deposited with MongolBank, in breach of the BIT's fair and equitable treatment provision. It now sits with the claimants to prove what damages they suffered from this action.

> "The claimants would argue that granting a stability agreement to Boroo Gold, but not to GEM, amounted to a violation of the BIT."

Counterclaims dismissed

Mongolia submitted a number of counterclaims, alleging that the claimants are liable for unpaid taxes, foreign workers fees, and failures to abide by environmental regulations, among other charges.

In considering whether it had jurisdiction to hear a counterclaim, the tribunal asked "whether there is a close connection between them and the primary claim", and also whether the domestic laws of the Mongolia covered the alleged infractions. It ultimately determined that the Mongolian public law and its courts were the more appropriate mechanism for settling these claims.

The tribunal noted that if it "extended its jurisdiction to the Counterclaims, it would be acquiescing to a possible exorbitant extension of Mongolia's legislative jurisdiction without any legal basis under international law to do so …"

> "Under Mongolia's 2006 Minerals Law, a 10 percent quota was placed on foreign workers; for each foreign worker hired in excess of the quota, mining companies were obliged to pay a fee equal to ten times the minimum salary in Mongolia."

Next steps

The claimants were given 60 days to inform Mongolia and the tribunals if they intended to claim damages for treaty-breach connected to MongolBank's premature sale and export of its gold. The respondent and claimants must bear their own legal costs and share the costs of the arbitration proceedings.

The arbitration was conducted under the UNCITRAL arbitration rules. The tribunal was formed by Marc Lalonde (President), Horacio A. Grigera Naón (claimant's appointee) and Brigitte Stern (respondent's appointee).

The decision on jurisdiction and liability in Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia is available at: http://ita.law.uvic.ca/documents/PaushokAward.pdf

Notes

1 Most of those frequencies were obtained in connection with a settlement agreement between Mr. Lemire and Ukraine that the parties entered into in 2000 to dispose of a previous ICSID case filed by Mr. Lemire against the country. See Lemire v. Ukraine, ICSID Case No. ARB(AF)/98/1, Award (embodying settlement agreement) 18 Sept. 2000.

2 Award, para. 303.

3 Dr. Voss's dissenting opinion took issue with only select aspects of the tribunal's finding here. See, Dissenting Opinion, n.180.

4 Award, para. 333.

publications and events

Foreign Direct Investment in LDCs: Lessons Learned from the Decade 2001-2010 and the Way Forward

UNCTAD, April 2011

This report, prepared in preparation of the Fourth United Nations Conference on the Least Developed Countries, gives a broad overview of the FDI trends in LDCs over the past decade. The study is divided into two parts. The first part deals with the analysis of the trends in FDI flows and stock in LDCs, as well as policy developments concerning FDI at the national and international levels over the last decade. By detailing FDI trends by industry and country of origin, and by mode of entry, and examining the impacts of FDI on LDC economies since the last conference, the study draws observations and highlights some shortcomings from the past decade (2001-2010). A plan of action to increase FDI and enhance its development impact in the next decade is suggested. The second part of the study presents 48 individual country profiles that provide comprehensive data and information on FDI. The report is available at: http://www.unctad.org/en/docs/diaeia2011d1_en.pdf

The Evolving International Investment Regime: Expectations, Realities and Options

edited by Jose E. Alvarez and Karl P. Sauvant with Kamil Gerard Ahmed and Gabriela P. Vizcaino, Oxford University Press, March 2011

This volume looks at how bilateral and regional investment protection treaties and investor-state arbitrations that apply them accommodate the different expectations of various stockholders, including governments, foreign investors and civil society. The volume's diverse authors focus especially on the views of developing countries and international civil society. They address the extent to which the regime is satisfying the expectations of those who originally drafted the treaties as well as the states now at the losing end of investor-state awards. They review critiques of the regime that help explain sovereign and political backlash, identify avenues for accommodating various interests, and make specific proposals to address concrete challenges. The volume should interest academics, practitioners, negotiators of international investment agreements, and others who want to know more about the rules that govern foreign direct investment, the activities of multinational enterprises, and those who seek to advance sustainable economic development through both. Information on how to order the book is available at: http://www.oup.com/us/catalog/general/subject/Law/?view=usa&ci=9780199793624

Understanding Land Investment Deals in Africa

Oakland Institute, June 2011

New series of reports from the Oakland Institute adds to the recent wave of criticisms aimed at so-called land grabs. The reports charge that hedge funds and other foreign speculators are increasing price volatility and supply insecurity in the global food system. The reports are based on the actual materials from these land deals and include investigation of investors, purchase contracts, business plans and maps never released before now. The series examines on-the-ground implications in several African nations including Ethiopia, Mali, Sierra Leone, Mozambique, Tanzania and South Sudan – and exposes contracts that connect land grabs back to institutional investors in these nations and others. In addition to publicly sharing – for the first time – the paperwork behind these deals, the reports demonstrate how common land grabs are and how quickly this phenomenon is taking place. Investors in these deals include not only alternative investment firms like Emergent Asset Management – that works to attract speculators, but also universities including Harvard, Spellman and Vanderbilt. In 2009 alone nearly 60 million hectares – an area the size of France – was purchased or leased in these land grabs, according to the Oakland Institute. Most of these deals are characterized by a lack of transparency, despite the profound implications posed by the consolidation of control over global food markets and agricultural resources by financial firms. These reports, as well as briefs on other aspects of land grabs, are available at http://media.oaklandinstitute.org.

Law and Power in Foreign Investment in Africa: Shades of Grey in the Shadow of the Law (Routledge Research in International Economic Law

Lorenzo Cotula, Routledge, (Forthcoming)

This book explores how the law protects the different and competing interests that are brought into contact by foreign investment projects in Africa. It draws on international investment and human rights law, on the national law of selected jurisdictions and on the contracts concluded for a large investment project to consider the legal frameworks regulating the growing investment flows to Africa. The book relates the findings of this legal analysis to an analysis of negotiating power between different holders of legally protected rights (investors, local people affected by the investment), exploring whether any differences in legal protection tend to counter, or reinforce, asymmetries in negotiating power. The outcome is a thorough legal analysis that is directly anchored to social processes and that provides insights into the relationship between law and power in a globalised world.

Events 2011

July 26
LAUNCH OF THE UNCTAD WORLD INVESTMENT REPORT 2011, http://www.unctad.org/Templates/Meeting.asp?intItemID=2068&lang=1&m=21579&year=2011&month=6

September 6
UNCTAD LAUNCH OF THE TRADE AND DEVELOPMENT REPORT 2011, http://www.unctad.org/Templates/Meeting.asp?intItemID=2068&lang=1&m=21540&year=2011&month=6

9 September – 9 October
WORLD TRADE FORUM 2011: "NEW DIRECTIONS & EMERGING CHALLENGES IN INTERNATIONAL INVESTMENT LAW AND POLICY", Bern, Switzerland, http://www.wti.org/

October 3-7
UNCITRAL WORKING GROUP II, 2000 TO PRESENT: ARBITRATION AND CONCILIATION, 54TH SESSION, Vienna , http://www.uncitral.org/uncitral/en/index.html

October 17-19
THE FIFTH ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, Kampala, Uganda, investmentlaw@iisd.org

October 26-27
SIXTH COLUMBIA INTERNATIONAL INVESTMENT CONFERENCE: THE RESOURCE BOOM AND FDI IN AFRICA, Faculty House, Columbia University, New York, http://www.vcc.columbia.edu/content/sixth-columbia-international-investment-conference-resource-boom-and-fdi-africa

November 4-6
2011 FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION, London, United Kingdom, www.fdimoot.org/2011/

November 8
SIXTH ANNUAL LECTURE ON INTERNATIONAL COMMERCIAL ARBITRATION, Washington D.C., United States, http://www.wcl.american.edu/arbitration/annuallecture.cfm

November 16
SALIENT ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION, Washington D.C., United States, www.wcl.american.edu/arbitration

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