



Standards of Review in Investment Arbitration: What Role for Deference?

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Investment Treaty News Quarterly is published by
The International Institute for Sustainable Development
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Chemin de Balexert, 5th Floor
1219, Chatelaine, Geneva, Switzerland

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Design:
The House London Ltd.
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Deference or No Deference, That is the Question: Legitimacy and Standards of Review in Investor-State Arbitration

Andreas von Staden

feature 1



The appropriate standard of review to be applied in investor-state arbitration—as well as in other dispute settlement contexts, for that matter—remains a recurrent and much debated topic.¹ The reason is straightforward: In many cases, the outcome of arbitral proceedings hinges, *inter alia*, on the intensity with which a tribunal scrutinizes the conduct of the investment's host state that is alleged to have breached one or more obligations under applicable investment treaty provisions, with a stricter standard of review tending to benefit the investor and a more lenient or permissive standard advantaging the respondent state. The standard of review issue has become all the more salient in light of what has been called alternatively the “public law challenge”² and the “quest for policy space,”³ that is, the concern that investor-state arbitration increasingly intrudes upon states’ ability to exercise fully, and as needed, legitimate regulatory government functions, and is becoming more akin to public law litigation, rather than private-law-based commercial arbitration.⁴

Elsewhere, I have argued, jointly with William Burke-White⁵ and alone,⁶ that properly designed standards of review can enhance the legitimacy of investor-state arbitration (including genuinely *democratic* legitimacy), especially when it comes to public-law-type disputes, and may thus be able to mitigate some elements of the frequently asserted “legitimacy crisis”⁷ of, and “backlash”⁸ against, investment arbitration. In any event, investor-state arbitration, like other governance arrangements, ultimately needs to be empirically seen as legitimate by both sides to the disputes to assure its institutional survival and maintain compliance, not only from an abstract normative vantage point. Here I reprise key arguments in favor of a deferential standard of review in appropriate circumstances as one approach to enhance investment arbitration’s normative as well as empirical legitimacy.

The legitimacy-related function of standards of review

Standards of review are almost entirely⁹ judicially created instruments that allow the reviewing court or tribunal to adjust the scope, depth, and intensity with which it will review the acts of another (usually governmental) actor, based on considerations of normative appropriateness, technical expertise, politico-cultural proximity, or a mix thereof. In other words, the articulation of standards of review—irrespective yet of their concrete definition—reflect the recognition of the existence of several sites of political and legal decision-making, each of which can lay a claim to legitimate authority in interpreting and applying the relevant legal norm at issue. In the absence of other sites of concurring legitimate authority (whatever the specific claim to legitimacy may be), the standards of review concept would not serve any meaningful purpose, and a particular standard, be it strict scrutiny or good faith review,¹⁰ needs to be justified precisely because it defines the relationship between different sites of legitimate political and legal decision-making from the vantage point of the reviewing court.

It is this function that connects the standards of review question with the concerns about the proper “balance between the public regulatory needs of states, and the private interests of investors.”¹¹ By defining reasonably deferential standards of review that grant respondent states enough freedom of choice in pursuing public interest policies that they deem necessary, investor-state arbitral tribunals can recognize and protect states’ legitimate regulatory interests without abdicating their judicial supervisory function, nor the protection of investor interests, as the parameters of a given standard of review and the assessment of whether state action meets the specific and/or general threshold requirements under a given provision (e.g., no abuse of right, no arbitrary discrimination etc.) remain subject to judicial control.

What is to be considered a “reasonably deferential” standard of review cannot be defined in the abstract, but needs to emerge (and evolve) over time out of the repeated interactions between tribunals and their users, as it has in other judicial contexts. Examples of changes in judicial policies and approaches as a result of such interactions are abundantly provided, *inter alia*, by the jurisprudential histories of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). The *ad hoc* and decentralized character of investor-state arbitration may make such processes more difficult, but is not an absolute bar to the evolution of a shared and harmonized approach.

Triggering deference: Text & interpretation

Recognizing, in principle, the appropriateness of deferential standards of review does not imply the necessity, much less the suitability, of a general, one-size-fits-all standard that would need to be added to the treaty as a whole.¹² What it requires, though, is that tribunals carefully scrutinize the provisions invoked in a given dispute and inquire whether they include substantive terms or concepts that point toward the legitimate role of regulatory action by the respondent state *and* the latter's justified expectation to have its decision(s) respected and upheld, as long as it meets certain threshold requirements. In other words, standards of review need to emerge endogenously out of the interpretation of concrete legal texts, not be imposed from the outside. By the same token, depending on the specifics of the text and the issue area it seeks to regulate, the chosen standard of review may range from substantial deference to no deference at all. Such a variable approach has long been pursued by the ECtHR in the context of its margin of appreciation doctrine which provides for different degrees of deference depending on the specific rights and legal provisions at issue.¹³ Although not without criticism, I submit that the recognition of the margin of appreciation on the part of respondent states has contributed, not detracted, from the ECtHR's overall legitimacy.

Indeed, deferential standards of review are also being applied in investment arbitration, albeit inconsistently. For example, it is quite clear in the context of provisions laying down the requirements for permissible expropriations that the identification of the relevant "public purpose"¹⁴ for which such an expropriation may be undertaken deserves deference, in that it is not for the tribunal to replace the state's assessment of what public purposes should be pursued with its own. As long as the stated purpose is not clearly a mere pretense,¹⁵ tribunals generally accept it, as they do increasingly the good faith exercise of a state's police powers as non-expropriatory more generally.¹⁶ Similarly, it is difficult to argue that a state's determinations under a treaty's non-precluded measure provision as to what measures are necessary to protect its essential security interests or public order should not receive at least some deference; still, a number of tribunals, though not all, have held otherwise, in part because of a dubious mixing of treaty and customary law.¹⁷ (Indeed, to make the expectation of deference clear, the U.S. has rewritten the relevant clause in its two most recent model BITs to make it explicitly self-judging).¹⁸ On the other hand, when it comes to questions of whether there has been unjustified discrimination under national treatment or most-favored nation clauses, there is generally much less reason for deference because the assessment of such discrimination is typically more amenable to "objective" analysis and less subject to justifiable disagreements based on different preferences, values, or expertise.

Conclusion

Investor-state arbitral tribunals are part of a broader multi-level governance arrangement regulating investment flows that includes different institutional sites of legitimate legal and political authority. Carefully designed and justified standards of review enable arbitral tribunals to recognize this embeddedness and the legitimacy of the interpretation and application of investment treaty provisions by respondent states in line with the pursuit of their regulatory objectives. Even if a tribunal comes to the conclusion that in a given legal context a respondent state's decisions do not deserve any deference, justifying this position while pointing out other contexts in which greater deference would be due will contribute not only to normative, but also the empirical legitimacy of the investor-state arbitration system.

Author

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Notes

- 1 See only Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor State Arbitration*, 15 J. INT'L ECON. L. 223 (2012); Rahim Moloo & Justin Jacinto, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law*, in [2011-2012] Y.B. INT'L INV. L. & POL'Y (Karl Sauvant ed., forthcoming 2012), working paper version available on SSRN at <http://ssrn.com/abstract=2036243>.
- 2 Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 67 (2011).
- 3 Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037 (2010).
- 4 On the public-private tension, see Alex Mills, *Antinomies of Public and Private at the Foundation of International Investment Law and Arbitration*, 14 J. INT'L ECON. L. 469 (2011).
- 5 William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010).
- 6 Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. CONST. L. (forthcoming 2012).
- 7 See only Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).
- 8 See *The Backlash Against Investment Arbitration: Perceptions And Reality* (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin eds., 2010).
- 9 The prominent exception in international law is Article 17.6 of the WTO Anti-Dumping Agreement whose explicit standards of review are, however, partly phrased in an ultimately self-defeating manner; see Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 200-201 (1996).
- 10 On the spectrum of possible standards of review, see Burke-White & von Staden, *supra* note 5, at 302-322.
- 11 Mills, *supra* note 4, at 488.
- 12 See Moloo & Jacinto, *supra* note 1, at 3.
- 13 See, e.g., Burke-White & von Staden, *supra* note 5, 304-310; Susan Marks, *The European Convention on Human Rights and Its 'Democratic Society'*, 66 BRIT. Y.B. INT'L L. 209, 219 (1995).
- 14 See, e.g., 2012 United States Model Bilateral Investment Treaty [US Model BIT], Art. 6 (1) lit. a, available at <http://www.state.gov/documents/organization/188371.pdf>
- 15 See, e.g., ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award of Oct. 2, 2006, paras. 429-433.
- 16 See August Reinisch, *Internationales Investitionsschutzrecht*, in INTERNATIONALES WIRTSCHAFTSRECHT 346, 363 & 371 (Christian Tietje ed., 2009); Christoph Schreuer, *Investment Disputes*, in ENCYCL. PUBL. INT'L L. para. 9 (Rüdiger Wolfrum ed., 2008 [online ed.]).
- 17 See Burke-White & von Staden, *supra* note 5, 323-328; Andreas von Staden, *Towards Greater Doctrinal Clarity in Investor-State Arbitration: The CMS, Enron, and Sempra Annulment Decisions*, 2 CZECH Y.B. INT'L L. 207 (2011).
- 18 See 2012 US Model BIT, *supra* note 14, Art. 18, and 2004 US Model BIT, Art. 18, available at <http://www.state.gov/documents/organization/117601.pdf>.

The Source for Determining Standards of Review in International Investment Law

Rahim Mooloo

feature 2

After several cases assessing whether state regulation in the public interest gives rise to a claim under an investment treaty, commentators have begun asking questions about the applicable standard of review that should be applied in evaluating those claims. Now that there is emerging clarity around the interpretation of the most common substantive investment treaty standards, the determinative question seems to be taking a new form. Specifically, advocates appear to be recasting the relevant query with respect to public interest regulation in terms related to the deference that ought to be accorded to states in their adoption of such measures. Drawing on nomenclature from municipal inquiries of a similar nature, the query is often framed as: what is the applicable standard of review? As we have elsewhere provided, the phrase “‘standard of review’ refers to the criterion by which an adjudicative entity assesses the validity of a legislative, executive or administrative action.”¹

It seems that an important threshold matter in identifying the appropriate standard of review is determining the source from which the standard is derived. Recent studies have suggested a variety of approaches to making this determination, with a particular focus on taking into account the public law nature of the matters being addressed.² More general studies contend that we are heading towards a “general margin of appreciation doctrine in international law.”³ Both of these approaches suggest that tribunals should impose a more lenient standard of review in assessing state conduct, especially in the context of domestic regulation in the public interest. The tribunal in *S.D. Myers v. Canada* embraced that approach, stating that the determination of whether a breach of the investment treaty occurred “must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”⁴ Other approaches suggest that the standard of review applicable can be ascertained from the investment treaty itself. For instance, the tribunal in *Glamis Gold v. the United States* found “the standard of deference to already be present in the standard as stated, rather than being additive to that standard.”⁵

In the international investment treaty context, as a general matter, the applicable law is international law.⁶ In particular, the *lex specialis* is the investment treaty being applied. *Lacunae* can be filled with reference to the general background of international law, including other international treaties or conventions that might otherwise be applicable in the relations between the parties, customary law, or general principles of law.⁷ Judicial decisions and the teachings of the most highly qualified publicists should be considered as a subsidiary means for determining the applicable law.⁸

As such, starting point for establishing the criteria by which to assess the validity of government public interest regulation is the applicable treaty itself. One ought to begin by asking what the substantive investment treaty standards say about the standard of review. Certain investment treaty standards are formulated in such a way as to articulate both the standard of protection and the standard of review; that is, both the treatment that investors are guaranteed, and the criteria by which a state’s conduct ought to be judged. For example, the fair and equitable treatment requirement ensures a certain level of treatment to investors, but by interpreting what is meant by “fair” and “equitable” a tribunal is also establishing the criteria by which the government measure is being reviewed. Without getting into the details of defining the standard, a task we have undertaken elsewhere,⁹ the tribunal essentially builds an assessment of the importance of the state’s policy interests into its application of the standard: asking, for example, whether it is fair and equitable to adopt an environmental regulation for which there is imprecise scientific support.¹⁰ This query inevitably requires a tribunal to establish the degree of deference it must accord to the state in making such determinations. In other words, the appropriate standard of review follows from the interpretation of the substantive standard of protection itself.¹¹

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Cases and commentaries citing the existence of a principle in international law whereby states are generally owed deference in regulating matters within their borders do not often articulate where this legal obligation arises.

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This is not to say that other relevant sources of international law cannot aid in the determination of the appropriate standard of review, but that the bilateral investment treaty itself is an important source of making this determination in the first instance. As has been suggested by others, general principles of international law can help guide tribunals in this regard;¹² however, care must be taken to ensure that principles that are being relied on are in fact commonly accepted by “all or nearly all states.”¹³ Similarly, customary international law may also

become a source to assist tribunals in assessing the appropriate standard of review. For instance, in assessing the appropriate standard of review, it may be appropriate to apply the principle that states are generally permitted to regulate in areas that are not otherwise specifically proscribed by international law.¹⁴

Cases and commentaries citing the existence of a principle in international law whereby states are generally owed deference in regulating matters within their borders do not often articulate where this legal obligation arises. This poses a significant concern as it suggests that tribunals are free to adopt a standard of review that they see fit, which would introduce an undesirable bias into the decision-making process, and undermine the objectives of certainty and consistency in deciding investment claims. Further, in the context of cases under the auspices of the International Center for the Settlement of Investment Disputes (ICSID), the failure to apply the applicable law can render any resulting award subject to annulment.¹⁵

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Tribunals should follow the discipline of asking what the parties to the treaty have agreed with respect to the criterion by which their actions are to be judged.

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This short article argues that the question of the applicable standard of review ought to be answered with reference to the applicable law as agreed by the parties. The determination of the applicable standard of review is too important and determinative to be subject to approaches inserted by arbitrators, as learned as they may be, on an ad hoc basis. Tribunals should follow the discipline of asking what the parties to the treaty have agreed with respect to the criterion by which their actions are to be judged. It is only this approach that can gain the legitimacy that comes with the rule of law.

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Notes

¹ Rahim Moloo and Justin Jacinto, 'Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law,' in Karl P. Sauvant (ed), *Yearbook on International Investment Law and Policy 2011-2012* (2012) (forthcoming).

² See, e.g., William W. Burke-White and Andreas von Staden, 'Private litigation in a public law sphere: The standard of review in investor-state arbitrations,' 35 *Yale Journal of International Law* 283, 285-86 (2010); William Burke-White and Andreas von Staden, 'The need for public law standards of review in investor-state arbitration,' in Stephan Schill, ed., *International Investment Law and Comparative Public Law* 689-720 (New York: Oxford University Press, 2010); Stephan W. Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review through Comparative Public Law,' Society of International Economic Law Working Paper No. 2012/33; Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration,' 15 *Journal of International Economic Law* 223, 255 (2012).

³ Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' 16 *European Journal of International Law* 907 (2005). See also Burke-White and von Staden, 'Private litigation in a public law sphere: The standard of review in investor-state arbitrations,' *supra* note 3.

⁴ *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Partial Award (November 13, 2000) at 263; see also, *Saluka Investments BV (The Netherlands) v. the Czech Republic*, UNCITRAL, Partial Award (March 17 2006), at 305; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (January 14, 2010) at 505; *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v. the United Mexican States and Talsud S.A. v. the United Mexican States*, ICSID Cases Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award (June 16, 2010) at part IV, p. 14.

⁵ *Glamis Gold v. the United States of America*, NAFTA/UNCITRAL, Award (June 8, 2009) at 617.

⁶ Many investment treaties expressly call for the application of international law. See, e.g., Energy Charter Treaty, (1994) 2080 U.N.T.S. 95, Article 26(6), <http://www.encharter.org/fileadmin/user_upload/document/EN.pdf> accessed 22 February 2012; 2012 US Model BIT (2012), Article 30 <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> accessed 22 May 2012. Where the dispute is submitted to the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID), Article 42(1) of the ICSID Convention requires tribunals to decide disputes in accordance with applicable 'rules of international law' if no selection to the contrary is made. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, (1965), Art. 42(1), 575 U.N.T.S. 159.

⁷ ICJ Statute, Article 38(1)(a)-(c). *Jus cogens* also applies irrespective of the terms of the treaty, and can override the parties' treaty obligations. See generally Ian Brownlie, *Principles of Public International Law* 510-12 (7th ed. 2008). In the investment treaty context, *jus cogens* has been applied in the *Decision on the Annulment of Fraport AG Frankfurt Airport Services Worldwide*, ICSID Case No. ARB/03/25 (23 Dec. 2010), paras. 197-208.

⁸ ICJ Statute, Article 38(1)(d).

⁹ See generally Rahim Moloo and Justin Jacinto, "Health and Environmental Regulation: Assessing Liability under Investment Treaties," 29 *Berkeley Journal of International Law* 1, 37-56 (Fall 2010) (discussing liability under the fair and equitable treatment standard for environmental and health regulation).

¹⁰ *Id.*

¹¹ We have elsewhere provided a detailed analysis of the standards of review applicable vis-à-vis indirect expropriation, fair and equitable treatment, non-discrimination and non-precluded measures. See Moloo and Jacinto, 'Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law' *supra* note 1.

¹² Schill, *supra* note 3 at 16-17, 20-21.

¹³ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 25 (1953).

¹⁴ Moloo and Jacinto, 'Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law' *supra* note 1, Part B.1, referring to: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion 84 (July 22, 2010); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment (June 27, 1986), ICJ Reports 258 (1986); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (January 14, 2010), para. 505.

¹⁵ ICSID Convention, Article 52(1)(b) ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: . . . (b) that the Tribunal has manifestly exceeded its powers."). *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, *Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic* (September 25, 2007) para. 49 ("A complete failure to apply the law to which a Tribunal is directed by Article 42(1) of the ICSID Convention can also constitute a manifest excess of powers.").

Consent to Arbitration Through National Investment Legislation

Makane Moïse Mbengue

feature 3



National investment codes¹ may function as potential sources of international investment law. In other words, states may make unilateral undertakings within the framework of national investment legislations and, as a result, be considered as having “created international obligation[s]”.² The addressees of national investment legislations are foreign investors as well as the state that is itself the ‘author’ of the investment legislation.³

That states commit themselves through bilateral or multilateral investment treaties or through contracts with foreign investors is rather standard. That states may subject themselves to *binding* investment obligations *via* national investment legislations is rarer, but reflects a growing trend in developing countries.

National investment codes embody, *inter alia*, substantive rules of investment treatment (fair and equitable treatment, national and most-favored-nation treatment, protection from arbitrary and discriminatory measures, protection from nationalization and expropriation, and the right to free transfer of capital), as well as provisions defining the notions of an investment and of an investor. However, of all the provisions contained in national investment codes, those dealing with the settlement of disputes between the host state and the foreign investor appear to be the most problematic. This is particularly true of provisions concerning investor-to-state arbitration.

Investor-to-state arbitration is subject to consent, which traditionally emanates from a preexisting agreement. That agreement often takes the form of a treaty between the host state and the state of nationality of the foreign investor. It can also be shaped as a contract between the host state and a foreign investor. In contrast, when given through foreign investment legislations, consent to investment arbitration does not involve an agreement between two states or between a state and a foreign investor.

Rather, consent to arbitration proceeds from a *unilateral undertaking* of the host state in its domestic investment law(s).⁴ For instance, a state can decide “by means of a unilateral commitment [...] set forth in its legislation”⁵ to “propose [...] to submit the differences, arisen from any investment or any kind of investment, to the ICSID jurisdiction.”⁶

In that sense, the ‘offer to arbitrate’ made under national investment codes is broader than the offer to arbitrate made by virtue of BITs or investment contracts. Consent to arbitration through BITs is an offer limited to foreign investors whose states of nationality have concluded a BIT with the host state against which they intend to initiate arbitration proceedings. In the same vein, consent to arbitration through investment contracts is an offer strictly limited to foreign investors that are parties to those contracts. By contrast, consent to arbitration through national investment legislations constitutes an offer made to the foreign investment community *as a whole* with no real possibility of individualizing the scope of the offer. This is a particular feature of foreign investment legislation, which should be taken into account by states when deciding to draft such pieces of legislation.

In practice, national investment codes apply differential language and stipulate different levels of engagement when it comes to consent to arbitration. Four main patterns can be distinguished.

To consent or not to consent to arbitration? The four patterns arising from national investment legislation

The first pattern can be qualified as the ‘no-arbitration pattern’ or ‘opt-out arbitration pattern’ as it refers to those national investment laws that do not encompass any provision regarding dispute-settlement and are, thus, silent on international investment arbitration.⁷ Sometimes, national investment codes of that type merely provide for dispute settlement before the host state’s domestic courts.

The second pattern can be characterized as the ‘opt-in arbitration pattern.’ National investment legislations that are governed by such a pattern require the settlement of foreign investment disputes by domestic courts. It is only when an investment treaty (*e.g.*, a BIT) or an investment contract explicitly allows for recourse to investment arbitration that the latter supersedes settlement by domestic courts. This kind of national investment legislations does also not, formally speaking, incorporate a standing offer of consent to arbitrate. Investment arbitration is only foreseen as a derogatory mechanism. A good illustration of the ‘opt-in arbitration pattern’ is to be found in the Mongolian Foreign Investment Law.⁸

The third pattern can be designated as the 'optional arbitration pattern.' Foreign investment legislations that include such a pattern do not entail a strict consent to arbitration. They simply *recommend* or *authorize*, among other possibilities, recourse to international arbitration in order to settle foreign investment disputes. The usual language tends to say that an investment dispute "may be settled" through arbitration or that arbitration "*as may be mutually agreed by the parties*". A relevant example of the 'optional arbitration pattern' can be seen in the Investment Code of Seychelles.⁹

The 'optional arbitration pattern' is not to be confused with ordinary choice of forum clauses. The latter usually give the possibility to foreign investors to choose between investment arbitration or settlement by domestic courts. The choice made by the foreign investor is then imposed on the host state. In contrast, national investment laws that are based on the 'optional arbitration pattern' require a previous agreement (i.e., a preexisting arbitration clause in an investment contract) or a subsequent agreement (i.e., what is commonly called a *compromis*) between the host state and the foreign investor. In absence of such an agreement, no consent to arbitration can be determined. The sole remaining choice for the foreign investor would be to initiate a dispute before the host state's domestic courts. Accordingly, the 'optional arbitration pattern' allows host states to exercise a margin of discretion in deciding on whether or not to submit themselves to investment arbitration. Because of these characteristics, the 'optional arbitration pattern' constitutes a sort of safety valve for those states that do not want to make standing unilateral offers to arbitrate while preserving the option to subject themselves to arbitration under some circumstances.

The fourth pattern can be referred to as the 'mandatory or compulsory arbitration pattern.' By contrast to national investment codes governed by the three above-mentioned patterns, some national investment legislations embody a clear-cut unilateral offer to arbitrate. The semantics generally used to express such standing offer to arbitrate are either "the host state hereby consents" or "the consent of the host state is constituted by this article." The best illustrations of this trend are to be found in the Albanian Foreign Investment Law as well as in several investment codes enacted by African states.¹⁰ Furthermore, the 'mandatory arbitration pattern' encompasses those national investment codes which—albeit not containing explicit statements of consent by the host state—are worded so as to grant foreign investors an unequivocal right to submit a dispute to arbitration. Noteworthy are the examples of the Georgian Foreign Investment Law and the El Salvador Foreign Investment Law.

Of all the four patterns identified, the 'mandatory arbitration pattern' seems to be the more straightforward and at the same time the more risky for states. Indeed, it allows foreign investors to directly initiate investment arbitration proceedings against the host state without additional *ad hoc* consent required. Consent to arbitration through foreign investment legislations is, thus, susceptible of producing legal effects at the international level. As a consequence, a host state that is governed by a 'mandatory arbitration pattern' is precluded from claiming that only its domestic courts have competence in interpreting the scope and content of the consent to arbitration embodied in its national investment code. Once a clear-cut offer to arbitrate has been formulated in a domestic law, the host state relinquishes its power to interpret its own law. It is up to an international arbitral tribunal to decide on the proper interpretation to be given to an alleged consent to arbitration even when embodied in a national legislation.¹¹

This rationale also applies to ambiguous offers to arbitrate under national investment legislations. In the case of unclear and imprecise formulations of consent to arbitration-related provisions,¹² foreign investors may still initiate arbitration proceedings against host states. There is indeed a 'grey area' of consent to arbitration that can be exploited in order to subject a state to arbitration. It is within the power of an international arbitral tribunal to decide by means of interpretation whether such a 'grey area' constitutes a unilateral offer to arbitrate or not. This is noteworthy. Regardless of whether a state has not *clearly* consented to arbitration under its investment code, it can still be subject to the jurisdiction of an arbitral tribunal which will have the final say on the meaning of the investment legislation.

Therefore, it is advisable for states that do not want to enter the realms of arbitration to simply avoid any reference whatsoever to international arbitration when drafting or amending foreign investment legislations. It is preferable that states, in particular in developing countries, subscribe to the 'opt-out arbitration pattern' or to the 'optional arbitration pattern' to prevent unwanted legal effects.

The 'grey area' of consent to arbitration: Interpreting national investment legislations

In recent arbitral practice, much controversy has arisen in relation to obscure consent to arbitration-related provisions under national investment legislations.¹³ The most prominent example is Article 22 of the 1999 Venezuelan Law for the Promotion and Protection of Investments.¹⁴

Some scholars firmly believe that Article 22 of the Venezuelan legislation is an expression of consent to arbitration at the International Centre for Settlement of

Investment Disputes (ICSID).¹⁵ However, the arbitral tribunal in the *CEMEX v. Venezuela* case reached a different conclusion,¹⁶ finding that a unilateral offer to arbitrate could not be deduced from the Venezuelan investment legislation.¹⁷ It is not within the scope of the present article to discuss whether the arbitral tribunal was correct in the interpretation achieved. Nevertheless, it is important to address briefly the proper way of interpreting national investment codes.

In order to determine the effect of ambiguous offers to arbitrate, interpretation should follow to a certain extent the basic methodology of treaty interpretation. The methodology consists in giving prevalence to the *ordinary meaning of the terms* (what is strictly said in the unilateral offer),¹⁸ in their *context* (foreign investment codes as instruments of protection and promotion of foreign investment) and in light of their *object and purpose* (i.e., to provide legal assurances and safeguards to foreign investors). While relevant, the criterion of the intention of the host state (what the state was seeking by inserting a *sort* of arbitration clause in its legislation) should not prevail.

National investment legislations are “not similar to a diplomat’s off-the-cuff apparent promise or a leader’s political statements.”¹⁹ Rather, they create legal relations between host states and foreign investors. When a state makes so-called unilateral offers to arbitrate in its foreign investment code, good faith must be the guiding principle with respect to the determination of the binding nature of the said offers.²⁰ Ambiguity in the formulation of unilateral commitments within the frame of foreign investment legislations should neither profit the state nor the investor.

In conclusion, states remain free to draft investment legislation according to their own interests and standards. What is sure is that consent to arbitration through national investment codes is not necessary. Attraction of foreign investment in the developing world is not dependent on the insertion of unilateral offers to arbitrate in domestic law. This is a myth. For instance, Mauritius is generally considered as providing a safe environment for investments without having inserted any dispute-settlement clause in its national investment code.²¹ Should a sovereign state consider that it is appropriate to incorporate a unilateral consent to arbitration in its legislation, it should do so in the least ambiguous way. Consent to arbitration is not a *sine qua non* but legal predictability is.

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Notes

1 In the context of the present contribution, national investment legislations will be indifferently referred to as ‘foreign investment legislations’ or ‘national investment codes’.

2 *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010, para. 85. Unless otherwise indicated, all the awards are available on the following website: www.itlaw.com.

3 See, e.g., the 1998 Foreign Investment Law of Myanmar.

4 See *Tradex Hellas (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, (1999) 14 *ICSID Rev. – Foreign Inv. LJ*, pp. 186–187.

5 *IBM World Trade Corporation v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction, 22 December 2003, para. 24.

6 *Ibid.* See also, *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 45.

7 This is the case, e.g., of the 1998 Foreign Investment Law of Myanmar (comprised of the “Statement on Foreign Investment Law on Myanmar” and the “Union of Myanmar Foreign Investment Law”), available at: <http://missions.itu.int/~myanmar/t&b/invest01.html>. See also, the 2000 Investment Promotion Act of Mauritius (amended in 2009), available at:

8 Article 25 of the Mongolian Foreign Investment Law reads as follows: “Disputes between foreign investors and Mongolian investors as well as between foreign investors and Mongolian legal or natural persons on the matters relating to foreign investment and the operations of the foreign invested business entity shall be resolved in the Courts of Mongolia unless provided otherwise by international treaties to which Mongolia is a party or by any contract between the parties.” Quoted in *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company LTD. v. The Government of Mongolia and MONATOM Co., LTD, ibid.*, para. 67.

9 See article 13.2 of the 2005 Investment Code of Seychelles Act which reads as follows: “Disputes which cannot be resolved by the parties themselves *may be settled*: a) by an arbitration procedure whether local or international that is based on a previous agreement between the parties; or b) by legal proceedings in accordance with the Law of Seychelles”.

10 The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws”, 27 *Arbitration International* 2 (2011), p. 156.

11 See D. Caron, “The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law”, in M. H. Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff Publishers, Leiden/ Boston, 2011, p. 655.

12 See V. J. Tejera Pérez, “Do Municipal Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study”, in I. A. Laird, T. J. Weiler (eds.), *Investment Treaty Arbitration and International Law*, JurisNet, LLC, Huntington, 2008, p. 89.

13 See, e.g., *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010. See also, *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010. See also, *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011.

14 Article 22 provides as follows: “Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which the provisions of the Convention establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or the Convention on the Settlement of Investment Disputes between States and nationals of other States (ICSID) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.”

15 V. J. Tejera Pérez, *op. cit.*, p. 101: “although with an awkward wording, Article 22 of the Venezuelan Investment Law contains in itself an offer of ICSID arbitration from the Bolivarian Republic of Venezuela to settle disputes with all foreign investors.”

16 The arbitral tribunals in *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela* (*op. cit.*) and in *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela* (*op. cit.*) reached the same conclusion with approximately similar reasoning.

17 The arbitral tribunal considered that “if it had been the intention of Venezuela to give its advance consent to ICSID arbitration in general, it would have been easy for the drafters of Article 22 to express that intention clearly” (*CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela, op. cit.*, para. 137) and “that such an intention hav[ing] not been established [...] it cannot conclude from the obscure and ambiguous text of Article 22 that Venezuela, in adopting the 1999 Investment Law, consented unilaterally to ICSID arbitration for all disputes covered by the ICSID Convention in a general manner” (*ibid.*, para. 138).

18 See *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela, ibid.*, para. 90.

19 D. Caron, *op. cit.*, p. 674.

20 See *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 115.

21 See the website of the National Investment Promotion Agency of Mauritius which says: “According to the latest World Bank Doing Business Survey, Mauritius is the No.1 in Africa and 23rd globally in terms of ease of doing business. Canadian Fraser Institute also ranked Mauritius 1st in Africa and 9th worldwide on its chart of economic freedom”, available at: <http://www.investmauritius.com/Mauritius.aspx>.

Investment Law and Public Services: Clashes of Interests or Peaceful Coexistence?

Markus Krajewski

feature 4



[T]he Tribunal must balance the legitimate and reasonable expectations of the Claimants with [...] [the] right to regulate the provision of a vital public service.¹

This quote from an investment arbitration tribunal highlights the relationship between international investment law and the regulation of public services. This essay illustrates areas of contention between the requirements of international investment law and the regulation of public services.

Regulation of public services and international commercial interests

Public services are provided and regulated based on non-commercial public interests and on the need for the provision of such services in a way the market cannot achieve. Public service obligations aim at securing a certain quality of the service, general (universal) access and affordable prices. This involves value judgments that may vary by country and over time. Regulation of public services should be developed in democratic processes and articulated by democratically accountable public bodies. Public services are a key element of the modern social and welfare state that is subject to continued processes of adaption and reform. This implies reviewing and re-assessing existing models of providing public services. In this context, it is noteworthy that models exclusively relying on market-based solutions are increasingly challenged. It is, therefore, necessary to maintain regulatory autonomy and to create space for discourse and reflection on reforming public services regulation.

At first sight, regulating public services does not seem to collide with international investment law. However, an activity perceived in one country as a public service provided by a public monopoly on a non-commercial basis may be a commercial activity pursued by private companies in another. For example, traditional postal services, such as the delivery of letters, are subject to a state monopoly in Canada, whereas these services are provided on liberalised markets in Europe. This renders the inclusion of postal services a contentious issue in the Canada-European Union Economic and Trade Agreement (CETA) currently under negotiation.

Furthermore, in the process of transforming public services through liberalisation and privatisation, countries often experiment with various instruments and may also withdraw or change liberalisation or commercialisation policies. This may conflict with the interest of private companies active in the relevant field. For example, after several Latin American countries pursued privatisation policies in water and sewage services in the late 1980s and early 1990s, changes in political preferences and the financial crisis led to policy reversals in the 2000s which triggered a series of investment disputes.

The impact of international investment agreements on public services

Scope of investment agreements

International investment agreements, such as Bilateral Investment Agreements (BITs) and investment chapters in regional trade agreements, usually define their scope on the basis of an illustrative or exhaustive list of different forms of assets. Unlike trade agreements (such as the World Trade Organization's General Agreement on Trade in Services) investment agreements do not exclude governmental activities from their scope of application. The impact of investment law on public services regulation is therefore not filtered through limitations in the scope of application of investment agreements. In addition, many investment agreements include "concessions" in their lists of assets. The withdrawal of concessions, or the alteration of the terms of concessions regarding the provision of public services, such as gas, water or electricity distribution, have been the subject of a number of investor-state dispute settlement proceedings.

Protection against expropriation

Investment agreements protect against direct and indirect expropriation. In the context of public services, regulatory expropriation (regulatory taking) is of particular interest. The term denotes regulatory measures that generally aim at public interests but also deprive the investor of the commercial value of the investment. Arbitral tribunals have struggled to delineate legitimate regulation for public policy purposes, which would not trigger compensation, from regulatory measures with unjustifiably detrimental effects on the investor, which would require compensation. Most often tribunals referred to the degree or the extent of the interference with the investor's rights. For example, the *Azurix* tribunal stated that "the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim".² Hence, measures taken for regulatory purposes in public services can amount to indirect or regulatory expropriations if they adversely affect the investor's assets in such a way that it deprives the investor of the value of the investment.

Standards of treatment

Apart from protection against expropriation, investment treaties usually require fair and equitable treatment of the investor. Fair and equitable treatment is often defined with regards to legitimate expectations of the investor, which,

for example, may be upset by sudden or fundamental changes of the law relevant to the respective investment. In addition, the fair and equitable standard relates to the stability, predictability and consistency of the legal and business environment. In this context, reference is often made to the object and purpose of investment treaties to create favourable conditions for investments. Tribunals have concluded that guaranteeing a stable and predictable investment climate is one of the central purposes of these agreements.

The fair and equitable treatment standard has been at the heart of a number of investment disputes concerning water distribution, such as *Suez v. Argentina*. Here the tribunal was of the opinion that, despite the extraordinary circumstances of the Argentine financial and economic crisis, the provincial authorities were confined to exercising their regulatory discretion in accordance with the terms and conditions of the agreed regulatory framework.³ This shows that tensions between the requirements of this standard and government regulation of public services may arise if the fair and equitable treatment standard inhibits necessary adjustments and changes in the legal framework that the investor did not expect, or that are considered irrational or unjustifiable by the investment tribunals.

Another typical element of investment treaties that is relevant to regulating public services are so-called "umbrella clauses". They usually require the host state to fulfil "any other obligations" it may have entered into with regard to investments protected under the respective treaty. An important issue concerning the umbrella clause is whether it covers obligations under state-investor contracts, such as concession agreements. If this is the case, an investor may not only challenge direct violations of the principles of international investment agreements, but also breaches of investment contracts in an investor-state dispute settlement proceeding. The scope of the umbrella clause is of specific concern in the context of public services regulation, because investments in infrastructure (networks, grids, etc.) are usually large-scale projects that require elaborate and detailed contracts (usually concessions) between the state and the investor. Often these contracts contain a regulatory framework specific to the project and encompass commercial aspects, as well as elements of public power (administrative contracts). In light of the complexity of these contracts and the various legal fields they address, it is of great importance how claims arising from them will be adjudicated.

Areas of contention

The imposition of the obligations of international investment agreements may lead to conflicts with government policies and activities aimed at the regulation of public services, in particular if governments use ad hoc-measures and instruments addressing single cases that affect the operation of an existing investment. If the regulations are in place before the investment is made, and if the regulations are applied in a transparent and non-discriminatory manner, the potential for conflict between investment agreements and public services regulation seems less acute. However, the regulation of public services responds to changing needs of a society, to changes in public policies or to unforeseen problems that occur during the duration of an investment project. In these cases, the regulatory framework agreed upon and known to the investor before making the investment may be inadequate to deal with

those changes and unforeseen events. International investment law places a heavy burden on governments if they intervene with instruments not envisaged by the investor or in an unexpected manner. As seen in the water privatisation cases, issues of price and quality control are often at the heart of the relevant disputes. Price and quality regulation are, however, among the most important areas of the regulation of public services as they determine the conditions of the access of citizens to these services.

Potential for harmony?

Can international investment agreements also support the provision of public services? As the provision of public services is underfunded in many countries, the lack of funding and investment could be compensated through the attraction of capital from abroad. Consequently, foreign direct investment in public services could contribute to the provision of high quality services. In fact, in all water service disputes, the investor was initially invited into the country assuming that the investment would have a positive impact on the supply and distribution of drinking water. It could, therefore, be argued that investment agreements can have a positive impact on the provision of public services if they contribute to the attraction of foreign investment in those sectors. However, it is unclear whether investment agreements are positively linked to the attraction of foreign direct investment.⁴ Consequently, the question whether investment agreements may have a positive impact on the provision of public services depends on the circumstances of each individual case.

Conclusion

The impact of investment law on the regulation of public services is especially relevant in the context of decisions taken in specific situations, often in reaction to unforeseen changes in public policies, investor performance or the general economic or financial conditions in the country. While investment tribunals generally seem to accept the necessity to regulate public services, they are less tolerant to changes reacting to exceptional situation and unforeseen developments. Yet, the reaction to such changes is a fundamental element of the regulation of public services which can also be based on considerations of democratic decision-making within a given society. The approach of many investment tribunals towards cases involving public services therefore needs to be modified if they want to balance investor rights with the requirements of public services regulation.

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Notes

¹ *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 216.

² *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para 310.

³ *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para 227.

⁴ See UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (UNCTAD, 2009), p. 33.

Analysis of the European Commission's Draft Text on Investor-State Dispute Settlement for EU Agreements

Nathalie Bernasconi-Osterwalder

feature 5



With the European Union's Lisbon Treaty, in force since December 2009, foreign direct investment fell under the exclusive competence of the European Union (EU). Since then the three European institutions—the European Commission, the European Council of Ministers and the European Parliament—have been engaged in a vigorous debate over a new legal framework and negotiating positions for the negotiation of investment treaties by the EU. As a part of this process, in May 2012 the Directorate-General for Trade of the European Commission issued a first draft text on investor-state dispute settlement in EU investment treaties.

This note provides an overview and assessment of some of the proposed changes, before examining three issues of interest in more detail: the Commission's proposed approach to transparency in investor-state dispute settlement, the constitution of tribunals, and the implementation and enforcement of awards.

An overview

The Commission's draft text takes the form of a 'section' or chapter of a free trade agreement (FTA) and is meant to be the basis for the EU's negotiations with Canada, India and Singapore. The draft, which is not public, was revised in early June to reflect the comments provided by EU member states.

With its proposal, the Commission gives a clear signal that it wishes to include investor-state dispute settlement provisions in its negotiations with its current negotiating partners (Canada, India, Singapore) and most likely with future ones as well. The text also indicates that it is trying to grapple with some of the inherent concerns of the system that have crystallized over the past decade. Member states, however, appear divided on the need for the system to evolve. While the tone in a number of comments was generally positive, some members like Germany appear categorically opposed to any modernization and improvement proposed by the Commission. The opposition is difficult to understand because addressing the concerns of the dispute settlement system will be the benefit of states as well as investors. The only constituency that might be negatively affected by improvements would be the legal industry, consisting of practicing private lawyers and arbitrators, who could have important financial interests

in maintaining the status quo. At the same time, even the industry should be concerned about possible backlashes against investor-state arbitration more generally if the system is not fixed.

The investor-state arbitration system proposed by the Commission is based on the existing arbitration rules under the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL). The Commission therefore does not establish an entirely new and self-contained system. However, the Commission's draft does address some of the problems that have arisen under those rules in the investment-treaty arbitration context, and complements the gaps and concerns with additional rules. The draft includes an array of provisions to clarify or innovate current practice through the clarification of the scope of dispute settlement, new detailed rules on mediation, the exclusion of 'class actions', fork-in-the-road clauses to avoid multiple claims on the same issue, a special framework on the constitution of the tribunal and conditions for tribunal members, the allocation and setting of costs, the consolidation of claims, and the setting up of a Committee for the Settlement of Investor-State Disputes in charge of implementation and interpretation issues and examining the possibility of an appellate mechanism.

Many of these innovations go in the right direction, though some may require additional detail. At the same time, the draft also contains some more worrisome aspects relating to the enforcement of awards and the use of retaliatory measures. Finally, the draft addresses EU-specific issues, setting out a framework to determine who will be the respondent when a foreign investor takes action against a measure taken by the EU or one of its member states. This aspect is complemented by another proposal by the Commission for a regulation on the partition of financial responsibility in case of investor arbitration claims against the EU or a member state under EU-negotiated investment chapters and treaties, which was made public in June 2012.

Transparency in investor-state dispute settlement

Following a marked trend, the Commission is incorporating stronger transparency provisions that aim at ensuring access to documents and hearings in the dispute-settlement system. This builds on developments at ICSID, and at UNICTRAL where a working group is currently discussing more robust transparency rules, as well the existing practice of countries such as the United States and Canada that integrate transparency rules into their investment treaties. The draft includes an annex requiring that, subject to some exceptions for protected information, a wide range of documents be made available to the public, ranging from the notice of intent and other submissions by disputing and non-disputing parties and third persons, as well as expert reports and witness statements, and orders, decisions and awards of the tribunal. The Commission has designated the Secretary General of ICSID as the repository of arbitration documents in both ICSID and non-ICSID cases. It is to be expected that the ICSID Secretariat can and will take on this task. The draft does not specify how the information is to be made public.

In its comments on the draft, Germany has expressed a preference to balance transparency against “the rights of investors and States to keep the litigation secret” and that “EU investors expect that their special situation is reflected in the drafting of transparency rules.” Besides being out of sync with recent trends, Germany’s approach would arguably be contrary to citizens’ access to information rights and would undermine the legitimacy of the investor-state arbitration even further. In its draft, the Commission is addressing precisely this governance and legitimacy problem by requiring transparency in dispute settlement, and, as such, it is essential that these rules be included in all future EU agreements.

Constitution of tribunals

On the constitution of the tribunal the Commission follows an approach in which the disputing parties each appoint one arbitrator and the chairperson is appointed by agreement. The Commission complements this traditional approach with the creation of a roster of “at least 15 individuals” to serve as arbitrators in investment disputes involving the EU or EU member states under the EU treaty. It is specified that each Party to the treaty is to propose at least five individuals to serve as arbitrators and also select at least five individuals “who are not nationals of either Party to act as chairperson of the tribunals.”

The elaboration of a treaty-specific list approach is an improvement in that it provides some indication for the parties to the treaty as to who will be interpreting and implementing the treaty because it is from that list that the Secretary General of ICSID will appoint the arbitrators in case the disputing parties have not appointed their arbitrator or cannot agree on the chairperson. Yet, the Commission could have gone further by moving away from party-appointments altogether in favour of a system of appointment through a designated authority or a type of lottery system, along the lines of the one used in the WTO Appellate Body. This could have set the stage for establishing an institutionalized system of tenured panelists in the future.

The draft does set out a number of qualifications to ensure independence and avoid conflicts of interest of arbitrators, including that the individuals: (i) have specialised knowledge of international law, in particular international public law and international investment law; (ii) be independent, serve in their individual capacities and not take instructions from any organisation or government with regard to matters related to the dispute, or be affiliated with the government of any Party or any disputing party; and (iii) comply with a code of conduct, which is included in an annex to the draft. The code builds on the International Bar Association’s Guidelines on Conflicts of Interests in International Arbitration and contains unequivocal language requiring arbitrators to be impartial, independent and free of any conflict of interest for the entire period of the arbitration. The code also tightens and clarifies the rules to avoid conflicts of interest of arbitrators in the UNCITRAL and ICSID processes, and sets out the common standard of an “appearance of conflict of interest.” One important example of conflict arises where arbitrators serve as counsel in other investment arbitrations at the same time. A growing number of arbitrators have declared they will no longer act as counsel in investment arbitration cases due to the conflicts of interest this creates. For purposes of clarity,

it would have been useful for the Commission to expressly state that arbitrators may not concurrently act as counsel in other investment arbitrations.

Enforcement of awards

The draft contains a number of problematic elements as to the enforcement of awards. For example, it provides that “[e]ach Party shall enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that Party.” This article has the consequence of rendering awards enforceable like a final judgment of a court of the State Party where the award is to be enforced, an approach accepted in the ICSID Convention. But the ICSID Convention provides the disputing parties with the opportunity to resort to an annulment process. The ICSID annulment process, although heavily criticized for a host of reasons, allows parties to seek correction of awards in certain limited instances. As long as the EU treaty itself does not provide for a review process, the recognition and enforcement of a non-ICSID award should be subject to the well-established framework set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been signed by 146 states. Under the New York Convention, an arbitration award issued in any other state can generally be freely enforced in any other contracting state but is nevertheless subject to certain limited defenses, such as issues of procedure (including regarding the composition of the tribunal), or if the award contains matters beyond the scope of the arbitration, or enforcement would be contrary to public policy.

Also related to the enforcement of awards, the draft provides that where a Party has failed to comply with a final award, the other Party may suspend obligations under the FTA, proportionately to the non-compliance, until there is compliance. How this relates to the international trading system is unclear and could raise a host of complications. Moreover, it reverses the primary rationale of the investor-state system, which is that investment disputes should not be turned into diplomatic or state-state disputes, but be left exclusively to the investor to resolve with the host state.

Conclusion

The Commission’s draft on investor-state dispute settlement incorporates a number of important elements to improve investor-state dispute settlement, long overdue. Notably, it enhances transparency in the process and improves the independence requirements for arbitrators. While the Commission could have been more bold and innovative in some areas, the draft does provide the institutional basis for additional improvements to be made in the near future. A key task now is to gain consensus among the member states and European Parliament on the need for change.

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Trends in Investor Claims Over Feed-in Tariffs for Renewable Energy

Vyoma Jha

feature 6

As governments increasingly turn to renewable energy to mitigate climate change, domestic climate-related policies in the form of price support measures such as feed-in tariffs (FiTs) have played an important role in stimulating the much needed investment—public and private, domestic and foreign—in the sector.

Feed-in tariffs are characterized by guaranteed electricity purchase prices (set higher than market rates), guaranteed grid access and a long-term contract.¹ Another feature in many FiT policies are 'local content' or 'domestic content' requirements, which make it mandatory for the investor to source a certain percentage of materials from local suppliers in order to be eligible to receive the benefits of the policy. For example, in Canada the Province of Ontario's FiT program requires the 'Minimum Required Domestic Content Level' to be in the range of 25-50% for wind projects over 10 kW and 50-60% for solar projects over 10 kW.²

As readers of this publication may be aware, FiTs for renewable energy have been involved in a series of claims by foreign investors under investment treaties. This brief article highlights two ways in which renewable energy investments have featured in investment disputes.

FiTs and performance requirements

The first type of dispute relates to domestic content performance requirements imposed on investors.

In July 2011, Mesa Power Group LLC, a Texas-based company, served Canada with a Notice of Intent to Submit a Claim to Arbitration under the North American Free Trade Agreement's (NAFTA) Chapter 11 in connection with Ontario's FiT program. The investor complains that the program breaches several obligations under NAFTA: Article 1102 and 1103, for providing more favorable treatment, in like circumstances, to a domestic company and to a non-NAFTA party; Article 1105, for failing to accord minimum standard of treatment; and Article 1106, for imposing prohibited "buy local" performance requirements.³

Canada's measures relating to domestic content requirements in Ontario's FiT program are also the subject of two ongoing WTO disputes brought by Japan and the European Union, which are now being heard together.⁴ One of the claims raised is that these measures are inconsistent with Article 2.1 of the WTO Agreement on Trade-Related Investment Measures (TRIMs Agreement), which restricts states' freedom to impose domestic content performance requirements.⁵ Although the TRIMs Agreement prohibits trade-related investment measures with domestic content performance requirements, two exceptions relevant to the protection of the environment: paragraphs (b) and (g) of Article XX of GATT 1994 could be relied upon to justify a TRIMs Agreement-inconsistent measure.⁶

Domestic content requirements within a FiT for renewable energy are particularly vulnerable to an investor challenge if the country's investment treaties contain an express prohibition on performance requirements, which

are particularly common in the treaties belonging to Canada, the United States and Japan.⁷ There will be, in such cases, clear inconsistencies between the climate-related policy and the investment treaties.

Although, investment disputes relating to performance requirements have been rare so far, the fact that that Canada has recently lost a dispute brought by two US-based oil companies for the breach of NAFTA's provision on performance requirements⁸ highlights the concerns over their prohibition—especially where they are designed to achieve environmental and social objectives. To avoid surprises, governments will need to better ensure that they limit the scope of the prohibitions through careful drafting and exceptions.

Stability vs. flexibility

The second, and more common, issue raised in the context of renewable energy investment has related to the withdrawal or modification of the FiTs. Spain, Italy, and the Czech Republic are among the countries known to be facing claims challenging these types of measures.

The claim against Spain, for instance, has been brought by a group of 14 investors over retrospective cuts to solar energy tariffs. The investors claim that they relied on the FiT laws while making their investment and the subsequent cuts in tariffs by the government breach the Energy Charter Treaty (ECT), a multi-lateral agreement that provides protections to investors in the energy sector that are similar to those found in bilateral investment treaties (BITs).⁹

Italy, too, is in a dispute with foreign investors over its efforts to roll back FiTs in the country's booming solar energy sector. Initially taken with a view to induce investments in solar energy production, the generous subsidies have proved financially burdensome in times of economic austerity. Again, the investors complain that the cuts in FiT are a breach of the government's earlier promise of long-term price support.¹⁰ It is not yet clear if the investors are claiming breaches of the ECT, or one of Italy's many BITs.

The Czech Republic, where investors were enticed by generous FiT policies for solar power, also faced a heavy bill for the solar boom. In order to curb costs, the government in December 2010 introduced a new 26 per cent retroactive 'solar tax' on all producers of solar energy. Other measures taken by the government in this regard were: ending the tax holiday for solar power plant operators, changes in the FiT policies and a 500% hike in land use fees. Now, the Czech Republic is threatened with a series of legal disputes and potential arbitration claims by the foreign-based solar investors.¹¹

While the legal arguments raised by the investors are not yet publicized, any measure interfering with the amount or duration of price support is likely to be challenged as a breach of the fair and equitable treatment (FET) standard. Some tribunals have interpreted the FET standard as protecting the investor's "legitimate expectations," which are based on the principles of the

state ensuring “a stable business environment”¹² and “a transparent and predictable framework for investors’ business planning and investment.”¹³

Tribunals, however, have taken divergent approaches to determining what constitutes an investor’s “legitimate expectations,” making it impossible to predict how a particular tribunal will rule in a given case. Some tribunals have placed a heavy burden on host states by not allowing them to avoid obligations on the grounds that compliance may be difficult or costly¹⁴, while others acknowledge that legal and economic frameworks must evolve. As the tribunal in the *Saluka* case underlined, “no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.”¹⁵ However, tribunals do frown on government actions that run counter to explicit commitments. Therefore, if a country refuses to pay or diminishes the amount or duration of the promised feed-in tariffs, it risks frustrating the investor’s legitimate expectations.¹⁶

Another likely challenge could be that withdrawal of price support or cuts in FiT amount to indirect expropriation. Tribunals relying on the so-called “sole effects doctrine,” such as in the case of *Metalclad*¹⁷ and many others that followed, could view such a measure as an indirect expropriation if it results in a significant decline in the economic value of the investment. However, it has been argued that FiTs merely entitle the operators of the renewable energy installation to fixed prices and that these may not be traded independently from the main electricity transaction. In that light, since FiTs are incapable of independent economic exploitation and investors will likely not lose control of their installations, any interference with such schemes may not be considered expropriation.¹⁸

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The cases indicate that governments need to be aware of the commitments they have under their investment treaties and design FiT policies for renewable energy accordingly.

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Lessons learned

FiT policies are an important tool to promote renewable energy investments. Yet different aspects of these policies are now subject of investment disputes brought under BITs or the ECT. The cases indicate that governments need to be aware of the commitments they have under their investment treaties and design FiT policies for renewable energy accordingly. If the government concludes that its commitments under these treaties restrict its ability to set and implement environmental and other legitimate objectives, it may have to re-think its investment rules, such as those

relating to prohibitions on performance requirements, to ensure that it can take the measures it judges necessary for its contribution to climate change mitigation.

Governments should also be aware that making long-term commitments with respect to tariffs and other benefits to stimulate investment in the renewable energy field can lead to expensive international arbitration down the road, as can be seen in the claims brought against cash-strapped European countries. Governments should take care to build in flexibilities at the outset so as to eliminate the risk of legitimate policy decisions triggering legal battles, while at the same time providing adequate assurances to the investors. Moreover, incentives should not be set too high to be unreasonable or too difficult for the treasury to bear.

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Notes

1 See, Wilke, Marie (2011). *Feed-in Tariffs for Renewable Energy and WTO Subsidy Rules: An Initial Legal Review*, ICTSD Programme on Trade and Environment; Trade and Sustainable Energy Series, Issue Paper No. 4, Geneva

2 Feed-In Tariff Program Rules, Version 1.5.1, 15 July, 2011 available at: <http://fit.powerauthority.on.ca/>

3 “More legal woes for Canada’s Feed-in Tariff program for renewable energy”, *Investment Treaty News*, October 7, 2011, available at: <http://www.iisd.org/itn/2011/10/07/news-in-brief-5/>. See also, Mesa Power Group’s Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11 dated 6 July 2011. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Mesa_Power_Group_NOI.pdf.

4 *Canada — Certain Measures Affecting the Renewable Energy Generation Sector (DS412) and Canada — Measures Relating to the Feed-in Tariff Program (DS426)*, available at: <http://www.wto.org>

5 Article 2.1 of the TRIMs Agreement provides that no Member shall apply a trade-related investment measure inconsistent with Article III (national treatment) or Article XI (quantitative restrictions) of the General Agreement on Tariffs and Trade (GATT). The Illustrative List in the Annex to the TRIMs Agreement stipulates “domestic content requirements” as one of the trade-related investment measures inconsistent with the obligation of national treatment in Article III of GATT 1994.

6 Article 3 of the TRIMs Agreement provides that all exceptions under GATT 1994 shall apply to the provisions of the TRIMs Agreement

7 For example, Article 1106 of NAFTA expressly prohibits a party from imposing or enforcing mandatory performance requirements to achieve a given level or percentage of domestic content

8 *Mobil Investments Canada Inc and Murphy Oil Corporation v. Canada* (ICSID Case No ARB(AF)/07/4), See, “Canada loses NAFTA claim; provincial R&D obligations imposed on US oil companies held to constitute prohibited performance requirements”, by Jarrod Hepburn, *IAReporter*, June 1, 2012 available at: <http://www.iareporter.com/articles/20120601>

9 “Foreign investors sue government of Spain over hikes to solar energy tariffs”, *Investment Treaty News*, January 12, 2012, available at: <http://www.iisd.org/itn/2012/01/12/news-in-brief-6/>

10 “Italy put on notice of treaty claim arising out of economic austerity”, by Luke Eric Peterson, *IAReporter*, Vol. 5, No. 8, April 30, 2012

11 Dorda, Jaroslav (2010, October). *Solar bonanza turns into a nightmare for investors in the Czech Republic*, available at: http://www.pv-tech.org/guest_blog/guest_blog_iv_solar_bonanza_turns_into_a_nightmare_for_investors_in_the_cze

12 See, *Occidental Exploration and Production Co. v. Ecuador*, LCIA Case No. UN3467 (2004) at para. 183; Also, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award dated 17 March 2006 at para. 303.

13 See, *Metalclad Corporation v. United Mexican States*, ICSID Case No. Arb(AF)/97/1, (2000) at para. 99

14 *GAMI Investments GAMI Investments, Inc v. United Mexican States*, UNCITRAL (NAFTA) Final Award dated 15 November 2004 at para. 94

15 See, *Saluka*, *Supra* note 12 at para. 305

16 Boute, Anatole (2011). *Combating Climate Change through Investment Arbitration Changes*. *Fordham International Law Journal*, Vol. 35. Available at SSRN: <http://ssrn.com/abstract=1867663>

17 *Metalclad Corporation v. United Mexican States*, ICSID Case No. Arb(AF)/97/1 (2000)

18 Boute, *Supra* note 16

news in brief

Vattenfall launches new claim against Germany

The Swedish state-run energy firm Vattenfall has launched a second claim against Germany.

The claim stems from Germany's May 2011 decision to phase-out its nuclear power plants, in which 8 plants have been shuttered and the remaining 9 plants to be closed over the next decade.

While Germany has long debated its use of nuclear power, opposition swelled in the wake of Japan's Fukushima Daiichi nuclear disaster in March 2011.

German media have speculated that Vattenfall will seek between 700 – 1000 million Euros in damages for breaches of the Energy Charter Treaty (ECT), a multilateral agreement that governs trade and investment in the energy sector. The company complains that it invested in two nuclear power plants on the understanding that the life-spans of the plants would be extended.

Vattenfall's case was registered with ICSID on 31 May 2012.

This is Vattenfall's second case under the ECT that challenges the German government. In April 2009 Vattenfall sought 1.4 billion Euros in damages related to environmental restrictions imposed by the City of Hamburg on a coal-fired power plant. That dispute was settled in March 2011 when Vattenfall was granted a modified water-use permit and released from previously imposed requirements at the Moorburg power plant.

“ While Germany has long debated its use of nuclear power, opposition swelled in the wake of Japan's Fukushima Daiichi nuclear disaster in March 2011. ”

United States tweaks its model bilateral investment treaty

The United States released its latest model bilateral investment treaty in April 2012, several years after the Obama administration initiated a review of the treaty. The new model is not substantially different from the previous 2004 model.

The review of the model BIT was informed a committee of non-government advisers to the US government on matters of international economic policy—the members of which diverged sharply in their recommendations. Many of those

recommendations have not been taken on board by the Obama administration.

Indeed, the core substantive protections—national treatment, most favoured-nation treatment, minimum standards of treatment and expropriation—have been left unaltered. The US has also not changed dispute settlement provisions.

The new model slightly expands environmental obligations, stating that governments have a duty to enforce local environmental laws. However, that duty is not enforceable by state-state dispute resolution, as has been the case in recent US FTAs. The model also clarifies that states are not liable for breaches of the treaty for environmental-related actions that reflect “a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.”

The model sets out an obligation for states to enforce local labour laws, albeit less extensively than the US has done in its most recent FTAs. Similar to the environmental obligations, these labour obligations are not re-enforced with state-state or labour-state dispute resolution. Rather, the treaty allows for state-state consultations.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) stated that it is “deeply disappointed” by the lack of strong enforcement mechanisms, saying that the new provisions amounted to “little more than paper commitments, without any recourse in the event that consultation fails to resolve a problem.”

A number of changes have drawn praise from US businesses. This includes a provision that requires states to allow persons of the other state-parties to the treaty to engage in the development of technical standards. That provision is backed-up by state-state dispute settlement, but not investor-state.

US investment treaties are notable for their restrictions on performance requirements, and these now include limits on states preferring local “technology”; a change that has been welcomed by US businesses. The USTR explained that it wants to prevent states from “requiring the purchase, use or according of a preference to domestically developed technology in order to provide an advantage to a Party's own investors, investments or technology.”

Notably, while a number of non-government advisers called for the model BIT to carve out more explicit policy space for governments to react to financial crisis, the Obama administration has decided not to make substantial changes in this regard.

The release of the new model has unleashed calls from US businesses interests for the US to

aggressively pursue new investment treaties, with China, India and Russia at the top of the list. US investment treaty negotiations slowed over the last few years, while the treaty-review was in process.

The 2012 US model investment treaty is available here: <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>

Lawyers unite against investor-state in TPPA

A hundred prominent jurists have called for investor-state arbitration to be excluded from the Trans-Pacific Partnership Agreement (TPPA).

In a letter published in May 2012, the lawyers share the opinion that the types of investor protections found in BITs, including investor-state arbitration, should not feature in the TPPA.

“We base this conclusion on concerns about how the expansion of this regime threatens to undermine the justice systems in our various countries and fundamentally shift the balance of power between investors, states and other affected parties in a manner that undermines fair resolution of legal disputes,” state the lawyers.

The lawyers hail from countries that are involved in the TPPA negotiations, and include Jagdish Bhagwati, a trade economist from Columbia University; Bruce Fein, former associate deputy attorney general and general counsel to the Federal Communications Commission; and Margaret Wilson, former speaker of the New Zealand House of Representatives.

The lawyers express concern that BITs extend protection to a range of “covered investments” (i.e., speculative financial instruments, government permits and intellectual property) beyond the original intent to protect real property from expropriation from government. They also worry about tribunals interpreting investment treaties in an overly expansive manner, which place the interests of investors before the rights of states to regulate and govern.

The letter points to recent arbitrations launched by the tobacco company Philip Morris against Australia and Uruguay, over the strict cigarette marketing regulations adopted by both countries.

Investor-state arbitration has emerged as a flashpoint in the TPPA negotiations. In a move that will likely complicate the negotiations, Australia has affirmed that it will not sign on to investor-state arbitration in the agreement (indeed, its policy, announced last year, is to reject investor-state in all of its FTAs). That has drawn concern from the US corporate lobby, which values strong investment protections in the agreement.

The letter is available here: <http://tpplegal.files.wordpress.com/2012/05/juristsletter8may2012.pdf>

UN Adopts Guidelines on Long-term Land Deals

Members of a UN committee on food security have adopted voluntary guidelines that address concerns over long-term investments in agricultural land in developing countries, often termed “land grabbing” by critics.

The “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security” were unveiled in May by the UN’s Committee on World Food Security, after several years of negotiations.

The guidelines are intended “to serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security.”

Recent years have seen an increase in foreign acquisitions of agricultural land, particularly in Africa and Asia. The trend has stoked concerns that these deals can marginalise rural communities, while contributing little to the broader economy.

The main targets for these investments have been Sudan, Mozambique, Liberia, and Ethiopia – countries with weak governance and regulatory frameworks.

The guidelines cover legal recognition and allocation of tenure rights and duties, transfers of tenure rights, such as through investments, and the administration of tenure.

The guidelines also urge alternatives to large land investments. “Investment models exist that do not result in the large-scale acquisition of land, and these alternative models should be promoted,” say the guidelines.

While the guidelines are not binding on states, they have non-the-less been praised for the broad support they have received. The Director General of the UN Food and Agriculture Organization, Jose Graziano da Silva, hailed the guidelines as the “first-ever global land tenure guidelines. We now have a shared vision.”

With an eye to the challenges in implementing the guidelines, Ambassador Yaya Olaniran, the Nigerian Permanent Representative to FAO and CFS Chair stressed that “these changes won’t happen overnight. But we also know, as a result of the extensive consultations by FAO and the CFS-led negotiation process, that there is a lot of buy-in and support for the guidelines.”

The guidelines are available here: http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_Final_May_2012.pdf

awards & decisions

Claim against Slovakia dismissed, as tribunal complains of poorly presented case *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* **Damon Vis-Dunbar**

A tribunal has dismissed a claim by a pair of Dutch investors against the Slovak Republic, finding no evidence that a “financial mafia” colluded with the Slovak government to bankrupt the claimants’ investment.

The dispute centered on bankruptcy proceedings involving BCT, a privatised company acquired by the claimants that produced traditional yarn and thread. The claimants argued that the Slovak government had taken a benevolent approach to the company’s tax arrears, before unfairly abandoning its leniency when it pushed the company into bankruptcy proceedings. The claimants also alluded to a “financial mafia” eager to take hold of BCT’s real-estate, and which allegedly pressured Slovak authorities and courts to act improperly.

However, the tribunal found no evidence to substantiate these claims.

Poorly presented case

The tribunal expressed frustration at the presentation of the claimant’s case at various points in the award. “The Claimants’ submissions did not present the factual allegations in a clear, consistent and systematic manner,” notes the tribunal.

Indeed, the tribunal struggled at points to make sense of legal arguments underpinning the claim. The claimants made vague references to expropriation, for example, while lacking a clear articulation of concept. “The random sprinkling throughout the pleadings of a strong term with a well-defined legal meaning such as ‘expropriation’ or ‘creeping expropriation’ does not transform that term by itself into an allegation of facts founding a treaty violation,” admonished the tribunal

Claims lack evidence

The claimants asserted breaches of the treaty’s provision on fair and equitable treatment. While not elaborating on the content of the standard, Slovakia identified two aspects to be considered: the investors’ legitimate expectations, and a denial of justice.

With respect to legitimate expectations, the tribunal noted that this is linked stability. Quoting the tribunal in *Tecmed v. Mexico*, for example, it noted that the standard has been interpreted to “provide to international investments treatment that does not affect the basic expectations there were taken into account by foreign investor to make the investment.”

However, the tribunal also nodded to the more recent *El Paso Energy v. Argentina* award, which stressed the limits to which an investor can expect stability. That tribunal acknowledged that “economic and legal life is by nature evolutionary,” and thus considered if changes to a legal framework were “unreasonably or contrary to a specific commitment.”

Turning to the facts of case, the tribunal failed to see how the Slovakia had frustrated the investors’ legitimate expectations. In its interpretation, Slovakia’s leniency with respect the BCT’s tax arrears were premised on

repeated promises that the investors would modernize the company; while in reality, BCT’s condition continued to deteriorate. As such, the claimants could not expect “that the authorities would invariably maintain a lenient attitude.”

With respect to a denial of justice, the tribunal underlined that this requires a failure of an entire legal system to deliver justice – not the mistakes of one court. In any case, however, tribunal found no convincing evidence of procedural irregularities or unreasonable delays in the bankruptcy proceedings.

The claimants’ allusions to corruption also failed to convince the tribunal, given the lack of concrete evidence.

Claimants’ must contribute to Slovakia costs

The disputing parties invested vastly different amounts in the case: the claimants legal costs amounted to 1.46 million Euros, while Slovakia spent nearly 12.5 million Euros. In considering the allocation of costs in light of these different amounts, the tribunal remarked: “Each one made its choices and bears the consequences. The Tribunal does not consider that one should necessarily pay for the choice of the other.”

However, the tribunal also noted that the poor presentation of the claimants’ case placed a burden on the proceedings.

Weighing these considerations, the tribunal decided that the claimants should contribute 2 million Euros to Slovakia’s costs, that being in the range of what the claimants paid for their own case. The claimants were also ordered to pay the costs of the arbitration, which amounted to nearly 800,000 Euros.

The tribunal consisted of Gabrielle Kauffman-Kohler (President), Vojtech Trapl (respondent’s nominee), and Mikhail Wladimiroff (claimants’ nominee).

The award is available here: <http://italaw.com/documents/OostergetelvSlovakRepublic.pdf>

Decisions published in rare State-to-State dispute between Italy and Cuba *Italy v Cuba, ad hoc tribunal* **Larisa Babiy**

In 2003 Italy initiated a rare State-to-State arbitration on the basis of the 1993 Italy-Cuba BIT. It espoused the claims of sixteen Italian investors operating in various sectors, from aluminium to pasta sauce production.

Italy claimed that through the actions of different entities, such as the Cuban Central Bank and the Cuban Chamber of Commerce, Cuba discriminated against Italian investors, including by denying them fair and equitable treatment, national treatment and full protection and security. Italy also sought from Cuba a symbolic compensation of one Euro for the violation of the letter and spirit of the BIT. Cuba, in turn, requested a public apology for the moral damage caused by the initiation of the arbitral proceeding.

In recently published decisions (an interim award from 2005, and final award from 2008), the tribunal accepted jurisdiction over the claims, but the majority went on to dismiss the claims on their merits.

Cuba's preliminary objections

Cuba raised several preliminary objections. Firstly, it affirmed that Italy was not entitled to initiate a proceeding for diplomatic protection on the basis of article 10 of the BIT. Under this provision, Italy could only bring a dispute in its own name regarding the interpretation and application of the treaty.

Secondly, Cuba maintained that none of the claims espoused by Italy could be considered as relating to investments. It was Cuba's argument that, since the definition contained in the BIT referred to investments made in conformity with local laws, a unique concept of investment could not be said to exist. Rather, the definition of investment contained in the BIT had to be subordinated to the notion of investment contained in the local law.

Thirdly, Cuba argued that Italy's claims were not admissible since the claimant had failed to exhaust local remedies.

Finally, Cuba asserted that the tribunal should rule only on Italy's claims regarding two of the sixteen investors, since the remaining claims were raised after the initiation of the arbitral proceeding.

Tribunal's analysis

The tribunal rejected Cuba's preliminary objection on Italy's legal standing. It acknowledged that while the BIT entitles an investor to initiate a dispute against the host State, that fact does not, in itself, bar the home State from giving diplomatic protection in an arbitration under the same treaty. An investor's right to diplomatic protection exists as long as he does not submit a claim to arbitration in his own name. Italy, thus, had legal standing in the arbitration, provided that the conditions for the application of the BIT and for the recourse to diplomatic protection had been fulfilled.

The tribunal also rejected Cuba's argument regarding the definition of investment. It stated that the object and purpose of the BIT would be frustrated if the notion of investment could vary together with the laws of each contracting State. The majority also considered that the requirement of conformity with local laws did not concern the notion, but rather the legality, of the making of the investment. The tribunal looked into scholarly writings and international jurisprudence and concluded that there are three elements that characterize an investment: contribution, duration and risk. The final decision on whether the dispute regarded protected investments was deferred to the merits stage.

In dealing with Cuba's objection concerning the exhaustion of local remedies, the tribunal distinguished between claims brought by Italy in its own name and claims advanced on behalf of its investors. It concluded that exhaustion of local remedies applies only in the latter case, provided that the remedies were existing and effective. The decision on these points was deferred to the merits stage.

In addressing the admissibility of claims advanced by Italy after the commencement of the arbitration, the tribunal underlined the importance of avoiding potential conflicting decisions. The majority then considered that, since the claims were filed at the beginning of

the proceeding, their examination would not have any negative impact on it.

Majority dismisses claims on their merits

At the merits stage, Italy withdrew ten claims and proceeded on behalf of six companies.

Caribe and Figurella Project s.r.l.

Caribe and Figurella Project concluded a contract with a Cuban hotel for the creation of a beauty center. Two years later, Cuban authorities revoked the center's operating licence after finding that it was providing unauthorized tattooing services. When the licence was re-established, the Cuban hotel failed to notify Caribe and Figurella Project and dismantled the area occupied by the Italian company. Italy claimed that Cuba violated its obligation to encourage Italian investments, discriminated against them and failed to grant fair and equitable treatment.

The tribunal found that Caribe and Figurella Project's contract constituted an investment in accordance with the criteria of contribution, duration and risk established in the award on jurisdiction.

The tribunal considered the revocation of the licence by Cuban authorities "brutal" but not illicit, since at the time the permit was granted the annex of the contract referring to the tattoo services was not signed. Moreover, the fact that the licence was reestablished 20 days later mitigated the brutality of its withdrawal. Thus, the tribunal found that Cuban authorities did not commit any internationally wrongful act.

Adopting a structural and functional test, the tribunal decided that the hotel's conduct was not attributable to Cuba. The non-governmental function of the hotel was determinant for excluding Cuba's responsibility for the hotel's conduct. As a consequence, all actions that lead to the dismantling of the Italian equipment were considered as contractual faults, rather than violations of the treaty.

Finmed s.r.l.

Finmed Ltd. is an Irish corporation owned by two Italian companies. In 1996 it formed a mixed company with Cubanacan, a state entity, for the creation of a tourist complex. Italy claimed that Cubanacan impeded the replacement of Finmed Ltd. in the mixed company with the Italian Finmed s.r.l. and, as a consequence, that Cuba violated its obligation to encourage Italian investments, discriminated against them and failed to grant fair and equitable treatment.

The tribunal acknowledged that the situation within Finmed Ltd. was confused. The substitution by Finmed s.r.l. was approved by the mixed company's assembly but never received the necessary governmental authorization. The required documents had not been produced because of an ownership dispute among Finmed Ltd.'s representatives, which rendered it impossible to determine who had the authority to decide on the substitution. As a result, the activity of the mixed company was blocked for 8 months. Finally, Cubanacan decided to recognize a minority shareholder as the legitimate representative of Finmed Ltd, despite serious doubts on the validity of the documents presented by all sides.

The tribunal recognized that Cubanacan's acts were attributable to Cuba because the entity belonged to the Ministry of Tourism. It considered that its decision was "rushed", but justified by the desire to put an end to the 8 months paralysis of the mixed company. In doubt, Cubanacan opted for preserving the *status quo*, continuing to consider Finmed Ltd. the owner of the investment. The tribunal considered that the inability to take control of the investment was due to the situation within Finmed Ltd. itself, rather than to acts or omissions by Cubanacan and Cuba.

Icemm srl and Menarini Società Farmaceutica

The tribunal rejected Italy's claims regarding Icemm s.r.l. and Menarini Società Farmaceutica, on the ground that their activity did not constitute an investment under the treaty. In both cases the tribunal found that the long term sales contract the Italian companies had with their Cuban partners did not satisfy the required criteria of contribution, duration and risk.

Cristal Vetro SA and Pastas y Salsas Que Chevere

The majority considered that two of the companies defended by Italy lacked a valid link of nationality with the country. Cristal Vetro SA and Pastas y Salsas Que Chevere were incorporated in Panama and Costa Rica respectively, but the capitals and the ownership were Italian. The tribunal looked at the text of the BIT, which referred to companies and individuals of a Contracting State. It deduced that the treaty covered investments made either by an individual, or by a corporation of a signatory State, and could not be extended to third country corporations only because their capitals were Cuban or Italian. The principles of diplomatic protection prevailing at the time of the conclusion of the treaty confirmed this conclusion.

The dissent

Italy's nominee, Prof. Tanzi, disagreed with the majority on the appreciation of the facts of the dispute. With regard to Italy's claims on behalf of Caribe and Figurella Project, Prof. Tanzi considered that Cuban authorities could not have been unaware of the tattoo services offered by the beauty center. Evidence such as price lists including tattoo services and authorizations for the import of tattoo equipment supported his conclusion. Moreover, since the tattoo services constituted only a small portion of the center's activity, the arbitrator considered the revocation of the licence disproportionate and inequitable.

Prof. Tanzi also disagreed with the tribunal's finding on the issue of attribution of the hotel's conduct to Cuba. He criticized the "functional approach" adopted by the majority and focused instead on the control exercised by Cuban authorities over the hotel. He concluded that the hotel's actions should have been attributed to Cuba, independently from the commercial nature of its activity.

Concerning the Finmed s.r.l. claims, Prof. Tanzi highlighted that the majority acknowledged the questionable validity of the documents on which Cubanacan based its decisions. In his opinion, the tribunal should then have recognized negligence, if not complicity of Cubanacan in the ownership dispute. Furthermore, Prof. Tanzi underlined that to attribute Cubanacan's actions to Cuba the majority opted for a structural instead of a functional test, in contrast with what it did in the Caribe and Figurella Project case.

Prof. Tanzi disagreed with the majority ruling on the absence of nationality link in the Cristal Vetro and Pastas y Salsas Que Chevere claims. He focused on the broad wording of the BIT, which did not indicate a test for the determination of corporate nationality. He argued that, although customary international law refers to the place of incorporation as relevant standard, it also provides several exceptions. One of those is contained in article 9 of the ILC draft articles on diplomatic protection. Prof. Tanzi considered that Italy's claims met such an exception, since they concerned two companies who were lacking effective connection between ownership and place of incorporation.

The tribunal was composed by Mr. Yves Derains (president), Prof. Attila Tanzi (Italy's nominee) and Dr. Narciso Cobo Roura (Cuba's nominee, in substitution of Dr. Olga Miranda Bravo).

All decisions are available in French.
The interim award is available here: http://italaw.com/documents/Italy_v_Cuba_InterimAward_15Mar2005.pdf

The final award is available here: http://italaw.com/documents/Italy_v_Cuba_FinalAward2008.pdf

The dissenting opinion is available here: http://italaw.com/documents/Italy_v_Cuba_FinalAward2008_Dissent.pdf

Paraguay in breach of treaty with Switzerland for non-payment of invoices *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29* **Damon Vis-Dunbar**

The government of Paraguay has been ordered to pay damages of US\$ 39 million plus interest following a February 2012 ruling in favour of a Swiss claimant. Paraguay has since moved to annul the award.

The claimant, *SGS Société Générale de Surveillance S.A* (SGS), lodged its claim under the Swiss-Paraguay BIT in 2007 over unpaid invoices. SGS was contracted by Paraguay to inspect imports to ensure that correct customs duties were collected. Many of those invoices went unpaid, as officials within the government questioned the legality of the contract with SGS.

SGS argued that Paraguay's failure to pay the invoices breached the treaty's Article 11 (a so-called umbrella clause), which states that "either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the other investors of the Contracting Party." The claimant also asserted breaches of the treaty's provisions on discriminatory measures and fair and equitable treatment.

Paraguay's defense

Paraguay did not contest the fact that the invoices had not been paid. However, it made three arguments in its defense: 1) that any breach of the contract by Paraguay were made as a "normal market player" rather than as a sovereign power; 2) the forum selection clause in the contract precludes liability under the BIT, because the contract calls for disputes to be submitted to local courts; 3) that SGS breached the contract, relieving Paraguay of its contractual commitments.

Umbrella clause is clear

In its first line of defense, Paraguay argued that the claimant must “establish that Paraguay abused its government power,” in order for it to constitute a breach of the BIT. In Paraguay’s view, the non-payment of invoices “are the kind that can and often do occur in private commercial transactions, and without more, they cannot be characterized as instances of ‘abuse of government power.’”

The tribunal dealt with similar arguments during the jurisdictional phase of the proceedings, when it declined to accept Paraguay’s arguments with respect to “sovereign action.” In re-affirming that decision, the tribunal stated that the plain language reading of the BIT’s umbrella clause – to “guarantee the observance of commitments” – includes the obligation to observe its contractual commitments.

Local courts vs. arbitration

The tribunal also found flaws in the assertion that the dispute must first be settled in local courts (according to the forum selection clause in the contract) before it could be found in breach of its contractual commitment. In the tribunal’s eyes, Paraguay had two distinct commitments: one to fulfill the payment obligations, and another to not frustrate efforts to litigate in local courts.

As the tribunal explained, the “Respondent’s argument, taken on its face, lacks logical coherence. Paraguay argues that the ‘commitment’ that Paraguay made was to pay SGS or to resolve disputes about payment in the local courts. This cannot be correct. It cannot be that Paraguay had the option of *either* paying its invoices *or* submitting the dispute to local courts.”

The tribunal also stated that forum selection clause in the contract does not negate its commitment to international arbitration under the BIT. “The BIT arbitration mechanism formed part of the applicable legal framework and became, in effect, an irrevocable part of the bargain,” wrote the tribunal.

Finally, the tribunal found that Paraguay’s arguments that SGS had breached the contract did not meet the burden of proof.

Having determined that Paraguay breached Article 11, it did not deem it necessary to consider the claims based on discriminatory measures and fair and equitable treatment.

The tribunal consisted of Stanimir A. Alexandrov (president), Donald Francis Donovan (claimant’s appointee), and Pablo Garcia Mexia (respondent’s appointee).

The award is available here: <http://italaw.com/documents/AWARD.pdf> in English; and here: <http://italaw.com/documents/LAUDO.pdf> in Spanish

Prominent arbitrator opines on denial of justice in Chevron vs. Ecuador *Chevron & TexPet v. Ecuador (PCA Case No. 2009-23)* **Damon Vis-Dunbar**

A well-known investment lawyer has given his opinion on Chevron’s claim that Ecuadorian courts committed a denial of justice when it ordered the US oil company to pay billions of dollars in punitive damages.

Jan Paulsson, one of the most prolific investment arbitrators, was asked by Chevron to give his expert opinion to the tribunal hearing the dispute between Chevron and Ecuador under the US-Ecuador BIT. The case is part of a long-standing set of legal battles that involves Chevron, Ecuador, and residents of the Amazon over environmental damage in Lago Agrio allegedly caused by Texaco Petroleum (TexPet), which Chevron acquired in 2001.

Chevron is seeking a ruling from the tribunal that would rid it of a multi-billion dollar judgment by Ecuadorian courts rendered in favor of Ecuadorian citizens. The oil company asserts that Ecuador’s judiciary was pressured by Ecuador’s executive office, leading to numerous procedural defects.

Denial of justice?

Chevron claims that Ecuador has committed a denial of justice under customary international law, and breached Article II(7) of the US-Ecuador BIT, which states that “Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”

Chevron’s argument is novel in that claims over “asserting rights” normally come from investors that have pursued claims in domestic courts. Here, Chevron argues that it has not been able to assert its rights as a defendant. According to Paulsson, however, that is not a problem: “An investor must equally be able to ‘enforce rights’ in defence of a claim brought against it in a domestic court.”

Exhausting local remedies – futile

Paulsson’s concludes the conduct of Ecuador’s courts alleged by Chevron, if assumed true, would establish a claim of denial of justice. But he notes that a denial of justice claim also requires the claimant “exhaust local remedies” – that is, test the legal system as a whole.

In this case, Chevron has further avenues to defend itself in the Ecuadorian legal system – and, indeed, continues to pursue them. At the same time, however, the judgment against Chevron is enforceable, allowing the plaintiffs in the Lago Agrio proceeding to seek enforcement in Ecuador or abroad.

Leaving aside the question of enforcement, Paulsson argues that a claimant does not need to exhaust local remedies “where they offer no reasonable possibility of effective redress to the foreign litigant.”

“The broader form of futility arises where an international tribunal is satisfied that the local courts are notoriously lacking in independence, such that, even though theoretically available remedies might theoretically satisfy the claim, the lack of independence of the judiciary in the relevant domestic litigation renders the pursuit of those remedies futile ...,” explains Paulsson.

Notably, Paulsson indicates that, assuming Chevron’s account of its treatment before Ecuadorian courts to be true, it would be futile to expect continued efforts to deliver justice. “The executive has taken an active interest in these proceedings in an institutional context in which there is no meaningful chance of the judiciary assessing the matter independently of the executive’s expressed wishes,” writes Paulsson.

What remedy?

That conclusion leads Paulsson to discuss how the tribunal may remedy Chevron's claim.

One response is a declaration stating that Ecuador's judgment is unlawful under international law. "A declaration is the most obvious mechanism to record this nullity and to communicate it to any court, anywhere, hearing an application for recognition and enforcement of the Lago Agrio judgement," writes Paulsson.

Paulsson states that the tribunal may also order Ecuador to annul the punitive damages ordered by the court. He acknowledges the separation of powers between the judiciary, executive and legislative branches of government may pose a challenge in this respect, but argues that the state as a whole would remain obligated to abide by the tribunal's ruling.

He acknowledges that international tribunals have been reluctant to order states to repeal regulatory frameworks when they are found in breach of international law – preferring to order compensation instead. But Paulsson argues that "concern is inapplicable where what is unlawful is not a generally-applicable regulatory framework, but a single defective judgment ..."

The Expert Opinion of Jan Paulsson in *Chevron & TexPet v. Ecuador*, PCA Case No. 2009-23 is available here: <http://italaw.com/documents/JPaulssonOpinion.PDF>

Committee upholds stay of enforcement in Libananco's dispute with Turkey *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8
Damon Vis-Dunbar

Libananco Holdings has been given a reprieve from paying a \$15 million dollar award in favour of Turkey, while an ad-hoc ICSID committee considers its application to annul the award.

Libananco, a company registered in Cypriot, had earlier lost its US\$10 billion claim against Turkey for alleged breaches of the Energy Charter Treaty. Moreover, the tribunal ordered Libananco to pay US\$ 602,500 in reimbursement of the Turkey's advance on the arbitration costs, as well as US\$ 15,000,000 for legal fees and out of pocket expenses.

In December 2011 Libananco filed a request to annul the award, which also contained to request for a stay of enforcement.

Exchange of allegations

In its request, Libananco accuses Turkey of spying on its legal counsel and intercepting privileged information, thus tainting the arbitration. Libananco also argues that it would be premature to decline the stay of enforcement, before the committee had a chance to hear the facts behind its request for annulment. Libananco stresses that the award will continue to accrue interest, and so Turkey will be no worse off if the award is not annulled.

For its part, Turkey complains that Libananco is a "shell", behind which lay the Uzans, a wealthy Turkish family. "The Uzans are fugitives from justice that have accumulated enormous wealth by illegal means, in

particular by committing massive fraud in the telecoms ... and banking sector ..." said Turkey. Turkey accuses the Uzans of using litigation as a form of harassment.

Turkey also points out that the award does not order payment of compound interest, thus countering Libananco's assertion that a delay in payment would do no harm.

Tribunal balances interests

In its 7 May 2012 decision, the committee acknowledged that each party faced a potential burden depending on which way it decides. Libananco, for example, feared it would not recoup the award, should it be annulled. Turkey, meanwhile, said the backers of Libananco could not be trusted to respect the award.

However, on balance, the committee found that Libananco's interest in staying enforcement outweighed those of Turkey's. It also indicated the annulment proceedings were scheduled to proceed swiftly, and so a stay of enforcement would not last long.

In coming to its conclusion, the committee declined Turkey's argument against the stay due to Libananco's "vexatious character," finding no basis that the request for annulment is "abusive."

It also noted Turkey's wish to bring "closure" to the dispute, but explained that "enforcement of the Award would not bring *this* proceeding to closure."

Provisional measures denied

Citing Turkey's alleged espionage, Libananco also requested provisional measures "to preserve the [Applicants] rights, including the right to due process of law, the right to a fair hearing, the right to confidentiality and legal privilege and, ultimately, the right to prepare and present its case without interference from the Respondent's illicit espionage."

Turkey countered that the ICSID Convention does not grant the committee the power to grant provisional measures, apart from ordering a stay of enforcement.

In a separate decision, the committee doubted that it held competence to grant provisional measures, but side-stepped the issue by first considering the necessity of Libananco's request. The committee determined that it did not see a basis for the provisional measures, given that it lacked evidence that Turkey has, or will, spy on the applicants.

The members of the committee are Hans Danelius, Andres Rigo Sureda (President), and Eduardo Silva Romero.

The Decision on Applicant's Request for a Continued Stay of Enforcement of the Award is available here: <http://italaw.com/documents/LibanancoAnnulmentStay.pdf>

The Decision on Applicant's Request for Provisional Measures is available here: <http://italaw.com/documents/LibanancoAnnulmentProvisionalMeasures.pdf>

For a summary of the earlier jurisdictional award, see "Turkey defeats US\$ 10.1 billion claim, as tribunal finds no 'investment' under the Energy Charter Treaty", available here: <http://www.iisd.org/itn/2012/01/12/awards-and-decisions-6/>

resources and events

Resources

UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD)

UNCTAD, June 2012

The United Nations Conference on Trade and Development (UNCTAD) has established a set of principles for investment policymaking, guidelines for national investment policies, and guidance (in the form of options) for the design and negotiation of IIAs—titled the “Investment Policy Framework for Sustainable Development” (IPFSD). The report is divided into chapters on the “New Generation” of investment policies; principles for investment policymaking; national investment policy guidelines; and policy options related to the elements of IIAs. According to UNCTAD, the IPFSD has been designed as a “living document.” An online version establishes an interactive open-source platform that will enable stakeholders to exchange views and experiences in order to stimulate critical assessment of the guidelines and continuously improve them. UNCTAD says the IPFSD “may serve as a reference for policymakers in formulating national investment policies and in negotiating investment agreements or revising existing ones.” It is also intended to support capacity building and facilitate convergence for international cooperation on investment issues. Available for download here: http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf For access to the online, interactive elements of the IPFSD, go to: <http://ipfsd.unctad.org/Default.aspx?ReturnUrl=%2f>

Background to the New Dispute Vattenfall v. Germany (II)

International Institute for Sustainable Development, June 2012

This policy brief examines a recent dispute between the Swedish energy company Vattenfall and the government of Germany. In May 2012 Vattenfall filed a request for arbitration against Germany at ICSID, in reaction to Germany's decision to phase out nuclear energy. Vattenfall relies on its rights under the Energy Charter Treaty, an international trade and investment agreement in the energy sector that grants foreign investors the rights and protections similar to those found in bilateral investment treaties, including access to investor-state arbitration. Vattenfall is expected to claim well over €700 million in compensation in response to the closure of the nuclear power plants Krümmel and Brunsbüttel. This policy brief provides background on the conflict, including the first 2009–2011 Vattenfall v. Germany arbitration, and the central elements of international investment law that Vattenfall is likely to call into play. It also offers a comparison with the domestic legal situation by looking into the pending review of the constitutionality of the nuclear phase-out. Finally, the authors recommend elements in the relationship between international investment protection law (including arbitration) and public policy-making. Available for download here: http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf

Confronting the Tobacco Epidemic in a New Era of Trade and Investment Liberalization

World Health Organization, June 2012

This paper is intended to expand upon and update the 2001 paper entitled “Confronting the tobacco epidemic in an era of trade liberalization,” which suggested that trade liberalization and foreign direct investment in the tobacco sector may stimulate demand for tobacco products, and also identified a risk that rules in trade agreements governing nontariff barriers to trade (such as regulatory measures) could limit the autonomy of States to implement effective tobacco control measures. This paper provides an update of the links between trade and investment liberalization and tobacco control and outlines two ways in which the tobacco industry has sought to exploit trade and investment agreements. Furthermore, this

paper examines the challenges that trade and investment agreements continue to pose for tobacco control at the domestic level and outlines challenges faced by governments in coordinating their public health policies with their trade and investment policies. Available for download here: http://www.who.int/tobacco/publications/industry/trade/confronting_tob_epidemic/en/index.html

Yearbook on International Investment Law & Policy 2010-2011

Oxford University Press, December 2011

With contributions by leading experts in the field, this book monitors current developments in international investment law and policy. Part One focuses on recent trends and issues in foreign direct investment. Part Two addresses developments in European Union policy toward bilateral investment treaties, and annexes the key official European Union documents. Available for purchase here: <http://www.oup.com/us/catalog/general/subject/Law/InvestmentandFinanceLaw/?view=usa&ci=9780199812356>

Events 2012

July 18 - 19

SECOND WORKSHOP ON CONTRACT NEGOTIATION SUPPORT FOR DEVELOPING HOST COUNTRIES,

Colombia University, New York, <http://www.vcc.columbia.edu/content/second-workshop-contract-negotiation-support-developing-host-countries>

September 3 - 7

OIL, GAS AND MINERALS: INTERNATIONAL ARBITRATION AND ADVOCACY SKILLS,

Centre for Energy, Petroleum and Mineral Law and Policy, London, London, https://www.buyat.dundee.ac.uk/browse/extra_info.asp?compid=2&modid=2&prodid=146&deptid=3&catid=5

September 13 - 14

SWEDISH ARBITRATION DAYS, The Swedish Arbitration Association, Stockholm, <http://swedisharbitration.se/the-swedish-arbitration-days/>

September 24 - 28

NATURAL RESOURCE MEDIATION, Petroleum and Mineral Law and Policy, London, http://www.buyat.dundee.ac.uk/browse/extra_info.asp?compid=2&modid=2&prodid=155&deptid=3&catid=5

October 10 - 12

MULTI-YEAR EXPERT MEETING ON INTERNATIONAL COOPERATION: SOUTH-SOUTH COOPERATION AND REGIONAL INTEGRATION (FOURTH SESSION),

UNCTAD, Geneva, <http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=51>

20 October – 7 November

REGIONAL COURSE ON KEY ISSUES ON THE INTERNATIONAL ECONOMIC AGENDA FOR WESTERN ASIA, UNCTAD, Sultanate of Oman, <http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=77>

November 2 - 4

NINTH ANNUAL SEMINAR ON INTERNATIONAL COMMERCIAL ARBITRATION: HOW TO HANDLE A BIT ARBITRATION, American University, Washington College of Law, Washington, <http://www.wcl.american.edu/arbitration/seminar.cfm>

November 14 - 15

SEVENTH COLUMBIA INTERNATIONAL INVESTMENT, Columbia University, New York, <http://www.vcc.columbia.edu/content/seventh-columbia-international-investment-conference>



Investment Treaty News Quarterly is published by the International Institute for Sustainable Development

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