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A quarterly journal on investment law and policy from a sustainable development perspective

The European Union's future international investment policy

What to expect in the wake of the Lisbon Treaty

Arbitrator appointments in investment arbitration: Why expressed views on points of law should be challengeable, by Tony Cole

The transparency requirement in the new UNCITRAL arbitration rules: A premonitory view, by Ignacio Torterola

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Analysis of CEMEX v. Venezuela, Sempra v. Argentina, Enron v. Argentina, Saba Fakes v. Turkey

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interview

Towards a comprehensive European international investment policy: An interview with Tomas Baert, European Commission, Directorate General for Trade, Services and Investment

With the EU's Lisbon Treaty granting the European Union competence over Foreign Direct Investment, the European Commission released two documents in July 2010 that help chart the way forward: a draft regulation on how to deal with existing Bilateral Investment Treaties (BITs) of the EU Member States over the next five years, and a Communication that kick-starts the discussion on the EU's future international investment policy. *ITN Quarterly* spoke to Tomas Baert at the Commission about both documents and what lies ahead.

Now that the European Commission submitted its draft regulation on establishing transitional arrangements for BITs between Member States and third countries, what happens next?
Now that we have an official proposal from the European Commission to the two legislators—the European Parliament and the European Council—we have entered into what is known as the Ordinary Legislative Procedure, formerly known as Codecision. The Council and the Parliament will consider the proposal and discuss their conditions for acceptance. At the same time, we continue to work on the broader, future aspects of the EU's international investment policy, which are found in the Communication. But on the regulation itself, we need to wait for it to enter into force and be adopted before we can start dealing with the issues it contains.

The regulation assumes that the European Union now holds exclusive competence over foreign investment, which is interpreted to include the standards often found in Bilateral Investment Treaties. However, the Lisbon Treaty does not define 'Foreign Direct Investment', and a number of commentators have expressed uncertainty as to whether the EU's competence encompasses all of the elements found in BITs. Do you expect this to be a point of debate with Member States?
I do think the question will be raised; in fact, it is already being raised. However, I don't expect it will be a major issue in the discussion on the regulation. Of course, for the broader audience, it might be interesting to have a discussion on what Foreign Direct Investment exactly means, which as you point out is not defined in the Lisbon Treaty. But at the end of the day, that is not extremely important from a practical policy perspective. We will be negotiating on investment, and if the European Court concludes that our investment agreements contain an element which relates to mixed competence, so be it—we will obviously have to follow the appropriate procedures and ratification measures.

In fact, we believe there is a very good chance that our future investment agreements will be mixed agreements, not so much because of investment, but more for other reasons. We suggest in the Communication that we will deal with investment in particular (although not exclusively) in the context of free trade agreements (FTAs), and in our FTAs there are usually elements which are of mixed competence. On these agreements we work on what is known in the legal world as the "Pastis Principle"—a drop of Pastis in water turns the whole glass cloudy. In other words, even if you have the slightest element of mixed competence in an agreement, the entire agreement will become mixed. There are currently debates on the existence of EU competence regarding criminal procedures in relation to IPR violations and cultural cooperation. In that case, we will deal with it as we currently do in our FTAs.

Academically, of course, you can write books on this subject, and we will certainly follow that discussion. We will also listen very carefully to what the European Court of Justice (ECJ) has to say. But we don't expect it to play a major role in the political debate on the regulation.

The proposed regulation would set the conditions in which Member States could enter into new agreements, one being that they may have to include an MFN clause in order to ensure that all Member States benefit from the treaty. Is the intention to have Member States negotiate on behalf of the European Union?
The assumption there is wrong. We have proposed a clause in the regulation, Article 9.2, which says we may ask our Member States to introduce certain standard clauses in future investment agreements. In the explanatory memorandum which accompanies the proposed regulation, we include some examples, such as termination clauses, transfer clauses (which is an issue which has been identified by the ECJ) and the possibility of introducing MFN clauses. Yet, that does not mean that we will automatically insist on having MFN clauses in every agreement.

That said, one of the key concerns for the European Commission is discrimination among EU investors: the fact that some investors now have better treatment than others, and some have no treatment under BITs for the lack of BITs. This is the issue we want to deal with. The MFN provision is an interesting mechanism to deal with the problem, essentially by asking our Member States to request from their partner countries to extend the benefits of a BIT to the other EU Member States' investors.

However, this does not mean we envisage Member States negotiating on behalf of the European Union, or that they would be allowed to open the door to the internal market. The MFN provision could be a way to deal with the issue of discrimination among EU investors, and to ensure that there is a level playing field. Our preference is to deal with this issue through EU-level agreements. But in the intermediary period, we will consider other alternatives, and one of them may be standard clauses that we ask our Member States to use.

Does the Commission foresee eventually developing an EU model BIT?

No. The Communication is fairly explicit on this point, for several reasons. You can have a very interesting theoretical discussion on the perfect model BIT; however, in practice it would mean that we spend a ye ar or more internally, and with the other institutions, discussing the perfect model. But in the end, the model may not prove very effective in our negotiations. That is one practical reason for why a model BIT is not necessarily helpful in defending our interests. The second reason is that there is a lot of history already on the table. When we negotiate with a third country, in some cases our Member States will already have up to 26 BITs with that country. In deciding how to replace those BITs, we need to consider their contents, and determine how we can most efficiently offer investment protection to all EU investors without differentiating on the basis on their nationality. That brings me to the third and final reason for not pursuing a model BIT. A model would entail a one-size-fits-all approach, and we don't believe it is right to have one model for negotiations with developing, emerging and developed economies.

Having said all this, we will have standard policies and clauses. It's not that we will envisage a different National Treatment provision in each agreement, for example. We will have certain model clauses, so that we don't reinvent the wheel with each new negotiation.

How active have EU investors been in lobbying to ensure that the status quo is maintained with respect to BITs?

Investors have been active and they have been making their voices heard. Of course, there is a diversity of views and positions. There are investors that believe that they are today well protected from existing BITs. Those investors have indicated that they would like to maintain the status quo at a minimum. There are other investors from Member States that do not have the same level of treatment, or have no BITs at all, and those investors are less concerned with maintaining the status quo than they are with the future European investment policy. But generally what we do hear from the investment community is that investment agreements—whether a stand-alone agreement or part of an FTA—is something that they value.

Another group with an interest in the EU's international investment policy is the law firms that are in the business of investor-state arbitration. Have they also made their voices heard?

Absolutely. There have been a lot of conferences and seminars on this issue, many of which have been organized by law firms. They are very interested in seeing what happens—both with respect to maintaining Member States' agreements and future EU-level agreements—and in particular its impact on the investment-arbitration business.

The Commission's Communication notes that transparency will be an important element of investor-state dispute settlement procedures. If this becomes EU policy, should it be applied to current investment disputes involving Member States?

The first point I want to make is that the Communication raises a lot of questions, yet it does not necessarily have all the answers. On some issues, such as transparency, we try to get the debate going and suggest a general direction, without necessarily reflecting the specific and practical questions on how we introduce some of these issues in a common investment policy. I say this because there are a lot of questions which apply to the issue of transparency. Also, very practically, we may not be able to change all existing practices in agreements to which we are not a party today. But the idea is that we want one common European policy. The task now is to have a debate with Member States in the European Council on that policy, so that when Member States are authorised to negotiate themselves, they work in a common direction. Of course, we can't have a common policy that is then contradicted by the practices of Member States.

The Communication also notes that a common investment policy needs to be guided by EU objectives such as human rights and sustainable development. Has the Commission considered including obligations for investors in areas of human rights and corporate social responsibility in EU investment treaties?

This has certainly been considered. But then again, as I just mentioned, there are a lot of questions to the debate. We raise them, and we do try to give a broad indication of our policy stance. But we don't necessarily give all the answers. The answers should come when we start talking very specifically about the negotiations we are going to pursue, for which we then need negotiating directives. In that context, we need to see how we can deal with certain issues, including the ones you have just mentioned.

Now, on human rights and other principles, these concern other aspects of the EU's external action; they are not limited to investment policy. I don't see any huge hurdles in this area, but we do need to reflect further on how to make concrete proposals in our investment negotiations. On other issues like CSR, we need to take into account developments at the European Union and global level. We have already started considering these issues, such as in the EU-CARIFORUM negotiations, which covers investment. And we will certainly do so in future. At this stage, I don't have a specific answer on how it will be done. But it will certainly be an important question in the public and political debate on the EU's investment policies.

feature 1

Reclaiming the public interest in Europe's international investment policy: Will the future EU BITs be any better than the 1200 existing BITs of EU member states?

Marc Maes

The Lisbon Treaty has shifted the competence related to Foreign Direct Investments (FDI) from the European Union Member States to the Union and has added it to the Union's exclusive common commercial policy. This transfer of competence not only requires the development of a common EU investment policy, but also legislative steps to clarify the status of the 1200 existing Bilateral Investment Treaties (BITs) of the EU Member States and their ongoing BIT negotiations. This offers a unique opportunity for an assessment of the existing BITs and for an open and broad discussion on the future European international investment policy.

Indeed, the opportunity is quite unique given that international investment policy has traditionally been extremely exclusive and untransparent. Member states very rarely communicate or consult about their BIT programmes or negotiations, except with their investor and business community, which are often invited to participate in closed administrative working groups or to propose amendments to negotiating texts. The result of this secretive and exclusive decision-making process are imbalances in the investment treaties, which seek the maximum protection of transnational investors, offering extraordinary privileges (like the right to by-pass domestic courts to challenge government policies before secretive international arbitration), without corresponding obligations for investors, and little to no regard for other private or public interests[1].

On 7 July 2010 the European Commission released two documents: a draft Regulation[2] and a Communication[3]. The draft Regulation, which proposes a transitional arrangement for existing BITs, has to be approved by both the Council and the Parliament, while the Communication on the EU's future investment policy invites the Council, the Parliament, the Economic and Social Committee and the Committee of the Regions to express their views.

The Communication is essentially a discussion document that does not bind the Commission. More important will be the first draft mandates for EU investment negotiations with Canada, India, Singapore, China and MERCOSUR, which the Commission will propose in the autumn. Formally only the Council, i.e. the Member States, needs to approve these mandates, and there is no indication that they will suddenly change their practice and organise broad consultations to determine their positions. The Lisbon Treaty has given the EU Parliament the competence to approve trade and investment agreements, but not the negotiating mandates. However the Parliament has warned the Council and the Commission that it better be consulted about the mandates if they want to ensure parliamentary approval at the end of negotiations. Unfortunately (draft) negotiating mandates will remain "restricted" documents not open for public examination.

Even before its release on 7 July, the draft regulation has been the subject of intense lobbying and wrangling by the corporate lobby groups and law firms, and by the Member States in tune with the corporate positions. As a result, an important opportunity has been missed to assess the existing BITs with a view to obtain a greater balance between public and private interests.

The Commission dropped its proposal to phase out Member States' BITs in seven years. Instead, the draft proposes to automatically and without review authorise all Member States' BITs that have been concluded on the day that the regulation comes into force. However, the Commission has maintained another option to deal with the BITs by proposing that it can withdraw authorisation when existing agreements do not comply with EU law, overlap with the future EU investment agreements or "constitute an obstacle to the development and implementation of the Union's policies relating to investment". EU member states are fiercely criticising this proposal in the Trade Policy Committee and will no doubt try to get rid of it.

As mentioned, the "Union's policies relating to investment" will depend more on the negotiating mandates than on the Communication. The Communication also does not enter into much detail. Interestingly, and in sharp contrast with the one-sidedness of the 1200 existing EU BITs, it does mention broader policy objectives, in that it explicitly refers to the objectives of the overall European foreign policy (like the promotion of the rule of law, human rights and sustainable development) and also to the OECD Guidelines for multinationals. It also says that there needs to be a balance between different interests with regard to expropriation and endorses more transparency, consistency and predictability with regard to the investor-to-state dispute settlement.

But the Communication does not call into question investor-state arbitration per se, nor does it add any nuance to key features of the member states BITs, such as National Treatment, Most Favoured Nation Treatment, Fair and Equitable Treatment, Full Security and Protection and even Umbrella Clauses. So far there is little indication that these elements will appear in the future EU investment agreements in a more balanced way.

However the case is not yet closed. While Member States will continue to hang on to their outdated and unbalanced BITs and BIT models, the Parliament could take up the defence of the EU's common approach and, more importantly, its consistency and coherence with the Union's overall policies and objectives. After all, if not corrected, the flaws of the current BIT practice could backfire against European environmental and other public interest policies and cost European taxpayers dearly in compensations to foreign investors.

Author

Marc Maes is a Trade Policy Officer of the Belgian NGO-coalition 11.11.11.

Notes

1 For a statement, press releases and a reader on the EU investment policy from an EU civil society perspective, see www.s2nnetwork.org

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

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

feature 2

The EU's international investment policy:

Hardware without the software

Ramon Torrent

The Lisbon Treaty broadens European commercial policy in what marks the latest milestone in a long (and unfinished) journey in which the EC/EU has sought to extend its exclusive competence over the entire area of external economic relations.[1]

Towards this goal, the European Commission has always led the course, albeit with limited success. It failed in the 1992 Maastricht Treaty to explicitly broaden the scope of article 113 on commercial policy. Later, it attempted to achieve a somewhat similar result by referring to the "trade-relatedness" of all economic phenomena and urging the European Court of Justice (ECJ) to recognize that all WTO agreements were covered by the EC's exclusive competence. However, this ended in failure when the ECJ, in its Opinion 1/94, rejected the Commission's thesis and judged that Member States remained competent for many topics embraced by GATS and TRIPS. After another failure in the 1997 Amsterdam Treaty (similar to that in the Maastricht Treaty), the Commission was partially successful in 2001 when it achieved a significant extension of article 133 (former article 113) of the ECT to "trade in services" in the Treaty of Nice. However, it paid a high price for this success, in part because the drafting of article 133 became a mess, impossible to interpret and to apply.

But this is a "Brussels story" about the hardware of the European integration process: that is, the division of competences between the EC/EU and its member states. But what really matters in political and economic terms is the software to be processed by this hardware. And the fact is that at no point in this 20 year journey has a new software been envisaged—i.e., a new "European policy" on external economic relations, or on FDI in particular, different from that already followed by individual member states. And this remains the case with the European Commission's July Communication[2] and Proposal for a Regulation[3]. The Commission offers no hint of a new policy on FDI, besides the commonplace idea that a priority should be given to relations with the more important partners or with those with which the EU is already negotiating. The main objective is the exercise of the new EU competence ("to mark the territory") without touching the existing member states policies and international agreements.

Therefore, as very often happens with "Brussels literature", it seems more illustrative to briefly analyze what the Communication and the Proposal do not say than what they do say. I will concentrate on two significant points that are notably absent from the discussion on the EU's future international investment policy.

First, the Commission does not address the issue of how to have an external EU policy (an "ambitious" one, furthermore) without having internal EU legislation in the area covered by that external policy. Indeed, the EU does not have an EU-wide regime for FDI—a legal regime that

is broad and complex, because the apparently simple notion of "treatment to enterprises", which is essential to the definition of this regime at the international level, has a sort of "double universality" at the domestic level: it covers not only all economic sectors but also all aspects of the legal regime applicable to firms. For example, what kind of policy will the EU have on protection of investments when there is not a single word in EU law (primary or secondary) on this issue? This is a problem that cannot be dismissed with a generic reference to the "progressive building up" of such a regime.

Second, the Commission does not address the blatant contradiction between existing member states' BITs (with their horizontal obligation on National Treatment not accompanied by a list of exceptions, as it is the case in US-led BITs) and the EU's internal pieces of legislation that explicitly reserve to EU firms owned or controlled by EU nationals/capitals a treatment more favourable than that granted to EU firms owned and controlled by non-EU nationals/capitals (two notable examples being the audiovisuals MEDIA programme and the airlines licensing regulation). This fact—that EU member states systematically violate the BITs to which they are a Party—is, in my opinion, one of the more outrageous in international economic relations and in EU law (all the more outrageous because of the complicity of experts in hiding it). Shouldn't the entry into force of the Lisbon Treaty have been the best opportunity to address it?

Author

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Notes

1 Technically speaking, the Treaty of Lisbon, which entered into force on 1 December 2009 amends the two treaties which form the constitutional basis of European Union (EU): the Treaty on European Union and the Treaty establishing the European Community (the Treaty of Rome), which is renamed as the Treaty on the Functioning of the European Union (TFEU). These are the two treaties that govern the Union. The Common Commercial policy can be found under Title II of Part Five (External Action) of the TFEU.

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

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

feature 3

The IBA's Model Mining Development Agreement:

A new paradigm for natural resource projects

IISD

In October 2009, at its annual meeting in Madrid, the Mining Law Committee of the International Bar Association launched a project to develop a Model Mining Development Agreement (MMDA). The MMDA was conceived to provide a different starting point for the negotiation of mining contracts between host governments and mining companies, one based expressly on promoting sustainable social, economic and environmental development through more equitable and transparent mining agreements.

As noted in the first public consultation on the MMDA, held in Toronto in April 2010, the Model recognizes that it is no longer sufficient to negotiate just the hard rock mining license and royalties. The social license to operate must also now be negotiated in tandem with the mining license. The MMDA sets out an agenda for such a negotiation that allows governments, companies and stakeholders to identify what may be needed in the specific circumstances of the project in question.

The MMDA project covers the mine development, production and reclamation phases of a mining project, understood as starting after exploration and feasibility studies show the economic and environmental viability of a mining site. It does not cover the exploration phase, though a further project may be conceived to do so.

The MMDA is a web-based tool that is able to address different circumstances rather than seeking to provide a one-size fits all model. It provides sample clauses taken from some 50 leading examples of existing mine development agreements for key clauses instead of one single formula. But the design goes beyond seeking this flexibility. Indeed, much of the value is anticipated to be found in the table of contents which contains links to the sample clauses, and which serves as a menu for parties to a negotiation and potentially impacted communities to consider during the negotiation of a mining development agreement. While not all model clauses will be relevant for all situations, collectively they and the sample clauses form a potential checklist for a negotiating agenda and a drafting tool from a sustainable development viewpoint.

The target audience for the MMDA is primarily developing countries and mining companies, but also includes all stakeholders in the mine development process. Hence, it is foreseen as being of value to government negotiators, industry, civil society organizations, Indigenous Peoples communities, parliamentarians and others who may engage in the process. The IBA Mining Law Committee recognizes that proper dissemination and capacity building will be needed, and anticipates developing further relationships towards this end.

Howard Mann, IISD's Senior International Law Advisor is leading IISD's participation in this project as a member of the MMDA's international administrative committee. He describes the MMDA as a potential game changer, setting a new paradigm for mining and other natural resource projects that brings sustainable development into the forefront of the negotiations. "No longer will the social, economic and environmental aspects be add-ons if the Model takes hold. But rather they will be integral parts of the negotiating structure and process. From economic linkages to the local community to human rights protection, the Model covers a wide range of social, economic and environmental issues."

Mann has been most impressed with the commitment of the private sector lawyers to the project: Peter Leon, the Chair of the Mining Law Committee, has stated:

"We envision producing, by the time of the IBA's annual conference in Vancouver in October 2010, a non-prescriptive, web-based, widely available resource that can lead to informed, transparent, and equitable negotiations and contractual outcomes. Our vision is that host countries and investors share an interest in the stability of the investment relationship, and that this stability is best achieved when host countries and regions secure sustainable and meaningful social and economic development."

The MMDA is now undergoing review by an international reference group and by representatives who attended civil society consultations conducted in conjunction with IISD during the project. The comments will be taken into account in revising the draft for presentation to the IBA Mining Committee in October at the Vancouver Annual meeting. MMDA will be open for on-line public consultations after the Vancouver meeting, following which a further round of consultations will be held, leading to a final document in December 2010.

feature 4

The transparency requirement in the new UNCITRAL arbitration rules:

A premonitory view

Ignacio Torterola

In October, State delegations are expected to discuss the issue of transparency in the UNCITRAL Rules of Arbitration. Ignacio Torterola, ICSID Liaison at the Argentine Embassy in Washington, DC, and Argentine Delegate to the UNCITRAL Working Group II, explains why greater openness would benefit the investment arbitration system.

Some preliminary considerations

Working Group II (WGII) of the United Nations Commission on International Trade Law (UNCITRAL), tasked with revising the Commission's Arbitration Rules, met at United Nations headquarters in February 2008. The working group examined the possibility of introducing rules on transparency and access to information in cases in which a State is a party to an UNCITRAL Rules arbitration, further to the initiative spearheaded by non-governmental organizations (NGOs) that included the Centre for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD). Despite a growing movement within the WGII to obtain the necessary consensus, the call for a discussion on the issue of transparency was ultimately rebuffed. However, the working group agreed to re-visit the question separately, once it finished revising the 'generic' Arbitration Rules. The proposal submitted at that time received the leading support from two delegations in particular: Argentina and Canada.[1] The *Investment Treaty News Quarterly* has asked me to comment on the reasons for the Argentine delegation's support of that initiative.[2] What follows are my personal views on the matter.[3]

The passage of time between the failed attempt of February 2008 to promote transparency and the upcoming Working Group meeting in October 2010 has had a positive bearing on the inclusion of transparency requirements in the UNCITRAL Arbitration Rules. During the intervening period, the arbitration community has developed an increased appreciation of the type of interests involved in State arbitration proceedings. In addition, there is now a greater understanding that access to decisions contributes to developing a body of case law that brings more certainty to the (investment) arbitration system. For these and many other reasons set out below, I venture to conclude that the WGII will approve transparency and public participation requirements for the new UNCITRAL Arbitration Rules at its October 2010 meeting. However, the scope of these requirements remains to be determined.

Transparency and Public Participation in Investment Arbitration

The Working Group II Mandate

At the first session of WGII deliberations for revising the 1976 UNCITRAL Arbitration Rules, the working group determined that a generic approach would be used, which refrained from reflecting the concerns of specific types of arbitration. This spirit, which was approved by the delegations, explains many of the conclusions subsequently adopted by the WGII and included in the Arbitration Rules.

Nevertheless, it was impossible to overlook certain defining characteristics of different types of arbitration and these progressively gained ground in the delegates' debate. One of the prominent topics in this debate was the presence of States as respondents in investment disputes.

A few of the now approved requirements that are a part of the new UNCITRAL Arbitration Rules reflect an obvious concern in this regard. For instance, Article I of the Rules states:

> … 2. *The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not*

apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date. …

Whereas the wording of this requirement suggests complete autonomy from any type of arbitration system, its main purpose—further to a proposal by the Argentine Delegation and seconded by the Chilean Delegation, followed by the other delegations—was to exempt investment arbitration from the application of the new rules until they were specifically incorporated into a Bilateral Investment Treaty (BIT) negotiated after 15 August 2010, especially since it was not yet clear at the time of its adoption (February 2008) what direction the working group would take in its deliberations on certain outstanding issues. Additionally, this requirement removed pressure from the delegations of having to consider such potentially distinct realms as commercial arbitration and investment arbitration.

However, given that Article 1(2) contains a specific requirement that applies to investment arbitration, there could be a complementary rule that sets out certain requirements on transparency and public participation that could also be applied specifically to investment arbitration. Such a rule would not affect any of the various types of commercial arbitration and would give investment arbitration a distinguishing characteristic which, in my view, is necessary.

In short, the deliberation (and approval) of transparency and public participation rules for the (new) UNCITRAL Arbitration Rules is in line with the WGII mandate.

Duty of transparency of, and public participation in, government proceedings

Investment arbitrations involve issues that potentially affect the public interest. Most modern democratic States have obligations regarding access to information by their citizens. Under such legislation, as in the case of the Argentine Republic (outlined below), the publication of certain government proceedings is a legal obligation, not the head of State's decision. The regulatory framework clearly establishes the constitutional principle of public participation in government proceedings and the right of access to public information pursuant to Article 1, Articles 33, 41, 42 et. seq. of Chapter Two of the Argentine National Constitution—which establishes new rights and guarantees—and Article 75(22), which is a listing of International Human Rights Treaties to which constitutional status has been granted.

I suspect that every delegate from each of the WGII member countries could add similar regulatory requirements regarding transparency of, and public participation in, government proceedings from each of their countries.

Article 34(5) of the 2010 UNCITRAL Arbitration Rules

The new Article 34(5) of the UNCITRAL Arbitration Rules states:
34(5) An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

The previous Rule 32(5) established that an award could only be made public with the consent of the parties. The new Rule 34(5), following the model adopted by the London Court of International Arbitration (LCIA), introduces the possibility of an award being made public, along with the agreement of the parties, because it reflects a legal duty that affects most modern States.

Specifically, the new requirement set out in Article 34(5) reflects the legal duty that some parties to the arbitration may have pursuant to legal obligations unrelated to the arbitration. For example, and mentioned above, States may have legal obligations of access to information and public participation in government proceedings.

Lastly, national court proceedings are generally open to the public and, as a result of legal action filed in support of the arbitration, in particular to enforce an award, an arbitral decision may end up being submitted to the national justice system, thereby becoming information available in the public domain.

The public nature of investor-State arbitration

Background

The UNCITRAL Arbitration Rules have been successfully applied around the world since they were adopted in 1976. The rules have been used in countless ad hoc arbitrations and incorporated by arbitral institutions as their rules of procedure.[4] The Rules have also been effectively applied in the public realm, having been adopted as arbitration rules by the Iran-US Claims Tribunals, which has much to do with the reputation they currently enjoy.

The public nature of the Iran-US Claims Tribunal decisions created a body of case law that provides a benchmark for elucidating the application of the 1976 UNCITRAL Rules and which has been used to study and establish a system for the application of the Rules. To that end, *Caron & Caplan & Pellonpää*, in one of the most cited works on the Rules, suggest that the study of the application of the UNCITRAL Rules is due, to a great extent, to the public nature of the Iran-US Claims Tribunal proceedings.[5]

Moreover, historically, the practice of tribunals hearing matters related to States acting with *ius imperii* (sovereignty) powers has always been public. This concept was applied to 19th century arbitration tribunals and to the prolific work of the International Court of Justice and its predecessor, the Permanent Court of International Justice.

Similarly, most of the bilateral commissions that settled monetary disputes in the past against sovereign States in the realm of diplomatic protection, such as the Mexico-United States Claim Commission, and subsequently under other specially designed mechanisms, such as the UN Compensation Commission[6] and the Iran-US Claims Tribunals,[7] published their awards, some well before the current concern for transparency of government proceedings.

Investment tribunal practice

The ICSID Convention prevents an award from being published without the consent of the parties (Article 48(5) of the ICSID Convention). However, starting in around 2000, and in connection with the advent of widespread Internet use, arbitral decisions began to become available publicly on websites, even without the consent of the parties.

This practice not only affects ICSID decisions, but also proceedings under other rules, especially UNCITRAL cases. This is why a commentator can state that certain information, such as "the existence of the arbitration, the parties, the legal representatives, and the composition of the arbitration Tribunal" finds its way in the public domain.[8]

Statement of the NAFTA Free Trade Commission. Metalclad, Loewen, Methanex and UPS

Early on in the life of investment arbitrations, tribunals had to focus their attention on dealing with access to information and third-party participation in the arbitration process. This issue came up particularly in NAFTA Chapter 11 arbitrations. In *Metalclad v. Mexico*, the Tribunal determined that neither NAFTA nor the ICSID Additional Facility Rules contained any express restriction on the freedom of the parties to make public documents related to arbitration proceedings.[9] In *Loewen v. USA*, the Tribunal held that imposing a general confidentiality obligation in arbitration involving State parties was not desirable in that it would restrict public access to information related to issues of government and the public interest.[10]

Further to a review of these proceedings, in 2001, the NAFTA Free Trade Commission issued an interpretation note that provides:

> *1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.*
>
> *2. In the application of the foregoing:*
> *(a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules…* [11]

In *Methanex v. USA*[12] the Tribunal had to deal with issues of transparency that differed from those in Metalclad and Loewen; specifically on the participation of amicus curiae briefs in arbitration proceedings. Generally speaking, the Tribunal's findings in Methanex, relying on Article 15 of the UNCITRAL Arbitration Rules, are similar to those subsequently adopted by the Tribunal in another NAFTA Chapter 11 case: *UPS v. Canada*.[13] While these two decisions are addressed together in this article for purposes of expediency, each has their own particular characteristics. Nevertheless, despite these differences, in both cases the Tribunals determined that they had the authority to accept and consider amicus curiae briefs under the broad powers given to them by Rule 15 of the UNCITRAL Arbitration Rules.

Aguas del Tunari v. Bolivia and AASA and APSF (Suez) v. Argentine Republic

Prior to their revision in 2006, the arbitration rules of the International Centre for the Settlement of Investment Disputes (ICSID)—which were drafted specifically to regulate the specific issue of investment arbitration, thus allowing some form of participation and transparency—determined that hearings were to be held in camera and that only the parties, their agents, counsel and advocates, witnesses and experts could attend. Pursuant to this requirement, the Tribunal in *Aguas del Tunari v. Bolivia* denied the petition by an interest group to take part in the arbitration proceedings, determining that it did not have the power to authorize this participation without the consent of both parties.

The Tribunal in *Aguas Argentinas S.A., Suez (AASA), Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. and AWG v. The Argentine Republic*[14] allowed amicus curiae participation, although it denied the petition to have access to and attend the arbitration hearings.[15] The Tribunal outlined the amici participation in detail and determined—as the Tribunals had done in Methanex and UPS—that the amici's presentations had to have the potential of assisting the Tribunal in determining a factual or legal matter in the dispute. Moreover, the Tribunal sought to exercise its powers in such a way as to minimize any additional burden on the parties and the defence proceedings.

The similarly composed Tribunal, in *Aguas Provinciales de Santa Fe, S.A, Suez, Socieded General de Aguas de Barcelona S.A. and Interaguas Servicios del Agua v. Argentine Republic*,[16] denied the petitioners' participation as amici because they did not qualify as amicus curiae pursuant to the conditions set out in the aforementioned case.

The 2006 revision of the ICSID Arbitration Rules and BiWater Gauff

In 2006, the ICSID Secretariat completed an overarching amendment of the ICSID Arbitration Rules.[17] The Secretariat, along with the working group formed to carry out the amendment and other seasoned practitioners consulted in this undertaking, determined that the topics of "transparency and third-party participation" were among the issues requiring revision in the Arbitration Rules to address new needs arising in a growing number of cases, as well as those involving arbitration brought pursuant to a treaty.[18]

Accordingly, three new rules, aimed at reflecting the state of transparency and public participation in investment arbitration practice, were approved: Rule 32 on open hearings, Rule 37(2) on amicus curiae status, and Rule 48 on publication of arbitration awards. In respect of hearings, Rule 32(2) provides:

"(2) Unless either party objects, the Tribunal, after consultations with the Secretary-General, may allow other

persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearing, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."

With regard to amicus curiae in arbitration proceedings, Rule 37(2) provides:

"(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
(b) the non-disputing party submission would address a matter within the scope of the dispute;
(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

Lastly, Rule 48 provides:

"(4) The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal."

The Tribunal in Biwater Gauff was the first to apply the new ICSID rules regarding transparency and access to information. The Tribunal had before it two separate issues: (1) publication of the arbitration documents submitted by the parties to the arbitration (and third-party access to them) and, (2) participation of non-disputing parties (amicus curiae) in the proceedings.[19]

The Tribunal allowed the amici submissions insofar as it considered there was a public interest in the dispute and that the participation of the non-disputing parties (amici) would result in greater acceptance of the arbitration outcome and assist the Tribunal in meeting its obligations.[20] However, the Tribunal denied participation of the amici in the hearing[21] or their access to the arbitration documents.[22]

Toward developing a body of case law

For some time now, it has been suggested that arbitral decisions should have some form of publicity. By arbitration decisions, I refer not only to publishing investment arbitration decisions, but of all types of arbitral decisions, including those of a strictly commercial nature. The reason for this is simple: the publication of arbitral decisions creates a body of case law[23] that enhances the quality and consistency of arbitral decisions and generates greater certainty in users—not just those who frequently use this mechanism, but rather a broader public that has discovered the value of arbitration and yet remains wary about the 'secrecy' shrouding proceedings, potentially turning them into a quasi-obscure process. The arbitration developments of the past decade show that publication gives more certainty to the system and precludes future inefficiencies and contingencies for the parties involved. Moreover, it raises the professional standards to be met by arbitrators in their decisions.

I was unaware that the notion I found to be so revolutionary had already been raised by other legal practitioners who had also considered the need to make arbitration decisions public in order to create a body of case law, enhance decision quality and thereby contribute to the credibility and trust of the parties (and the public at large) in respect of arbitration as a dispute settlement mechanism.[24] Two important works on this subject are Mourre[25] and Lew[26] in "The Case for the Publication of Arbitral Awards." Lew highlights the appropriateness of this idea thus:

[t]he publication of arbitration awards would … identify the real advantages of arbitration: specialist and expert arbitrators operating on the international level. The development of an arbitral case law would give to arbitration a greater certainty than that presently existing, with respect to the probable attitude of the arbitrators, and would facilitate the commercial world's knowledge and acceptance of the lex mercatoria. This would almost certainly obviate many recurring problems presented to arbitrators and would influence the negotiating attitudes and commercial decisions of businessmen. Above all, the systematic publication of arbitration awards would show that not only is arbitration an alternative to national courts as a system of dispute settlement, but it would prove conclusively that arbitration is the most appropriate forum in which to resolve disputes arising out of international commerce.[27]

Mourre identifies certain aspects that bear consideration. He maintains that a system is required in order to publish as many cases with as few omissions as possible. Only the availability of a sufficiently large number of cases will lead to the emergence of a body of arbitral case law.[28] Access to other arbitral decisions would improve the quality of new arbitral decisions and would help to clearly identify the fundamental legal principles underlying the arbitration hearing process.[29] Lastly, Mourre stresses the importance of disclosing the names of arbitrators for their own reputation and credibility, and to give greater or lesser weight to decisions (as well as greater certainty and consistency to the arbitration system.)[30]

I can only concur with the views set out in the paragraph above.

Conclusions

UNCITRAL Rules on Transparency and Access to Information should not be seen as radical issue, but rather as a necessary evolution that gives the UNCITRAL Arbitration Rules, when applied to arbitration proceedings involving State parties, the same level of transparency found in other arbitration systems. Moreover, as described above, these Rules would be merely aimed at regulating (and doing so from a proper perspective) an already de facto situation. If arbitration practice was already prepared in 2008 to accept transparency requirements in UNCITRAL State arbitration and if the issue had already developed to the extent set out in the 2006 ICSID Arbitration Rules and found in detailed organization by the Tribunals in Methanex, UPS and Suez, the situation has only evolved more favourably toward including these requirements as a complementary chapter in the UNCITRAL 2010 Arbitration Rules.

It is therefore this author's opinion that at its next meeting in October 2010, the WGII will find itself in a situation whereby the issue is not whether to include an additional section governing transparency and third-party participation in State arbitrations—an issue that should have a positive outcome given the evolution of arbitration practice to which I have referred above—but rather to determine the scope and level of this transparency and access to information.

Author

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Notes

1 Following the lead of Argentina and Canada other Delegations also supported some form of transparency and third party participation, particularly the Delegations from Chile, Colombia, Honduras, Mexico, Norway, Paraguay, Switzerland, Uganda, US and Venezuela, among others.

2 The position of the Argentine Delegation at the February 2008 meeting was to support the creation of a register of investment cases initiated under the UNCITRAL Arbitration Rules. This same body would keep a record of UNCITRAL Tribunals' decisions. We were not required to make our position known with regard to the other CIEL and IISD proposals, since none of them received the minimum consensus required for WGII deliberation. The Register of cases and decisions came close to receiving the necessary consensus for approval. Furthermore, in this author's view, the fact that amicus curiae submissions have been widely accepted in practice should also facilitate the deliberation and approval of that part of CIEL and IISD's proposals.

3 The author represented the Argentine Attorney General's office before WGII in the meetings of September 2007, February 2008, September 2009, February 2010, and when the Rules were adopted in July 2010. The opinions expressed herein are personal and do not necessarily represent the beliefs to the Republic of Argentina, its government or its agencies.

4 This is the case for the Permanent Court of Arbitration (PCA) in The Hague, the Cairo International Commercial Arbitration Center, the American Arbitration Association (AAA), the International Center for Dispute Resolutions (ICDR) of the AAA, and the Hong Kong Arbitration Center. Many more prestigious international institutions have also chosen to use the UNCITRAL Arbitration Rules -- with a few specific variations -- to administer their arbitration disputes.

5 " … the experience of the Iran-US Claims Tribunal with its wide range of cases remains central to understanding the UNCITRAL Rules. The Tribunal has more than any other body grappled with the application of these Rules. Moreover, the Tribunal's practice, unlike that of many other arbitral bodies, is public, thereby making it possible to draw lessons from that practice …" Caron & Caplan & Pellonpää. The UNCITRAL Arbitration Rules. A Commentary. Oxford Commentaries on International Law. 2008, page 9.

6 Andrea, Gattini. The UN Compensation Commission: Old Rules, New Procedures on War Reparations. EJIL, Vol. 13 No.1, 161 – 168 (2002).

7 Caron & Caplan & Pellonpää. Op.Cit. page 9.

8 Mistelis, Loukas. Confidentiality and Third Party Participation: UPS v. CANADA and Methanex Corp. v. USA. In International Investment Law and Arbitration. Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law. Edited by Todd Weiler, Cameron May, 2005. " … while the privacy of investment arbitration proceedings is generally still acknowledged, information such as the existence of the arbitration, the parties, their legal representatives, the composition of the arbitration Tribunal and the nature of the dispute now routinely finds it way in the public domain."

9 Metalclad Corporation v. United Mexican States. Case No. ICSID ARB(AF)/97/1. (Lauterpacht- Civiletti-Siqueiros). Decision dated August 30, 2000, ¶13.

10 The Loewen Group Inc and Raymond L. Loewen v. United States of America. ICSID Case No. ARB(AF) 98/3. (Mason-Fortier-Mivka). Decision dated January 5, 2001. ¶26.

11 Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001). http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en

12 Methanex v. United States. UNCITRAL Case. (Veeder-Rowley-Reisman). Decision on Jurisdiction and Admissibility (August 7, 2002).

13 United Parcel Service of America INC (UPS) v. Canada. UNCITRAL Case. (Keith-Fortier-Cass). Decision on Participation as Amici Curiae (October 17, 2001).

14 Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic. ICSID Case ARB/03/19. (Salacuse-Kauffman-Kohler- Nikken).Response to a petition for Participation as Amicus Curiae; and AWG Group Ltd. v The Argentine Republic, UNCITRAL (UK/Argentina BIT).

15 The Argentine Republic supported the participation of amici briefs in the hearings; however, as the claimants refused this participation, the Tribunal did not grant the petition of the NGOs. See also Aurelia Antonietti, The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rule. ICSID Review - FILJ, Vol. 21, No. 2, Fall 2006, page 6.

16 Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A.. v. Argentine Republic. ICSID Case ARB/03/17. (Salacuse-Kauffman-Kohler-Nikken). Response to a petition for Participation as Amicus Curiae.

17 Aurelia Antonietti, The 2006 Amendments of the ICSID Rules and Regulations and the Additional facility rules. Op. Cit. page 2. Antonietti states that "[w]ith the increased caseload of the Centre and the broadening of its jurisprudence, it became apparent over time that the ICSID Arbitration Rules needed amendments to adequately meet the needs of ICSID's users, particularly in the context of proceedings under bilateral or multilateral investment treaties." In fact, there had been complaints about the lack of transparency and the need was expressed to standardize current ICSID tribunal practice: "Changes were proposed to meet those requirements and to reflect current practices of the tribunals. The Secretariat consulted widely with and benefited from the participation of members of the Administrative Council, business association and civil interest groups, international arbitration experts and institutions around the world." See Antonietti, Op. Cit. page 3.

18 Aurelia Antonietti, Op. Cit. page 3. It is widely known that the ICSID was created for the resolution of investment disputes under contractual agreements. As a result, the facts argued in a current ICSID arbitration with State involvement can potentially have a much greater impact on the public interest than a specific commercial dispute arising under a contract.

19 It should be noted that the new ICSID rules do not contain requirements regarding the publication of documents; the resolution of such matters must therefore rely primarily on any pertinent provisions in the arbitration agreement at issue.

20 Biwater Gauff and United Republic of Tanzania. ICSID Case ARB/05/22. Procedural Order No. 5 of February 2, 2007 (Hanotiou, Born, Laundau), ¶¶ 47 et seq.

21 Biwater Gauff, Op. Cit. ¶72

22 Biwater Gauff, Op. Cit. ¶68

23 When referring to case law, I am not saying that these decisions have to be precedent-setting, but rather simply a guide for purposes of creating a system that provides the best possible decision quality.

24 This challenges the pace at which "arbitration institutions" publish their decisions.

25 Mourre, Alexis. Precedent and Confidentiality in International Commercial Arbitration. The Case for the Publication of Arbitral Awards. In Precedent in International Arbitration. IAI Series, Yas Banitafemi, Editor, 2008.

26 Julian D.M. Lew, The Case for the Publication of Arbitration Awards, in the Art of Arbitration – Essay on International Arbitration – Liber Amicorum Pieter Sanders 12 September 1912 – 1982, page 223, J.C. Schultsz and A.J. van den Berg eds. Kluwer, 1982.

27 Julian D.M. Lew, The Case for the Publication of Arbitration Awards, in the Art of Arbitration – Essay on International Arbitration – Liber Amicorum Pieter Sanders 12 September 1912 – 1982, page 223 (J.C. Schultsz and A.J. van den Berg eds. Kluwer, 1982). Cited by Mourre, A. Op. Cit. page 223.

28 Mourre, Op.Cit. page 48. In support of his position, Mourre cites Christian Larroumet in A propos de la Jurisprudence Arbitrale, Gaz. Pal. Dec.14, 2006.

29 Mourre, Op. Cit. page 49.

30 Mourre, Op. Cit. page 58.

feature 5

Arbitrator appointments in investment arbitration:

Why expressed views on points of law should be challengeable

Tony Cole

The aspect of international investment arbitration that is perhaps most consistently condemned by critics of the system is the role played in the resolution of investment disputes by non-permanent tribunals, constituted solely for deciding the case at hand, and consisting of individuals drawn primarily from the world of international commercial arbitration. Such tribunals, it is argued, lack the legitimacy that is possessed by more permanent bodies, and too often reflect the views of the commercial world in which they predominantly make their living.

The routine response to this complaint by arbitration specialists is that it displays a serious misunderstanding of the reality of such tribunals. Each tribunal, it is emphasised, is selected by the parties to the dispute, with the result that both the State and the investor can ensure that the tribunal is both unbiased and expert in international investment law. Use of such a tribunal, it is urged, is considerably fairer than the alternative of requiring the investor to argue its case before a domestic court both initially constituted and currently controlled by the State against which the claim is being brought, and lacking any real expertise in international investment law.

There is no real question that the response by arbitration specialists is fundamentally correct, as a properly-functioning arbitral tribunal constitutes an arguably ideal means for the resolution of international investment disputes. This can only be true, however, where the process of constituting the tribunal is properly designed and enforced. Yet as demonstrated in a recent decision in the arbitration *Urbaser S.A. v. Argentina*, the current rules governing the appointment of arbitrators remain open to precisely the form of manipulation of the tribunal of which critics have often complained.

On 12 August 2010, an arbitrator challenge decision was handed down in the ICSID case *Urbaser S.A. v. Argentina*[1], in which a challenge was denied to the appointment as arbitrator of the highly regarded legal academic Campbell McLachlan, based on general views of law that he had expressed in his academic writings. That is, claimants had challenged McLachlan's appointment by Argentina not because he possessed any ties to the Argentine government that would bring into question his ability to decide the case fairly, but because he had previously made statements on points of law that will be central in the Urbaser arbitration, and that the claimants argued demonstrated that he would clearly hold for Argentina on those points.

In itself this decision is unremarkable, as there is no prominent arbitral forum or national jurisdiction that currently allows arbitrators to be successfully challenged due to prior statements on general points of law. However, while it is hard to fault the Urbaser decision as a reflection of the currently accepted stance on this question within arbitration, the details of the decision serve well to emphasize the problems the current approach creates. Most problematically, McLachlan was not challenged simply because he had casually espoused an interpretation of a legal point relevant to the Urbaser arbitration. Rather, the Claimants highlighted two specific, considered statements in finalised academic publications in which McLachlan not only presented a considered argument for his position, and not only expressed his view with considerable force, but in one case was writing about the specific bilateral investment treaty at stake in the Urbaser arbitration. As the Claimants argued, McLachlan had basically already stated how he would rule on at least one central issue in the case.

There is certainly nothing unique to arbitration in a party to a dispute being faced with a tribunal that includes a member with known hostility to legal positions the party needs to rely upon. Even judges after all, whether in domestic or international tribunals, will have known positions on points of law, whether from academic publications or from previous decisions. To understand, then, why this situation is more problematic for investment arbitration than for a court system it is essential to understand the method by which arbitrators come to be appointed to cases, as well as the impact this process can have on the way any resulting award is viewed, both by the parties to the arbitration and by a public that is often already sceptical of the propriety of resolving such disputes through arbitration.

While arbitrators are often spoken of as undertaking a judicial function, and the very limited grounds on which international investment awards can be challenged in courts means that arbitrators can quite legitimately be viewed as exercising a form of judicial power by proxy, essential differences between arbitrators and judges exist due to the way the two groups are appointed to cases.

While approaches to the appointment of judges will vary between national judicial systems, the consistent characteristic feature of judicial appointments is its highly institutionalised nature. Parties have the freedom to pick the judicial system within which they wish their case to be heard, such as through choice of forum agreements, or merely by selecting the forum in which to commence litigation, but they never have the ability to select a particular judge to hear their case. Instead, once a judicial system has been selected, a judge will then be appointed to their case through the operation of the system's standard rules.

It will, of course, be possible for any party to challenge the judge appointed, but the standards on which such challenges can be made will be very limited, and generally restricted to instances in which a judge has a personal interest in the proceedings, or a personal bias against a party to the case. This limitation on the ability to challenge a judge is a reflection of the highly institutionalised nature of the judicial role. Not only are judges appointed through the operation of institutional rules, but their decisions are delivered within an institutional context of review by higher courts, a professional obligation to cooperate with other courts in the creation of a coherent body of law, and a recognition of the role of a judge as an agent of the State, rather than as an employee of the parties in the case over which the judge is presiding.

By contrast, the procedure governing the appointment of arbitrators within investment arbitration reflects a fundamentally different institutional structure. Or more accurately, a structure in which there is no institution. Under this approach, each party to the dispute has the right to appoint one arbitrator to the panel of three arbitrators that will preside over the dispute. A third individual, the Chair of the panel, will then be appointed through agreement of the two party-nominated arbitrators, and ideally the parties as well.

The obvious difference between this procedure and the procedure by which judges are appointed to preside over a case is, of course, the extent of party involvement in the selection of arbitrators. While, as noted above, parties in a litigation are restricted to choosing the forum in which they wish their case to be heard, parties to an arbitration can choose the specific arbitrators who will preside over their case. Moreover, while the classical view of arbitration is that both parties will have agreed to arbitrate under each member of the tribunal, the reality of contemporary international investment arbitration is that each party has almost complete control over the appointment of one arbitrator. That is, each party will have appointed its preferred arbitrator, with only the Chair being the subject of any form of consensus.

> "This issue ultimately gets to the heart of why arbitrator challenges are allowed, and what arbitration is attempting to be."

In addition, while any judge appointed to preside over a litigation will be drawn from a small pool of individuals serving in a long-term institutional role, there are no real restrictions on the individuals who can serve as arbitrators in international investment arbitrations, beyond the easily-satisfied constraint in the ICSID system that arbitrators must have "recognized competence in the fields of law, commerce, industry or finance."

The impact of this process is important to recognise, as while a properly functioning litigation will result in a decision delivered by an independently-appointed judge, impartially applying the applicable law, a decision even in a properly functioning contemporary international investment arbitration will be delivered by a tribunal that has been constituted through a process in which both parties have reason to be suspicious that the appointment made by the other party was an attempt to appoint an individual likely to hold in its favour, rather than to decide the case fairly and objectively.

It is in this adversarial context that the procedure for challenging arbitrators has been developed. Because the central role of parties in the appointment system raises an obvious risk that parties will attempt to appoint individuals certain to decide in their favour, each party is given the right to object to any nominated arbitrator. While the specific standards to be applied in evaluating a challenge to a nominated arbitrator vary depending on the rules and laws under which the arbitration is held, such standards revolve around two broad concepts, "independence" and "impartiality". In broad terms, the requirement for "independence" relates to objective elements regarding ties between the arbitrator and the parties, while "impartiality" refers to subjective elements of the nominated arbitrator's state of mind.

Thus, for example, the requirement of "independence" prevents a party nominating an attorney who regularly performs work for the nominating party, and who thus may find in favour of that party primarily to ensure further work in the future. Similarly, the requirement for "impartiality" precludes the appointment of any arbitrator who can be demonstrated to have already reached a decision regarding which party should win the dispute.

The procedure for arbitrator challenges, then, is designed to ensure acceptable levels of fairness within an appointment context that in itself is highly open to party manipulation.

Challenges based on generalised statements of law, however, as in the Urbaser decision, create a particular difficulty for the arbitrator challenge system. The justification for allowing parties to select their own arbitrator, after all, is that they will thereby ensure that at least one arbitrator on the tribunal understands their perspective, and can advance their arguments in any deliberations between the arbitrators.

That is, while parties are not allowed to select arbitrators predisposed to rule in their favour, no matter what facts or arguments are presented in the course of the arbitration, the entire point of party selection of arbitrators would be undermined if parties could not consider an arbitrator's substantive views on principles of law relevant to the arbitration.

Recognition of this fact is reflected in the distinction standardly made in arbitral practice and scholarship between a challenge to an arbitrator who has previously expressed her views on the case to which she has been appointed, and one who has merely expressed her views on general topics of law that will be central to the case. A challenge based on the former situation has a strong likelihood of succeeding, while one based on the latter will certainly fail.

However, the tenuousness of this distinction is not difficult to highlight. Consider a case in which a Claimant has commenced an investment arbitration against State X, based on a contractual dispute between the two parties. State X has never directly agreed to arbitrate with the Claimant, but has entered into a bilateral investment treaty with the State from which the Claimant comes. In that treaty State X has agreed to arbitrate directly with investors from the other State any claims alleging violations of the treaty. In addition, the treaty also includes what has come to be called an "umbrella clause", in which State X has agreed to respect any agreements into which it enters with investors from the other State. Whether an umbrella clause would allow the Claimant to commence an arbitration, alleging that State X's violation of its contract with the Claimant also constitutes a violation of the treaty, is a highly disputed topic in contemporary investment law.

Aware of this difficulty, and in the knowledge that unless it is successful on this issue it will fail entirely in its claim, Claimant nominates to the tribunal Professor Jones, famous for his strong endorsement of the view that umbrella clauses do indeed give investors access to arbitration for violations of contracts with the State.

Under the current approach to arbitrator challenges, Professor Jones' strong views on the topic of umbrella clauses would give State X no ground on which to challenge his appointment, even though his decision on this central point of the arbitration is effectively predetermined. Indeed, this would be true even if only a month before his nomination to the arbitral panel Professor Jones reiterated in an interview his view on umbrella clauses, stating that there was in his opinion simply no uncertainty regarding how such issues should be resolved.

By contrast, however, if in that interview he also mentioned rumours of a pending arbitration to be brought by the Claimant, and stated that the umbrella clause in the treaty should definitely give the Claimant access to arbitration, State X could use this specific reference to the case between Claimant and State X as a means of preventing Professor Jones' appointment to the tribunal.

Yet from the perspective of State X surely this distinction makes absolutely no difference. In both cases Professor Jones has been appointed to the tribunal to achieve a specific goal, rather than to ensure a fair arbitration, and in both cases his ultimate decision is equally certain. To assert that State X has no legitimate ground for complaint so long as Professor Jones' decision results from a fair-minded application of legal principle, rather than bias against State X, is to ignore the context of the appointment. This was, after all, not a judge appointed by an independent judicial system, who just happens to have views unfavourable to one party. Rather, this arbitrator's appointment was a specific part of the trial manoeuvring of the other party.

This issue ultimately gets to the heart of why arbitrator challenges are allowed, and what arbitration is attempting to be. If the goal is simply to stop arbitrators being appointed who will be biased against one of the parties, then the decision regarding Professor Jones, and that in the Urbaser case, are perfectly justifiable. However, if the concern is instead that the final decision in an arbitration should be something other than the result of a game of "let's stack the tribunal in our favour", then the distinction embodied in the Jones decision and the Urbaser case simply doesn't suffice.

There are, of course, significant complications in any attempt to develop a standard for allowing challenges based solely on expressed points of view on general questions of law. The Urbaser case is convenient in that it presents a stark example of the problem being described, but in most cases the question will be far more difficult, and parties will take every opportunity to challenge their opponent's nominee, as part of their own trial manoeuvring.

Nonetheless, the difficulty involved in finding a workable standard should not suffice as a justification to do nothing about a clear problem. After all, if a party has its preferred arbitrator disqualified because of such a challenge it is unclear how they have been harmed. They retain the power to another arbitrator, and this arbitrator will no doubt be willing to listen to that party's arguments with an open mind. They are, that is, simply forced to arbitrate in front of an unbiased tribunal, just as they originally agreed to do. By contrast, if the arbitrator challenge is rejected, the challenging party is forced to arbitrate in front of a tribunal at least one member of which is simply not going to rule in its favour on one or more central issues in the case, no matter how fair-mindedly he approaches his job.

The question ultimately is what an arbitral tribunal is meant to be and to do, and whether international investment arbitration is a genuine attempt at fair dispute resolution, or the illegitimate game its strongest critics argue it to be. No-one familiar with the individuals who serve on international investment arbitration tribunals would question the seriousness with which they approach their roles, but unless the problem highlighted by the Urbaser decision is addressed, there should be little surprise when the legitimacy of such tribunals is challenged.

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Notes

1 Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26

feature 6

Bilateral Investment Treaties and Preferential Trade Agreements: Is a BIT really better than a lot?

Lauge Skovgaard Poulsen

With the often costly and far-reaching implications when investors use Bilateral Investment Treaties (BITs) to adjudicate claims against developing countries, governments in the developing world need powerful arguments to justify that these treaties are in their national interest. One notable contribution to this debate has recently been put forth by political scientists Jennifer Tobin and Mark Busch, who set out to investigate the link between BITs and preferential trade agreements (PTAs). Using statistical techniques, they analyse annual data on pairs of developing and developed countries between 1960 and 2004 and conclude that BITs "raise the prospects of getting a North-South PTA with all the deeper and reciprocal obligations that these entail."[1]

If true, Tobin and Busch have revealed an exceptionally important finding that may add weight to the argument that BITs have a positive effect on investment flows. For while much of the empirical literature argues that BITs have not assisted developing countries in attracting foreign capital to any considerable extent, PTAs appear to have had a stronger impact on where, and how much, multinationals invest abroad.[2] In other words, BITs may not impact investment flows extensively in and by themselves, but they might do so indirectly by increasing the likelihood of broader economic integration agreements.

This brief essay will argue, however, that in its current form Tobin and Busch's claim is based on a flawed understanding of BITs' practical implications, and their statistical analysis is almost entirely contradicted by the politics of investment treaty rule-making in most developed countries.

BITs as preferential agreements

Tobin and Busch's argument is in two parts. First, the authors posit that Western multinationals lobby their governments to sign both BITs and PTAs as a way to protect their investments and reduce trade costs, respectively. But for developed country governments, BITs are 'easier' agreements to conclude than PTAs, as the latter are often met with opposition from their own protectionist constituents. So whereas wealthy states willingly pursue BITs with developing countries, they only pursue a PTA when it provides exceptionally large benefits. And this, they argue, is when the PTA can provide home state multinationals advantages vis-à-vis their foreign competitors. The twist to the argument, however, is that such advantages will be partly eroded if competing firms are also covered by BITs in the host state. This implies that support for a PTA will be greatest if the developing country has not already concluded too many BITs with other developed country governments.[3] To increase the likelihood of a PTA, Tobin and Busch therefore argue that "a BIT is better than a lot".

One of the key underlying assumptions is thereby that a BIT can give multinationals considerable preferential advantages when a developing country has not signed BITs with home states of competing firms. But as intuitive as this may sound, it misrepresents investment treaties' practical implications. For the most part, BITs include broad and open-ended definitions of investments, and many expressively cover indirectly controlled investments. So if firms are seriously concerned that they do not have the same BIT-coverage as their competitors, they have the option of structuring their investment vehicles accordingly, for instance through holding companies in third countries. So while the extent of 'treaty-shopping' is not well understood, Barton Legum, the former head of NAFTA's arbitration division, is probably correct in stating that:

"The reality that foreign capital is highly fungible and the breadth of the definitions of investor and investment thus combine to effectively transform the facially bilateral obligations of the BIT into an obligation that the host State must consider potentially applicable to all investors."[4]

The multi-layered corporate legal structure of modern multinationals thereby implies that while protections granted in BITs are perhaps preferential in theory, this is rarely the case in practise. Even a single BIT with the 'traditional' broad coverage of investors and investments should for all practical purposes be understood as involving obligations owed to every other state and investor.[5] The notion that a multinational can retain future PTA preferences if developing countries do not sign BITs with other home states therefore appears somewhat out of sync with the potential coverage of the global BIT-network.

> "Even a single BIT with the 'traditional' broad coverage of investors and investments should for all practical purposes be understood as involving obligations owed to every other state and investor."

The politics of investment treaty rule-making[6]

But while this questions the curve-linear relationship between BITs and PTAs suggested by Tobin and Busch—i.e. that a BIT is better than a lot—it doesn't necessarily contradict their first proposition, namely that developed countries tend to couple their programs on BITs and PTAs. Indeed, there are pragmatic reasons for doing so. Modern PTAs often include investment protection chapters, so having already signed a BIT would make any subsequent PTA negotiations simpler. Also, a BIT negotiation could indicate whether the developing country partner is 'mature' enough to enter into the much more complex and time-consuming PTA negotiations. But while a country like Japan is in fact using BITs as 'stepping stones' to PTAs for these very reasons,[7] does this really reflect a broader phenomenon? Should developing countries expect that by signing a BIT with a developed country, a subsequent PTA becomes more likely?

Let us start with the United States. While the United States Trade Representative (USTR) has occasionally mentioned that a BIT with the United States may lead to a PTA, it is doubtful that such a linkage has existed as a matter of policy.[8] Veteran American BIT-negotiator, Kenneth Vandervelde, fails to mention any link between BIT and PTA negotiations in any of his extensive works on the US BIT program for instance.[9] Also, no studies of US PTAs that this author is aware of can help sustain that BITs paved the way for American trade agreements in any substantial way.[10] So when looking at the actual sequencing of US BITs and PTAs, it is no surprise that the pattern hardly provides strong evidence in favour of Tobin and Busch's claim: out of the thirteen US PTAs with developing or transition economies (including NAFTA), only three were preceded by a BIT. These are the PTAs with Morocco, Panama, and CAFTA-DR (where BITs had been signed with El Salvador, Honduras, and Nicaragua), yet Tobin and Busch provide no evidence that the BITs in question were in any way connected with the subsequent trade negotiations.[11]

However, even if American decision-makers should on occasion have thought of BITs as potential stepping stones to a PTA, one should recall that the US has signed less than fifty BITs. And while naturally important, these constitute a miniscule share of the global BIT-network. EU15 countries alone have signed more than a 1000. So when suggesting a general pattern in BIT policy making among developed countries, Europe is clearly the litmus test. Yet, here the suggested linkage between BITs and PTAs is even harder to follow. Recall that at least until the entry into force of the Lisbon treaty (on 1 December 2009); EU member states negotiated BITs individually while entering into PTAs as a group. But while 61 percent of the developed countries in Tobin and Busch's analysis are EU member states, they fail to discuss what this implies for their theoretical model. Nor is it accounted for in their statistical analysis,[12] which leads to a rather bold implicit claim: a (hypothetical) developing country with no other investment treaties in place can increase its predicted probability to enter into an EU PTA from 0.01 to 0.05 simply by signing a BIT with an EU member state. That the absence or presence of BITs have played such a crucial role for the choice of EU PTA partners would probably surprise most European policy-makers, and the authors quote no official reports, have made no interviews, or found any study of EU trade politics that can support it.

Also, if we go back to their second proposition—a few BITs increase the likelihood of a PTA, whereas too many do the opposite—the implication in the European context is that a developing country with only one BIT, say with Finland, is more likely to obtain an EU PTA than one that has signed BITs with most EU member states. To the extent that BITs have played any substantive role in European trade politics thus far—which is questionable—this is a rather counterintuitive suggestion to say the least, and there again appears to be no additional evidence to support it apart from their statistical model.

A BIT of econometrics is not enough

So while the work of Tobin and Busch is thought-provoking, innovative, and sophisticated—making it worthy to engage with—their results are difficult to reconcile with realities on the ground. Why might this be? Apart from the fact that they probably misrepresent BITs' practical implications for multinationals, one reason could be their almost exclusive reliance on econometric techniques to ascertain government strategies in the international investment regime. While at times a legitimate empirical strategy if the right data is available, it is risky indeed when it is not.[13] Qualitative methodologies are naturally fraught with their own limitations and risks of biases, but it is often prudent to check whether causal claims based on statistical correlations alone are in fact supported by alternative types of evidence. In this case they don't seem to be. So before including the stepping stone argument among the justifications to sign (at least a few) BITs,[14] governments in the developing world would be well-advised to wait for further studies that confirm the authors' claims using alternative methodologies and sources of data. Given the remarks made here, this is likely to be a considerable challenge.

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Notes

1 J. Tobin and M. Busch, "A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements," 62 World Politics 1 (2010), at 31.

2 UNCTAD, The role of international investment agreements in attracting foreign direct investment to developing countries (Geneva: United Nations 2009), ch. 3.

3 Tobin and Busch also argue that too many PTAs with other wealthy states make them less attractive as PTA partners. While the underlying logic for this part of their argument is indeed convincing, the present essay will purely focus on their conclusions concerning BITs.

4 B. Legum, "Defining Investment and Investor: Who is Entitled to Claim?," 22 Arbitration International 521 (2006), at 525.

5 Ibid., at 524.

6 This section is an extension of; L. S. Poulsen, "The importance of BITs for foreign direct investment and political risk insurance: Revisiting the evidence," in: K. Sauvant (ed.) Yearbook on International Investment Law and Policy 2009/2010 (New York: Oxford University Press, forth.), footnotes 60-63 and accompanying text.

7 Not-for-attribution telephone interview with former Japanese BIT-negotiator, July 2009.

8 For instance, Tobin and Busch support their econometric findings with a USTR quote that its BIT-negotiations with Pakistan would lead to a subsequent PTA. But while this was also the expectation of several key Pakistani negotiators (various interviews, Lahore and Islamabad, Spring 2009), it is doubtful whether it was actually the US position. A USTR official notes: "Since Musharraf had vested so much political capital into the possibility of a PTA, we couldn't openly state that we found it practically impossible to get through in Washington, so we played along." (Comment at seminar on Pakistan's BIT program, Johns Hopkins School of Advanced International Studies' South Asia Program, May 11, 2009 [the author of this essay was the speaker]).

9 E.g. K. Vandervelde, U.S. International Investment Agreements (Oxford: Oxford University Press, 2009), in particular 66-82,

10 See e.g.; J. Schott (ed.) Free Trade Agreements: US Strategies and Priorities (Washington DC: Institute for International Economics, 2004).

11 See again Vandervelde, op. cit.

12 Tobin and Busch code an EU PTA as a series of bilateral PTAs with EU member states.

13 Even for the variables Tobin and Busch are able to control for, there are not only serious endogeneity challenges but also a considerable problem of missing data, see Tobin and Busch, op. cit., at 18-23.

14 See generally; R. Echandi, "What do Developing Countries Expect from the International Investment Regime?," in: J. Alvarez and K. Sauvant (eds.), International Investment Regime: Expectations, Realities, and Options (Oxford: Oxford University Press, forth.).

Procedural requirements for arbitrator challenges: Finding fault with CEMEX v. Venezuela

Lise Johnson

One fundamental principle of investor-State arbitration is the ability of parties to have their disputes resolved by independent and impartial arbitrators. In order to ensure adherence to this principle, laws and rules governing investor-State arbitrations grant parties the right to challenge arbitrators lacking these qualifications. Given the importance of ensuring arbitrator independence and impartiality, and as evidenced by the recent decision in and subsequent commentary on *Vivendi v. Argentina,*[1] practitioners and stakeholders in investor-State arbitrations are devoting significant efforts to defining the substantive standards warranting arbitrator challenges, and to understanding what those standards require in practice.

Yet what has received only minor attention, and deserves significantly more, is the issue of procedural requirements for arbitrator challenges. A challenge decision made public in early 2010 illustrates the importance of one such procedural issue—the issue of time limits for bringing challenges. In that case, *CEMEX v. Venezuela*,[2] a case under the ICSID Convention and ICSID Rules, the Tribunal rejected the Respondent's challenge on the ground that it was not "promptly" filed.[3] According to the Tribunal, because the proposal to remove the arbitrator was not timely, the Tribunal did not have to consider it on the merits.

This decision is problematic for a number of reasons. First, it effectively requires the parties to monitor and investigate the activities of arbitrators (and the entities and people connected to them), rather than enforcing arbitrators' continuing duties of investigation and disclosure. Second, it allows procedural standards under the ICSID Arbitration Rules—and vague standards at that—to negate parties' substantive rights under the ICSID Convention. And third, it likewise purports to allow procedural standards to release tribunals from their substantive obligations under the ICSID Convention. Whether better analysis of any of these three issues would have produced a different outcome is uncertain. What is certain, however, is that the approach followed by the Tribunal in the *CEMEX* challenge decision is flawed.

Background of the dispute and proposal for disqualification

In October 2008, and in response to actions taken by the Venezuelan government affecting the cement industry, CEMEX initiated a case against Venezuela under the ICSID Convention and the bilateral investment treaty between Venezuela and the Netherlands.[4] On 31 December 2008, CEMEX appointed Robert B. von Mehren as its arbitrator; and on 12 February 2009, Mr. von Mehren furnished the parties his curriculum vitae and the declaration of independence and impartiality required under Rule 6 of the ICSID Rules. The Tribunal was constituted on 6 July 2009.

On 21 September 2009, counsel for Venezuela wrote the Tribunal regarding an issue that needed to be "addressed and clarified." It informed the Tribunal that a separate ICSID case against Venezuala, Holcim v. Venezuela, had been registered by the ICSID Secretariat in April 2009 that, like CEMEX, arose out of Venezuela's actions toward the cement industry in 2008. Counsel for Venezuela further explained that claimant's counsel in Holcim was Debevoise and Plimpton LLP ("Debevoise"), the same firm where the claimant-appointed arbitrator in CEMEX, Mr. von Mehren, had been a partner before he retired. Counsel for Venezuala noted that Mr. von Mehren continued to list a Debevoise office, telephone number, and e-mail address on his curriculum vitae, and asked for additional information on the relationship between Mr. von Mehren and Debevoise.

Mr. von Mehren responded that same day by confirming that he was a retired partner of Debevoise, but continued to have an office there and use secretariat services provided by the firm.[5] He also explained that he received a pension from Debevoise that was based on the firm's earnings while he was a partner. Mr. von Mehren added that he had not known that the Holcim case had been brought, much less that Debevoise was acting as counsel for the claimant in that case.

On 15 October 2009, the Respondent sought additional information regarding the office and secretariat services provided by Debevoise and the measures that were being taken to protect the confidentiality of the arbitration proceedings. Mr. von Mehren responded on 20 October. The following day Venezuela replied in an email that it remained uncomfortable with the relationship between Mr. von Mehren and Debevoise and intended to formally challenge the arbitrator under Article 57 of the ICSID Convention. On 26 October 2009 the respondent filed its challenge, seeking to disqualify Mr. von Mehren on the basis of his continuing relationship with Debevoise, counsel to claimants in Holcim, an action against Venezuela arising out of the same set of fact as the *CEMEX* dispute.

The disqualification decision

In a decision dated 6 November 2009, the two un-challenged members of the Tribunal rejected as untimely Venezuela's proposal to disqualify Mr. von Mehren. The Tribunal explained that for arbitration proceedings to be "orderly and fair," arbitrator challenges must be made in a "timely fashion." It noted that neither the ICSID Convention, nor the ICSID Arbitration Rules, establish any "definite deadline beyond which a challenge is not to be considered,"[6] but that Rule 9(1) of the Arbitration Rules does state that a "party proposing the disqualification of an arbitrator … shall" do so "promptly." The Tribunal then asserted, without further discussion, that, pursuant to ICSID Arbitration Rule 27, the "sanction for the failure to object promptly is waiver of the right to make [the] objection."[7]

According to the Tribunal, by using the word "promptly," Rule 9(1) did not "fix a quantifiable deadline," and instead left it up to tribunals to decide on a case-by-case basis whether a challenge was timely filed. The Tribunal then looked to other tribunals' application of the rule. It cited *Azurix v. Argentina*, *CDC v. Seychelles*, and *Vivendi v. Argentina* as examples of decisions where delays of eight months, 147 days, and 53 days, respectively, had been deemed too long to qualify as "prompt." It also noted that the tribunal in *Saba Fakes v. Turkey* had described as "promptly" filed a proposal for disqualification brought ten days after that tribunal's constitution.

Turning to the facts of the case before it, the Tribunal stated that the Respondent learned that Mr. von Mehren was a retired partner of Debevoise no later than 12 February 2009, the date prior to constitution of the Tribunal when the Respondent received Mr. von Mehren's curriculum vitae. The Tribunal further observed that the Respondent knew that Debevoise was representing the claimants in *Holcim* when ICSID registered that case on 10 April 2009. Rejecting the Respondent's argument that Mr. von Mehren's curriculum vitae did not contain full information about his relationship with Debevoise, and that the Respondent only obtained such information after asking for it in September 2009, after which time it promptly filed the proposal for disqualification, the Tribunal concluded:

[I]n April 2009, the Respondent had in hand all the elements allowing it to raise the questions it raised in September 2009. It waited more than five months to put those questions. It did it more than two months after the constitution of the Tribunal. Having immediately received on 21 September 2009 the required information, it still waited one month before presenting its proposal for disqualification.[8]

The Tribunal then declared that, pursuant to ICSID Arbitration Rule 27, the "sanction for the failure to object promptly is waiver of the right to make [the] objection."[9]

Issues with the Decision

The *CEMEX* challenge decision is problematic for a number of reasons. For one, the Tribunal effectively imposed on the Respondent a continuing duty to police the activities of the arbitrators and the entities and persons related to them. The Tribunal stated that, as of 10 April 2009, the Respondent "had in hand all the elements allowing it to raise the questions it raised in September 2009." Those elements were two: the CV of one of the three arbitrators in *CEMEX*, which listed the address, phone number, and email of an office at Debevoise, the law firm where the arbitrator had formerly been a partner; and the registration of a separate ICSID case, *Holcim*, in which Debevoise was representing the claimants. The Tribunal thus effectively concluded that the Respondent was required to continually assess whether any of the relationships listed in the arbitrators' CVs created situations giving rise to doubts as to the arbitrators' independence or impartiality. Further, according to the Tribunal, the Respondent's failure to monitor and investigate the arbitrators' circumstances and relationships barred the Respondent's challenge.

This approach, however, imposes the duty to investigate and disclose potential conflicts on the wrong player. As indicated by ICSID Arbitration Rule 6[10] and challenge decisions,[11] and reinforced by practical realities regarding who has access to the relevant information, it is the arbitrator, not the parties, who must investigate whether conflicts exist and disclose them if they do. To charge parties with constructive knowledge of conflicts that may arise based on information disclosed in arbitrators' CV is to impose a difficult, and misplaced, burden on those parties.

A second issue with the Tribunal's decision is that it abdicated its own responsibility under the ICSID Convention to review the challenge proposal based on the Respondent's purported non-compliance with the Arbitration Rules. As noted by the Tribunal, Rule 27 of the Arbitration Rules states that if a party "knows or should have known that a provision of" the Arbitration Rules or "of any other rules or agreement applicable to the proceedings … has not been complied with and which fails to state promptly its objections thereto, shall be deemed … to have waived its right to object." What the Tribunal did not note, however, is that Rule 27 does not purport to waive tribunals' obligations under the ICSID Convention. Article 58 of the ICSID Convention requires tribunals to take a decision on "any proposal to disqualify [an] … arbitrator." It also obligates tribunals to replace the arbitrator if "the proposal is well-founded." There is no exception in the ICSID Convention allowing tribunals to refuse to evaluate a disqualification proposal on the grounds that the proposal was not "promptly" filed.

A third, similar problem with the *CEMEX* challenge decision is that the Tribunal too easily relied on vague procedural provisions in the Arbitration Rules to negate parties' rights under the ICSID Convention. More specifically, the ICSID Convention affirms' parties rights to arbitrators of "high moral character …, who may be relied upon to exercise independent judgment."[12] It also grants parties the right to challenge arbitrators who manifestly lack such qualities,[13] and specifies that parties can seek to annul awards if the tribunal was improperly constituted, if an arbitrator was corrupt, or if the tribunal failed to adhere to fundamental rules of procedure.[14] Under Arbitration Rule 27, failure to "promptly" raise an objection regarding non-compliance with the Arbitration Rules may waive the right to raise that objection. Yet Rule 27 does not state that failure to promptly raise an objection regarding non-compliance with the Arbitration Rules waives parties' rights under the ICSID Convention to arbitration by independent and impartial arbitrators and in accordance with fundamentally fair procedures.[15] Even more significantly, Arbitration Rule 9, which is the provision specifically governing the procedural requirements for arbitrator challenges, contains no language stating that failure to "promptly" file a challenge will result in a waiver of the right to seek to disqualify an arbitrator.[16]

Nowhere in the Disqualification Decision does the Tribunal adequately explain how or why failure to comply with a vague procedural standard will result in the waiver of parties' fundamental Convention rights to challenge arbitrators for a manifest lack of required qualifications. Rather, the Tribunal simply makes conclusory statements that it need not consider untimely disqualification proposals.[17] And although the Tribunal does cite some cases in support of its interpretation of "promptness," in each of the cases where the tribunals determined the proposals were not "prompt," the tribunals nevertheless proceeded to examine the merits of the challenges.[18]

Conclusion

Participants in and observers of the ICSID arbitration system have been increasingly emphasizing the importance of arbitrator independence and impartiality. Real or apparent lack of those qualities can delay resolution of disputes, increase costs, and threaten the legitimacy of this means of investor-State dispute resolution. Yet while much attention has been paid to the substantive standards used to ensure arbitrator independence and impartiality, relatively little has been focused on the procedural aspects of arbitrator challenges. As the *CEMEX* challenge decision shows, however, these procedural issues can—rightly or wrongly—determine the outcome of a disqualification proposal.

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Notes

1 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007 (10 Aug. 2010).

2 CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/08/15).

3 Decision on Proposal for Disqualification of an Arbitrator (November 06, 2009) (the "Disqualification Decision").

4 See Disqualification Decision, supra note 3; CEMEX will submit a complaint seeking international arbitration, CEMEX Press Release, 20 Aug. 2008, available at http://www.cemex.com/qr/mc_pr_082008.asp.

5 The Disqualification Decision notes that Mr. von Mehren responded to the respondent's letter "[o]n the same day." (para. 22). It does not, however, indicate how he responded, nor when the respondent received the communication.

6 Disqualification Decision, at para. 34.

7 Disqualification Decision,at para. 36.

8 Disqualification Decision, at para. 44.

9 Disqualification Decision, at para. 36.

10 Rule 6(2) requires each arbitrator to sign a declaration stating, in relevant part, "I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."

11 See, e.g., Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007 (10 Aug. 2010), para. 222;

12 Articles 14(1) & 40.

13 Article 57.

14 Article 52(1).

15 It should also be noted that the Tribunal's Disqualification Decision does not make clear how Rule 27 applies. Rule 27 deals with waiver of parties' rights to object to non-compliance with rules or regulations. It could be argued that, under Rule 27, the Respondent waived its rights to object to Mr. von Mehren's non-compliance with Arbitration Rule 6 regarding arbitrators' disclosure obligations. The decision, however, does not suggest that the Tribunal applied Rule 27 in that manner. Rather, the Tribunal seems to have read that provision regarding failure to object to other parties' or arbitrators' non-compliance as also waiving the parties' rights under the Rules (and even under the Convention) to take affirmative actions. Such an interpretation seems to stretch Rule 27 beyond its intended application.

16 Cf., e.g., Arbitration Rule 49(1) & (5) (stating clearly the consequence of a party's untimely exercise of its rights by stating that if a party did not request supplementation or rectification of an award within 45 days after the date on which the award was rendered, the Secretary-General "shall refuse to register the request").

17 Disqualification Decision, paras. 31 ("The Tribunal will first consider whether the Respondent's proposal to disqualify Mr. von Mehren was untimely. If so, it will not have to consider the substance of that proposal."); 32 ("An orderly and fair arbitration proceeding, while permitting challenges to arbitrators to be made on specific grounds, also requires that such challenges be made in a timely fashion. As a consequence, arbitration rules normally provide that challenges that are not timely should not be considered."); 36 ("The sanction for the failure to object promptly is waiver of the right to make objection, as provided for in ICSID Arbitration Rule 27."); 44-45 ("… Taking all those factors into consideration, we conclude that Venezuela did not file its proposal to disqualify Mr. von Mehren "promptly" within the meaning of ICSID Arbitration Rule 9(1) and that therefore it has waived such objection under ICSID Arbitration Rule 27. 45. As a consequence we do not have to consider the substance of the Respondent's objection.").

18 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), Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/03/19), AWG Group v. Argentine Republic (UNCITRAL); Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 Oct. 2007, paras. 27-43); CDC Group PLC v. Republic of Seychelles (ICSID Case No. ARB/02/14), Decision of the ad hoc Committee on the Application for Annulment (29 June 2005), para. 54; Azurix Corp v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on the Challenge to the President of the Tribunal (25 February 2005) (This decision is unpublished, but is briefly summarized in paras. 35 & 36 of the Decision of the ad hoc Committee seized of an application for annulment (1 September 2009)).

news in brief

Parties announce settlement of dispute over German power plant 28.8.2010

The Swedish power company Vattenfall and the Federal Republic of Germany have reportedly settled their international arbitration at the World Bank`s International Centre for the Settlement of Investment Disputes (ICSID), in which the power company sued Germany for about EUR 1.4 billion. The issues in the dispute related to the environmental regulations and restrictions applied to Vattenfall`s coal-fired power plant currently under construction in the city of Hamburg. The company alleged that these regulations were too strict and violated the principles on expropriation and fair and equitable treatment in the Energy Charter Treaty.

As first revealed in IAReporter in early 2009, Vattenfall turned to arbitration in a bid to challenge permit delays and other curbs imposed on the company's plant construction.

In late August Vattenfall announced that an agreement had been reached to terminate the ICSID case, but declined to disclose details due to the still-ongoing nature of the arbitration. (As parties are ordinarily free to discuss matters in ICSID arbitration, it is not clear if Vattenfall is abiding by a tribunal-imposed confidentiality order or one agreed voluntarily with Germany.)

To date, German and international media reports have alluded to a possible dilution of local water-use restrictions which would have prevented the completed plant from operating at full capacity. Vattenfall had complained that the project was hobbled by strict limits on the amount of water that could be drawn from the adjacent Elbe River for cooling purposes (as well a similar limits on the discharge of heated-water back into the river).

German environmental groups have been outspoken critics of the Hamburg plant and are expected to press authorities for more details of the settlement.

Belgian ratification of Colombia BIT suspended in face of labour protest 16.6.2010

Ratification of a bilateral investment treaty between Colombia and the Belgium-Luxembourg Economic Union has been suspended amidst pressure from Belgian trade unions critical of labour conditions in Colombia.

Belgium negotiates investment treaties in partnership with neighbouring Luxembourg, and has concluded such pacts with upwards of 100 countries. A BIT between the Belgium-Luxembourg Economic Union (BLEU) and Colombia was negotiated earlier this decade and signed on 4 February 2009.

So-called BLEU BITs undergo a complicated ratification process in Belgium whereby they must be approved by two Federal chambers of parliament, as well as three separate regional governments representing the Flemish, Walloon and Brussels-Capital regions.

Following regional Belgian elections in June of 2009, coalition governments in the Flemish and Walloon regions announced that future trade and investment agreements would need to incorporate binding labour and environmental standards.

As such, when trade union critics raised objections in the ensuing months to the BLEU-Colombia BIT— and what they characterized as inadequate labour provisions — the ratification process hit the skids. On 3 March 2010, the Flemish regional government announced it would no longer pursue ratification of the Colombia BIT.

“Following regional Belgian elections in June of 2009, coalition governments in the Flemish and Walloon regions announced that future trade and investment agreements would need to incorporate binding labour and environmental standards.”

Claim by oil corporation blocked for not giving prior notice of treaty violations 27.6.2010

Arbitrators have ruled that certain claims for breach of the US-Ecuador bilateral investment treaty are inadmissible due to the failure of a US energy company to give clear advance notice that it held Ecuador to be in breach of its treaty obligations.

Burlington Resources Inc. sought to hold Ecuador liable for failing to provide physical protection and security for a pair of vast oil development blocks in the Amazonian rain forest.

The sites—officially dubbed Blocks 23 and 24—were awarded in the late 1990s, but have seen clashes with indigenous groups opposed to oil exploration.

Indeed, not long after Burlington bought into the blocks, the company invoked the force majeure clauses of the production-sharing contracts, signaling that conditions beyond its control precluded immediate development in the areas.

Controversy over the two blocks has flared ever since indigenous communities and environmentalists raised concerns about oil development in the Amazonian rain forest. While Burlington has worked to appease critics, it signaled a new course in 2008 when it resolved to sue

Ecuador over a hefty windfall levy which side-swiped the company's other production activities in the country.

As part of its ICSID arbitration, Burlington also leveled charges that the Republic of Ecuador was liable for not providing adequate security so that activities in the stalemated Blocks 23 and 24 could move forward.

The claims, if heard on their merits, would have proven politically contentious—not least as arbitrators might have had to examine Ecuador's other international law obligations, including various human rights law obligations owed to indigenous communities.

In the event, however, Burlington's claims for physical protection and security will not be heard—at least at this time—by ICSID arbitrators.

In their 2 June 2010 Decision on Jurisdiction, arbitrators held that Burlington failed to give clear notice to Ecuador of its claims for denial of physical protection and security, and therefore the mandatory six-month waiting period in the treaty (which must elapse before arbitration can be initiated) had not begun to run. As such, the physical security and protection claims presented in Burlington's 2008 Request for Arbitration were deemed inadmissible by arbitrators.

Non-disputing parties CAFTA State intervenes in arbitration to present arguments 22.4.2010

The Republic of El Salvador has intervened in an ongoing arbitration between another party to the US-Central America Free Trade Agreement (CAFTA) and a US-based investor.

The intervention by El Salvador is pursuant to a CAFTA provision permitting other member-states to make submissions setting forth their views on matters of CAFTA interpretation.

In a brief submission dated 19 March 2010, El Salvador argued that the CAFTA investment chapter does not cover pre-existing disputes (i.e. disputes which arose prior to the CAFTA's entry into force and which persisted thereafter).

The move by El Salvador marks the first instance where a CAFTA party has exercised its right under Article 20.2 of CAFTA's Chapter 10 on investment.

Notably, the CAFTA investment chapter does not expressly address pre-existing disputes; however, El Salvador maintains that a reading of various CAFTA provisions leads to the conclusion that the chapter covers only government "measures" occurring after the entry into force of the treaty.

As new case lands at ICSID, and several more loom, Bolivia turns up the heat on arbitral system 4.22.2010

On the heels of a politically-embarrassing provisional measures decision issued by an arbitral tribunal at the International Centre for Settlement of Investment Disputes (ICSID), the Republic of Bolivia has reacted by demanding the disqualification of all 3 tribunal members.
According to a source familiar with the request, Bolivia contends that the arbitrators are prejudiced against the government, and fail to meet the "impartiality" criterion imposed by the ICSID system.

Under the ICSID rules, a challenge to an entire tribunal would be adjudicated by the Chairman of ICSID Administrative Council (i.e. the World Bank President).

However, in view of Bolivia's record of antipathy towards ICSID, it remains to be seen whether the Centre would hand the challenge off to some outside body. On occasion, the Centre has done this where challenges have been made to arbitrators with prior ties to the World Bank (for e.g. Andres Rigo Sureda, a former senior World Bank lawyer).

The latest move by Bolivia marks a dramatic escalation of hostilities between the country and an arbitral institution from which the government has sought to distance itself in recent years.

In 2007, Bolivia withdrew from ICSID, complaining that the Centre was biased towards foreign investors.

However, Bolivia's withdrawal did not sever all ties with the Washington-based Centre. One pre-existing arbitration, the Quiborax claim, continued to be arbitrated at the Centre, while another lodged by a Telecom Italia subsidiary in 2007 was pursued for nearly two years before an agreement was struck to move the dispute to ad-hoc arbitration.

More recently, a US energy company has sought ICSID arbitration in relation to the nationalization of its stake in a Bolivian energy company. PanAmerican contends that the move by Bolivia to nationalize its 51% shareholding in the Chaco energy company breached protections contained in the US-Bolivia bilateral investment treaty by failing to provide full compensation.

Although Bolivia has objected vociferously to new claims being brought to the ICSID following the 2007 announcement of the country's withdrawal from ICSID, PanAmerican is expected to argue that it was one of several multinational energy firms to put Bolivia on notice in 2005 of potential arbitration of claims arising out of the country's nationalization plans for the energy sector. As such, this consent or acceptance of Bolivia's offer to arbitrate at the ICSID would have been in place long before the country gave notice in May of 2007 to withdraw from the ICSID.

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Notes

1 Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe (ICSID Case No. ARB/05/6)

Argentina on the hook for breach of Fair and Equitable Treatment *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/03/19)*

Lise Johnson

On 30 July 2010, the ICSID tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v. Argentina* issued a decision unanimously finding Argentina liable to the claimants in three separate, but procedurally consolidated, cases.

In 1993, in connection with a privatization program, Argentina granted a 30-year concession to operate water and waste-water services in and around the city of Buenos Aires to an Argentine company, AASA. That company had been formed and funded to operate the concession by a group of foreign investors, including the claimants, Suez, Vivendi Universal S.A., Sociedad General de Aguas de Barcelona S.A. and Anglian Water Group Ltd. (AWG).

After roughly ten years of the concession's operation, in April 2003 the foreign investors in AASA initiated these cases against Argentina, alleging that a number of government actions and omissions related to the country's financial crisis derailed the concession and destroyed the value of the investment.

The claimants charge that the governments' conduct violated Argentina's obligations to the investors under applicable Bilateral Investment Treaties (BITs) with Spain, the UK and France.

Specifically, the claimants argued that Argentina breached the treaties because it (1) unlawfully expropriated the investors' property, (2) failed to grant the investors "full protection and security," and (3) failed to provide the investors fair and equitable treatment (FET).

According to the Claimants, these breaches arose from general legal and regulatory measures enacted by Argentina, Argentina's conduct to "force" renegotiations of the concession, and Argentina's unwillingness to raise the tariff for water and waste-water services.

In 2006, Argentina terminated the concession and transferred the water and waste-water services system to a state entity. Argentina supported that action by alleging AASA had breached its obligations under the concession agreement by, among other failures, providing water with excessive levels of nitrate. The Claimants added Argentina's termination of the contract to their list of purportedly wrongful conduct supporting their claims.

The Tribunal first rejected the Claimants' arguments that general legal and regulatory measures enacted by the government expropriated the investors' property. The Tribunal stated that such actions were within the country's general police powers and therefore could not be expropriatory.

Second, the Tribunal reasoned that the government's unwillingness to raise the tariffs likewise did not constitute an expropriation because such inaction did not substantially deprive the investors of their investment.

Third, the Tribunal determined that although the government's actions in connection with terminating the concession might have constituted a contract breach, they did not rise to the level of a treaty violation.

Next, the Tribunal evaluated and rejected the investors' "full protection and security" claim. In doing so, the Tribunal stated it would not follow other recent decisions' expansive interpretations of the obligation. Instead, it adopted the obligation's "traditional" meaning, which, according to the Tribunal, essentially only requires governments to protect investors and investments from physical injury.

The Tribunal then turned to the FET obligation. It interpreted the obligation as requiring states to protect investors' objective and reasonable "legitimate expectations" taking into account all relevant circumstances. Those circumstances, noted the Tribunal, include such factors as the nature of the investment, Argentina's rights and interests to exercise its regulatory authority, and Argentina's history and political, economic and social conditions.

Applying that interpretation, the Tribunal concluded that Argentina breached the FET obligation by refusing to adjust the tariff and through its "forceful" treatment of AASA in attempts to renegotiate the terms of the concession contract. However, it rejected the Claimants' arguments that the government's termination of the agreement violated the standard. The Tribunal explained that although that the termination might have breached the contract, it did not rise to the level of a treaty breach.

Notably, one of the members of the tribunal, Professor Pedro Nikken, wrote separately to critique the tribunal's interpretation of the FET obligation. In particular, he disputed the notion advanced by the Tribunal in this case and others that the standard aimed to protect investors' "legitimate expectations." Nevertheless, Professor Nikken stated that he agreed with the Tribunal's ultimate conclusion that Argentina breached the FET obligation.

Finally, the Tribunal addressed whether the "necessity" defense under customary international law absolved Argentina of liability. It accepted Argentina's argument that the country experienced a severe economic crisis that could in theory justify the defense. Nevertheless, the defense did not protect Argentina in these cases because, the Tribunal reasoned, Argentina could have taken other actions to respond to the crisis that did not violate the investors' rights.

Argentina had urged the Tribunal to take into account the fact that the concession dealt with water and impacted the human right to that resource. The Tribunal also noted that an amicus curiae brief submitted by a group of five NGOs had made similar arguments.

However, the Tribunal rejected the notion that a government's human rights obligations to assure its population the right to water trump its obligations to investors under BITs. According to the Tribunal, states must respect both its human rights and treaty obligations equally.

The Tribunal's decision only addresses liability. It will now proceed to determine the amount of damages, fees and expenses Argentina must pay.

Award against Argentina annulled *Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16)*

Lise Johnson

On 29 June 2010, the ad hoc Annulment Committee in one of the many investment cases against Argentina annulled the Tribunal's previous award against that country.

This dispute, like the vast majority of the investment disputes filed against Argentina, arose out of actions taken by the government in response to its financial crisis during the late 1990s and early 2000s.

The Claimant, a US investor that held shares in two Argentine natural gas distribution companies, initiated its ICSID action on 11 September 2002. It alleged that the government's conduct violated the investor's rights and breached the country's obligations under the applicable Bilateral Investment Treaty (BIT) between the United States and Argentina.

On 28 September 2007, the Tribunal found that Argentina had breached the fair and equitable treatment (FET) obligation and the "umbrella" clause.

Argentina filed an application for annulment of the decision on 25 January 2008.

In support of its application, Argentina argued that the Tribunal erred in assuming jurisdiction over the dispute, in its treatment of an arbitrator challenge, in admitting and interpreting certain items of evidence, and in interpreting and applying the FET standard, the "umbrella" clause, and the "necessity" defenses.

These flaws, Argentina further asserted, supported annulment pursuant to Article 52 of the ICSID Convention on the grounds that the Tribunal (1) was not properly constituted, (2) manifestly exceeded its powers, (3) seriously departed from a fundamental rule of procedure, and (4) failed to state reasons on which the award was based.

The Annulment Committee first addressed the issue of jurisdiction. Argentina had argued that Sempra, as a minority shareholder in the natural gas distribution companies affected by Argentina's measures, did not have standing to bring claims relating to harms allegedly suffered by those companies.

However, the Committee quickly rejected that argument, stating that it was "clearly of the opinion that Sempra" could bring its ICSID claims as they alleged damage to its investment, the minority shareholdings.

Next, the Annulment Committee examined Argentina's claim that the Tribunal manifestly exceeded its powers by equating the Article XI necessity defense with the CIL necessity defense. According to Argentina, the Article XI defense was distinct from, and required application of a different, less stringent test than the CIL defense. Thus, it continued, the Tribunal was obligated to, but did not, apply the Article XI test, and that failure to apply the applicable law constituted a manifest excess of powers.

The Annulment Committee agreed that the Tribunal manifestly exceeded its powers by failing to distinctly apply the applicable law, Article XI of the BIT. In reaching its conclusion that the CIL defense and treaty provision were in fact different and required separate analysis and application, the Committee highlighted a key distinction between the two.

According to the Committee, the CIL defense assumes the conduct it covers is "not in conformity with an international obligation of the State." In contrast, the Article XI provision states that, if it applies, the State's action will not be incompatible with its treaty obligations in the first place. (para. 200).

The Committee then concluded that because the Tribunal manifestly exceeded its powers by failing to apply the applicable treaty provision, the Committee had to annul the award in its entirety.

Second Argentine award annulled in one month

Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3)-Annulment Proceeding[1]

Lise Johnson

Following on the heels of the Sempra annulment decision, on 30 July 2010, the ad hoc Annulment Committee in this case annulled significant parts of the ICSID Tribunal's May 2007 award. This decision relieved Argentina of the obligation to pay the claimants, Enron Creditors Recovery Corporation and Ponderosa Assets L.P., the roughly US$ 100 million in compensation that had been ordered by the Tribunal.

The Claimants were minority shareholders in an Argentine gas transportation company, TGS. They invested in the company in 1992 after Argentina privatized its gas distribution and transportation sectors. The dispute arose when Argentina took various measures in response to its financial crisis that affected the legal and regulatory framework governing TGS's operations.

The foreign investors' initiated their case arguing that the government's actions harmed their investment in TGS and violated various provisions in the Bilateral Investment Treaty (BIT) between the United States and Argentina.

The Tribunal determined that Argentina's actions violated the treaty's Fair and Equitable (FET) obligation and the "umbrella" clause and ordered Argentina to pay the Claimants US$ 106.2 million.

Argentina then sought to annul the decision. It argued to the ad hoc Annulment Committee constituted to hear the matter that the Tribunal's decision should be annulled based on several of the limited grounds for annulment that are permitted in Article 52 of the ICSID Convention.

More specifically, Argentina asserted that the Tribunal (1) had manifestly exceeded its powers, (2) seriously departed from a fundamental rule of procedure, and (3) failed to state reasons on which the award was based. The Tribunal's failures, Argentina asserted, were numerous and included its acceptance of jurisdiction, admission and evaluation of evidence, and the Tribunal's interpretation of Argentina's obligations and defenses under the BIT.

When evaluating the merits of Argentina's application, the Annulment Committee peppered the decision with statements regarding its restricted role. It explained that per the ICSID Convention and guidance from other annulment decisions, its function was to ensure that the award was legitimate, not correct or convincing. Further, the Committee stated that it was not responsible for ensuring consistency in jurisprudence. That responsibility, it added, more properly belonged to the investment tribunals.

One by one, the Committee rejected Argentina's contentions regarding the Tribunal's findings that it had jurisdiction and that Argentina's conduct breached the FET obligation and the "umbrella" clause.

However, based on arguments the Committee seemed to raise on its own accord, it annulled the Tribunal's finding that Argentina could not rely on the defense of "necessity" under customary international law (CIL).

The Committee stated that annulment on this issue was warranted because, when considering the CIL defense, the Tribunal had failed to apply the applicable law and failed to state reasons for its finding.

More specifically, among the Tribunal's failures were that it too promptly concluded that the CIL necessity defense would only apply if the challenged measures were the "only" means available to the state to protect its essential interests. Similarly, the Committee stated that even if that were the proper test, the Tribunal was too quick to conclude that Argentina did not satisfy it.

Another error supporting annulment was that the Tribunal was too cursory in its determination that Argentina could not benefit from the CIL defense because it itself had contributed to the state of necessity in the country.

In the award, the Tribunal had relied on its determination that the CIL defense of necessity did not apply in order to also find that the necessity exception contained in the applicable BIT did not cover Argentina's actions. Consequently, based on its decision annulling the aspect of the award regarding the CIL necessity defense, the Committee also annulled the aspect of the award in which the Tribunal stated that the treaty defense did not apply.

The Committee specified, however, that it was not expressing any view on the relationship between the CIL defense and the treaty defense, nor on the Tribunal's conclusion that the meaning of those two defenses was essentially the same.

The Committee then proceeded to annul the Tribunal's findings that Argentina had breached the FET obligation and violated its obligations under the "umbrella" clause. According to the Committee, these decisions had to be annulled because, had the Tribunal determined the necessity defenses applied, it might have found that Argentina was not liable for any breach of the BIT.

Claim against Turkey deemed "frivolous"

Mr. Saba Fakes and Republic of Turkey, (ICSID Case No. ARB/07/20) - Award

Damon Vis-Dunbar

An ICSID tribunal has struck down a claim by Saba Fakes*, a Dutch and Jordanian national, for lack of jurisdiction, marking the latest of several unsuccessful bids against Turkey by claimants linked to the Uzan family.

The Uzans, a Turkish family that controlled a vast business empire, have faced multiple criminal proceedings in Turkey related to fraud and money laundering, as well a high-profile 2001-2002 lawsuit in New York brought by Nokia Corporation and Motorola Credit Corporation.

The present case involves shares held by members of the Uzan family in Telsim, a major mobile phone company in Turkey. The Claimant in this dispute argues that he became legal owner of those shares in 2003, before they were seized and sold by Turkish authorities.

Mr. Fakes brought his US$ 19 billion claim before ICSID in 2007, alleging multiple breaches of the Dutch-Turkey BIT.

The Tribunal's deliberations centered primarily on the question of whether Mr. Fakes had an investment in Turkey, as intended by the ICSID Convention and the Dutch-Turkey BIT. Determining the existence of an investment often poses a challenge in ICSID arbitrations because the ICSID Convention does not provide a definition or criteria for the term 'investment'. Lacking clear guidance, tribunals have taken widely diverging approaches.

The so-called Salini test, used by some tribunals, holds that the ICSID Convention requires that an investment consist of four criteria: (1) a contribution (2) a certain duration (3) an element of risk and (4) a contribution to the host State's economic development. Some tribunals have added criteria to the list, while others have stripped them away.

In this case, the Tribunal settled on three criteria: contribution, duration and risk, explaining that:

"These three criteria derive from the ordinary meaning of the word 'investment', be it in the context of a complex international transaction or that of the education of one's child: in both instances, one is required to contribute a certain amount of funds or know-how, one cannot harvest the benefits of such contribution instantaneously, and one runs the risk that no benefits would be reaped at all, as a project might never be completed or a child might be up to his parents' hopes or expectations."

Ultimately, the Tribunal determined that the Mr. Fakes arrangement with Mr. Uzan failed to meet any of these criteria, in large part because Mr. Fakes never realized legal ownership over the Telsim shares.

According to Mr. Fakes' testimony, his role was to act as "bait" to lure potential buyers of the Telsim shares, by masking the role of Mr. Uzan as the true owner of the shares.

To discourage similarly "frivolous" claims, Mr. Fakes has been ordered to cover the full cost of the proceedings. Therefore, in addition to his own costs, the Mr. Fakes is also on the hook for US$ 182,500.00 of Turkey's expenses.

Tribunals have taken a similarly dim view of other claims against Turkey involving members of the Uzan family.[2]

Notes

1 This dispute was previously titled Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic. The title was formally changed by the ICSID Centre on 8 May 2009 to reflect a name change of one of the claimants.

For reporting on these cases, see:

2 "Tribunal dismisses claim by Europe Cement against Turkey; Claimant ordered to bear cost of the arbitration", by Damon Vis-Dunbar, September 2009, available here: http://www.investmenttreatynews.org/content/archives.aspx

"Cementownia claim against Turkey found to be 'manifestly ill-founded'", By Elizabeth Whitsitt, November 2009, available here: http://www.investmenttreatynews.org/cms/news/archive/2009/11/01/cementownia-claim-against-turkey-found-to-be-manifestly-ill-founded.aspx

Public Statement on the International Investment Regime

Academics from 30 universities across 11 countries have lent their signature to a statement pronouncing concern that the international investment regime hampers the ability of governments to act in the public interest. The statement draws particular attention to investor-state arbitration—the common means to settle investment disputes under international investment agreements. In numerous cases tribunals constituted under these treaties "have prioritized the protection of the property and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples," state the signatories. Rather than international arbitration, the statement offers that domestic law should act as the basis for regulating investor-state relations. States are urged review their investment treaties with an eye to withdrawing or revising them, and international organizations are also called upon to examine the risks posed to governments by investment arbitration, and offer recommendations for alternatives.

The public statement is available at: http://www.osgoode.yorku.ca/public_statement/.

World Investment Report 2010: Investing in a Low-Carbon Economy, UNCTAD, 2010

The United Nation Conference on Trade and Development's (UNCTAD) World Investment Report 2010 remarks that international investment agreements are undergoing a "systemic evolution", in reaction to the growing number of investor-state arbitrations and divergent interpretations of investment provisions by arbitral tribunals. This includes the process of reviewing model BITs—an exercise that Russia, France, Colombia, Mexico, Austria and Germany have all undertaken in the last decade—to terminating certain treaties altogether, a move taken by Ecuador in 2008. New and renegotiated treaties demonstrate that governments are increasingly drafting BITs with greater precision, according to UNCTAD. For example, negotiators have clarified the scope of the treaties, introduced exceptions and clarified the meaning of specific obligations.

The World Investment Report 2010 is available at: http://www.unctad.org/Templates/WebFlyer.asp?intItemID=5535&lang=1

Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits? World Bank, 2010

A new report from the World Bank finds a massive upsurge in investor interest in farmland, mainly in Africa. In 2008, the year after rising food prices sparked off a global food crisis, 45 million hectares worth of land deals were announced, 70 percent in Africa. The total area is greater than the arable land available in France, Germany, the United Kingdom and Italy, combined. The World Banks research confirms the scale of the problem with an inventory of land deals in selected countries. Between 2004 and 2009, for example, Sudan, Liberia and Ethiopia transferred 4.0, 1.6 and 1.2 million hectares of farmland to investors, respectively. The trend is particularly worrying, given recent unrest over the cost of bread in Mozambique, and a warning by the UN Food and Agriculture Organisation of an "unstable situation" and "critical months ahead." The report points to a strong focus on African countries with weak land governance. Furthermore, land is often transferred in a way that neglects existing land rights and is socially, economically, and environmentally unsustainable. The IISD and the Global Donor Platform will host an online discussion from 13 September to 8 October to review the findings of the report and make recommendations for next steps. Please visit http://www.ediscussion.donorplatform.org/ for more information.

September

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THIRD INVESTMENT ARBITRATION FORUM,
Mexico City, Mexico, http://www.juridicas.unam.mx/

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THE FIFTEENTH INVESTMENT TREATY FORUM PUBLIC CONFERENCE,
London, England, http://www.biicl.org/events/view/-/id/546/

16-17
THE SWEDISH ARBITRATION DAYS 2010 - DAMAGES AND OTHER RELIEF IN INTERNATIONAL ARBITRATION,
Stockholm, Sweden, www.swedisharbitration.se

22-23
INVESTMENT TREATY ARBITRATION,
London, United Kingdom, c5-online.com/arbitration

October

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FOREIGN DIRECT INVESTMENT INTERNATIONAL MOOT COMPETITION,
Malibu, California, http://www.fdimoot.org/

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INTERNATIONAL INVESTMENT ARBITRATION - THE NEED OF CHANGE OF LEGAL REGULATIONS,
Warsaw, Poland, http://www.sadarbitrazowy.org.pl/en/conference26october

27-29
4TH ANNUAL INVESTMENT FORUM FOR DEVELOPING COUNTRY INVESTMENT NEGOTIATORS,
New Delhi, India, http://www.iisd.org/investment/

November

17-20
HONG KONG INTERNATIONAL ARBITRATION CENTRE 25TH ANNIVERSARY,
Hong Kong, http://www.hkiac.org/25th

December

8-9
THE 15TH GENEVA GLOBAL ARBITRATION FORUM - AHEAD OF THE CURVE,
Geneva, Switzerland, http://www.ggaf.ch/

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