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New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps

Lise Johnson and Nathalie Bernasconi-Osterwalder

feature 1



In July 2013, the United Nations Commission on International Trade Law (UNCITRAL) adopted a package of rules aiming to ensure transparency in investor-State arbitration (the “Rules on Transparency”), ratifying the work done by delegations to UNCITRAL—comprised of 55 Member States, additional observer States and observer organizations—over the course of nearly three years of negotiations.¹

Under previous versions of the UNCITRAL Arbitration Rules, disputes between investors and States were often not made public, even where important public policies were involved or illegal or corrupt business practices were uncovered. In contrast, the new rules, which will officially come into effect on April 1, 2014, provide for a significant degree of openness throughout the arbitral proceedings.

With the adoption of the new rules, there is now a carefully negotiated and widely approved template that can serve as a model for how to conduct investor-State arbitrations transparently. This model reflects and is consistent with broader worldwide trends recognizing the importance of transparency as a tool for promoting and ensuring effective democratic participation, good governance, accountability, predictability and the rule of law.²

The status quo prior to the Rules on Transparency

Prior to the Rules on Transparency, no arbitration rules used in investor-State arbitration had mandated transparency throughout the arbitral process. Indeed, most arbitration rules referred to in investment treaties are (with the exception of rules requiring both disputing parties’ consent to open hearings) essentially silent on the matter of transparency, neither mandating confidentiality nor requiring disclosure.

Yet, all arbitral rules allow the disputing parties and the tribunal significant latitude to determine—individually or through agreement—the degree of openness of the proceedings. The new Rules on Transparency thus represent not a complete upending of the approach to transparency in arbitration, but, instead, a shift in the underlying presumption toward openness, rather than privacy, in treaty-based investor-State arbitrations. Importantly, the new rules also set up a process and institutional framework to ensure that transparency is clearly and consistently put into practice.

New UNCITRAL arbitration rules on transparency

The new rules ensure transparency from the beginning to the end of treaty-based investor-State arbitrations to which they apply. They contain one article that governs the scope and manner of application of those provisions (Article 1); three articles mandating disclosure and openness (Articles 2, 3, and 6); two governing participation by non-disputing parties (Articles 4 and 5); one setting forth exceptions from the disclosure requirements (Article 7); and one regarding management of disclosure through a specific repository (Article 8).

After significant debate over the form of the new Rules on Transparency (e.g., whether they would even be rules or merely guidelines, a stand-alone instrument or an integral part of the UNCITRAL Arbitration Rules), UNCITRAL determined that its output would be rules that would both be (a) part and parcel of the UNCITRAL Arbitration Rules and (b) available as a stand-alone instrument for application in disputes governed by other arbitral rules. To effectively and clearly accomplish the goal of incorporating the Rules on Transparency as an integral part of UNCITRAL arbitrations, UNCITRAL amended its 2010 general arbitration rules by inserting a new paragraph (4) in Article 1 of those rules. Article 1(4) of the new 2013 UNCITRAL Arbitration Rules expressly states that the rules include the Rules on Transparency when the underlying dispute is based on an investment treaty.

Article 1 – Scope of application

The new Rules on Transparency will apply on a default basis to UNCITRAL investor-State arbitrations conducted under investment treaties concluded after the new rules come into effect on April 1, 2014. However, the State parties to the underlying treaty can agree to modify that default rule of application and “opt out” for (future) treaties, for example, by expressly excluding application of the UNCITRAL Rules on Transparency or stating that the “UNCITRAL Arbitration Rules, as adopted in 1976” will apply. In UNCITRAL arbitrations brought under treaties concluded prior to April 1, 2014, the Rules on Transparency will not apply unless States or disputing parties expressly “opt into” the new rules.

The Rules on Transparency also make explicit what is otherwise implicit: that the new rules may be used in connection with arbitrations under other arbitral rules. During the negotiations, various arbitral institutions, including the Permanent Court of Arbitration (PCA) and the International Centre for Settlement of Investment Disputes (ICSID), confirmed that the Rules on Transparency could apply to proceedings conducted under their respective rules.³

Some of the provisions in the Rules on Transparency call for the tribunal to exercise discretion. In those cases the rules expressly dictate that a tribunal shall take into account, firstly, the public interest—both in investor-State arbitration generally and in the particular dispute—and, secondly, the disputing parties’ interest in a “fair and efficient” resolution of their dispute.

The Rules on Transparency also address a tribunal’s authority to allow or require transparency in UNCITRAL arbitrations *not* using the Rules on Transparency, and aim to counter any potential presumption *against* transparency. The levels of transparency already

permitted by the general UNCITRAL Arbitration Rules (2010 or 1976) are in no way intended to be reduced by any non-application of the Rules on Transparency. The drafters also inserted limits on the ability of States to evade application of the Rules on Transparency where they do apply.

As regards their placement in the legal hierarchy, the Rules on Transparency trump conflicting provisions in applicable arbitration rules (e.g., Art. 1(1) of UNCITRAL Arbitration Rules 1976, 2010, and 2013). However, in case of conflict with provisions in the applicable treaty, the treaty provisions will prevail. The principle that the arbitration rules cannot prevail over mandatory laws is also reflected.⁴

Article 2 – Publication of information at the commencement of arbitral proceedings

The compromise reached in Article 2 requires prompt disclosure of a basic set of facts (which will not require exercise of subjective judgment or discretion by the repository) once there is evidence that the respondent has received notice of the arbitration. In some cases, the disputing parties may disagree about whether or not the Rules on Transparency apply. Nonetheless, Article 2 requires each disputing party and the repository to take action before a tribunal is in place to resolve any disputes regarding that issue. The notice of arbitration itself will be subject to automatic mandatory disclosure pursuant to Article 3 (below), but only after constitution of the tribunal.

Article 3 – Publication of documents

Article 3 provides for disclosure of documents submitted to or issued by the tribunal along three categories: (1) a wide set of documents submitted to or issued by the tribunal during the proceedings is to be *mandatorily* and *automatically* disclosed (including all statements and submissions by the disputing parties and non-disputing State parties or third persons; transcripts of hearings; and orders, decisions and awards of the arbitral tribunal); (2) documents such as witness statements and expert reports are to be *mandatorily* disclosed once any person requests their disclosure from the tribunal; and (3) other documents such as exhibits may be ordered to be published by the tribunal depending on the exercise of its discretion.

Where disclosure is mandatory, the tribunal must send the information to the repository “as soon as possible” after steps have been taken to restrict disclosure of information deemed protected or confidential.⁵ The repository is then to publish the information on its website.

Article 4 – Submission by a third person

In line with previous practice by tribunals, the Rules on Transparency expressly affirm the authority of investment tribunals to accept submissions from so-called *amicus curiae* (friend of the court), while incorporating detailed rules and guidelines. This express grant or acknowledgement of authority concerns “written submissions” and does not address other forms of participation, such as statements at hearings. Tribunals, however, may be able to permit other forms of participation pursuant to their discretionary authority under Article 15 of the 1976 UNCITRAL Arbitration Rules and Article 17 of the 2010 and 2013 UNCITRAL Arbitration Rules.

Article 5 – Submission by a non-disputing party to the treaty

The Rules on Transparency *require* that tribunals accept submissions on issues of *treaty interpretation* from non-disputing State parties to the relevant treaty, provided that the submission does not “disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.” They further expressly authorize tribunals to invite submissions (not only “written submissions”) from non-disputing State parties on matters of treaty interpretation under the same conditions. The tribunal also has authority to accept submissions on other matters relevant to the dispute from non-disputing State parties to the underlying treaty.

Article 6 – Hearings

A notable departure from other arbitration rules is that the Rules on Transparency require hearings to be open, subject to three limitations: (1) to protect confidential information; (2) to protect the “integrity of the arbitral process”; and (3) for logistical reasons. The disputing parties—alone or together—cannot veto open hearings. The article explicitly gives the tribunal authority to determine how to make hearings open, and contemplates that the tribunal may decide to facilitate public access through online tools. It also allows the tribunal limited authority to close the hearings for logistical reasons, while ensuring that this power will only be narrowly applied and not abused.⁶

Article 7 – Exceptions to transparency

To balance the Rules on Transparency’s provisions on disclosure, the rules also specify that disclosure is subject to exceptions for confidential or protected information. Article 7(2) lists four potentially overlapping categories of information that are confidential or protected. Whether and what information will fall under the exceptions will be an issue to be decided on a case-by-case basis based on the nature of the information and the applicable law. Further, Article 7(5) provides respondent States a self-judging exception to protect against disclosure of information that they “consider” would be contrary to their essential security interests. Finally, there is also an exception to the transparency rules that permits tribunals to restrain or limit disclosure when necessary to protect the “integrity of the process,” a narrow category that is only intended to restrain or delay disclosure to cover exceptional circumstances, such as witness intimidation or comparably exceptional circumstances.

Article 8 – Repository of the published information

This article reflects the unanimous decision by UNCITRAL that the repository should be UNCITRAL itself. At the time of adoption of the Rules on Transparency, however, it was not known whether UNCITRAL would have the resources available to play this role. If, come April 1, 2014, UNCITRAL is unable to serve as the repository, the PCA will take over that function. Such delegation of that function to the PCA, however, is intended to be temporary: the function will be transferred to UNCITRAL if and when UNCITRAL is ready for the task.

UNCITRAL’s efforts in context and next steps

UNCITRAL’s aim of “ensuring transparency in investor–State arbitration”⁷ is complex. In their investment treaties, most States offer investors the option to take

disputes arising under the treaties to international arbitration and to select from a menu of options which procedural rules will actually apply. The options may include the arbitration rules of UNCITRAL, ICSID or ICSID's Additional Facility, the International Chamber of Commerce (ICC) or the Stockholm Chamber of Commerce (SCC).

Even though the UNCITRAL arbitration rules now require transparency, the investor would be free to choose another alternative proposed in the treaty. Moreover, pursuant to a provision inserted in Article 1(2) of the Rules on Transparency, those rules will not by default apply to any UNCITRAL arbitrations arising under existing investment treaties.

Thus, although UNCITRAL's adoption of the Rules on Transparency represents crucial progress in the long-running efforts to increase transparency of treaty-based investor-State arbitrations under the UNCITRAL arbitration rules, in order to ensure real change, UNCITRAL and States need to take a number of additional steps.

Offers of consent, interpretive statements, treaty amendment and adoption of a transparency convention

Through unilateral offers of consent to apply the Rules on Transparency, States could enable and encourage application to disputes governed by UNCITRAL and other rules, irrespective of the date on which the underlying investment treaty was concluded.⁸ The other possibility is to issue unilateral or joint interpretive statements manifesting such consent. While these options have yet to be discussed in much detail in UNCITRAL sessions, they represent viable and seemingly simple mechanisms for facilitating broad use of the Rules on Transparency.

Another option to enable the Rules on Transparency to apply to existing and future treaties is for States to amend their existing investment treaties to expressly allow, if not require, their use. Yet, renegotiation of treaties is an option that many States will likely wish to avoid, as it could complicate their international economic relations with their trading partners.

An easier approach is for States to sign onto a new treaty—i.e., a transparency convention. Pursuant to Article 30 of the Vienna Convention on the Law of Treaties (VCLT), such a treaty could supplement or supersede provisions in investment treaties between transparency convention parties. Promisingly, UNCITRAL has mandated continued work on a transparency convention in order to facilitate application of the Rules on Transparency to disputes arising under treaties concluded prior to the rules' effective date, including arbitrations under rules other than the UNCITRAL Arbitration Rules. A draft text of this convention has been prepared by the UNCITRAL Secretariat, but has not yet been openly debated in UNCITRAL sessions. That will happen when UNCITRAL's Working Group II begins work focused on the transparency convention this fall.

Conclusion

Five years after officially recognizing the public interest in treaty-based investor-State arbitrations, and three years after beginning negotiations on a legal standard

to ensure openness of those proceedings, UNCITRAL has adopted a set of Rules on Transparency providing for increased disclosure of information generated from the initiation through the termination of the disputes. By incorporating those rules as an integral part of the UNCITRAL Arbitration Rules as amended in 2013, UNCITRAL has also taken an important policy decision reflecting the UN body's commitment to make transparency, rather than confidentiality, the default rule for investor-State disputes.

However, UNCITRAL has not yet completed its task. In order to truly achieve the goal of ensuring transparency in investor-State dispute settlement, it must now take additional steps to facilitate application of the Rules on Transparency to disputes initiated under both existing and future treaties. If done right, the new UN Rules on Transparency will have a reach beyond disputes conducted under UNCITRAL Arbitration Rules to apply to all investor-State disputes.

Author

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Notes

- 1 The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Pre-release publication – 30 July 2013) are available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf>
- 2 *Delivering Justice: Programme of action to strengthen the rule of law at the national and international levels*, Report of the Secretary-General (2012), A/66/749.
- 3 Notably, the Commission rejected the idea that the carve-out in Article 1(2), which limits the Rules on Transparency's applicability to disputes brought under treaties adopted after the Rules on Transparency's entry into force, could be extended to non-UNCITRAL arbitrations.
- 4 If, however, the Rules on Transparency are incorporated in a convention on transparency, as is discussed below in Part IV, then domestic law would have to be brought into conformity with the convention.
- 5 In contrast, the tribunal has more flexibility regarding the means of disclosure of requested exhibits or other documents.
- 6 Transcripts are subject to a different rule in Article 3. Thus, if all or part of a hearing is closed for any of the three permissible reasons identified in Article 6, non-confidential aspects of the transcript of that hearing (if prepared) will nevertheless be disclosed in accordance with Articles 3 and 7.
- 7 Report of the United Nations Commission on International Trade Law, 41st session (June 16–July 3, 2008), Gen. Ass. 63rd session, supp. no. 17, A/63/17, para. 314; Report of the United Nations Commission on International Trade Law, 45th session (June 25–July 6, 2012), Gen. Ass. 66th session, supp. no. 17, A/67/17, para. 200; Report of the United Nations Commission on International Trade Law, 45th session (June 25–July 6, 2012), Gen. Ass. 67th session, supp. no. 17, A/67/17, para. 69.
- 8 The North American Free Trade Agreement (NAFTA) parties used this approach in 2003 to provide for open hearings.

Conoco-Phillips and Exxon-Mobil Vs Venezuela and Petróleos De Venezuela: Using Investment Arbitration To Rewrite a Contract

Juan Carlos Boué

feature 2



During the mid-1990s, Venezuela's national oil company, PDVSA, implemented a policy known as the *Apertura Petrolera* (oil opening), which sought to mobilise the capital, technology and managerial capabilities of international oil companies in order to maximise the production of crude oil while simultaneously reducing drastically the fiscal burden on hydrocarbons exploration and production activities in the country. The *Apertura* achieved its objectives to a large extent, albeit in a fashion reminiscent of those operations which are hailed as a medical triumph though the patient winds up dead: production *à outrance* by Venezuela was a key factor behind the oil price collapse of 1998, and the paltry fiscal income generated by some of the *Apertura*-era projects made them the most unfavourable—for the State—in the history of the Venezuelan petroleum industry.¹

The standard-bearers of the *Apertura* were four large, costly and complex projects dedicated to the production, upgrading (i.e. partial refining) and marketing (as synthetic crude) of extra-heavy oils from the Orinoco Oil Belt (OOB), an immense reservoir with over 1 trillion barrels of dense—heavier than water—hydrocarbons in place. Today, three of these projects (Petrozuata, Hamaca and Cerro Negro) are at the centre of the arbitration proceedings that ConocoPhillips (COP) and ExxonMobil (XOM) initiated against Venezuela at the International Center for Settlement of Investment Disputes (ICSID) in late in 2007.²

These arbitrations feature some of the largest claims ever to have been brought against a state by international investors: US\$30 billion in the case of COP and more than US\$15 billion in the case of XOM. However, a careful reading of dispute's factual background suggests that these claims bear little connection with the deals that these oil firms actually agreed to in Venezuela.

A pure and simple contract?

At the root of these arbitrations was the decision by the Venezuelan government to re-structure the OOB projects to bring them in line with the legal requirements and fiscal conditions applicable to all other companies with

oil activities in Venezuela, as set out in the 2001 Organic Law of Hydrocarbons. This included a requirement that the projects be transformed into mixed companies in which PDVSA affiliates would have a shareholding of 60 per cent; to comply, COP and XOM would have had to reduce their equity in the projects by selling part of their stakes to PDVSA. The companies' rejection of the government's terms led to their exit from Venezuela, with PDVSA taking over their shareholdings completely.

The legal questions at the heart of these arbitrations are highly complex, and even explaining them in summary form took a paper running to around one hundred pages of text.³ And yet, paradoxically, XOM CEO Rex Tillerson says “[o]ur situation in Venezuela is a pure and simple contract. The contract was disregarded.”⁴

In a nutshell, COP and XOM allege that, in changing the fiscal conditions for the upgrading projects, and then re-structuring them along the lines sketched above, the Venezuelan government rode roughshod over their vested rights, treating contractual undertakings “as the proverbial ‘scrap of paper’ that they can disregard at their convenience ... breaking all the commitments ... made to induce ... investment.”⁵ As to what exactly those commitments were, however, COP and XOM studiously avoid going into specifics, which is hardly surprising because key documents on the record show that these alleged commitments are figments of over-active corporate imaginations.

The COP and XOM investments were only able to happen thanks to the legal *régime d'exception* defined in Article 5 of the 1975 Venezuelan Oil Nationalisation Law which—“in special cases and if convenient for the public interest”—allowed state entities to “enter into association agreements with private entities ... [with] the prior authorisation of the [Congressional] Chambers in joint session, *within the conditions that they establish*”⁶ Among the numerous conditions that the Venezuelan Congress stipulated for all upgrading projects is one that is fatal in terms of the companies' claims of governmental undertakings to the effect that neither the fiscal nor the legal framework of the upgrading projects would be altered. In the case of the Cerro Negro project, a joint-venture between XOM, PDVSA and British Petroleum,⁷ this condition was expressed in the following language: “[t]he Association Agreement, and all activities and operations conducted under it, *shall not impose any obligation on the Republic of Venezuela nor shall they restrict its sovereign powers, the exercise of which shall not give rise to any claim*, regardless of the nature or characteristics of the claim...”⁸ As can be clearly appreciated, this condition amounts to a full reservation of sovereign rights by the Republic (which, furthermore, was *not* a party to any of the association agreements).

An inconvenient truth?

There exist documents in the public domain, contemporary to the measures, which show that COP and XOM knew full well that their situation *vis-à-vis*

the Venezuelan government was *not* one of “pure and simple contract”. These documents are of special interest because the statements and opinions contained therein were made in the belief that they would remain confidential, but which came out in the open with the publication of 250,000 US diplomatic cables by *Wikileaks*. One such cable reported that the petroleum attaché in the US embassy in Caracas was told by an “ExxonMobil executive ... on May 17 [2006] that his firm did not believe it had a legal basis for opposing the tax increases” resulting from “amendments to the Organic Hydrocarbons Law (OHL) that raise income taxes on the strategic associations from 34 to 50 percent and introduced a 33.3 percent extraction tax.”⁹ This candid confession is irreconcilable with the fanciful COP and XOM allegations of fiscal guarantees. But the cable contains an even more revealing disclosure, which goes to the heart of the quantum of compensation COP and XOM are owed for the nationalisation of their interests, and makes a mockery of their colossal damages claims:

... each of the strategic association agreements has some form of indemnity clause that protects them from tax increases. Under the clauses, PDVSA will indemnify the partners if there is an increase in taxes. However, in order to receive payment, a certain level of economic damage must occur. In order to determine the level of damage, *the indemnity clauses contain formulas that, unfortunately, assume low oil prices. Due to current high oil prices, it is highly unlikely that the increases will create significant enough damage under the formulas to reach the threshold whereby PDVSA has to pay the partners.*¹⁰

The indemnity clauses mentioned above were inserted in the association agreements between PDVSA and its foreign parties pursuant to yet another condition established by Congress for all the associations, and intended to compensate foreign parties for the economic effects of adverse governmental measures, such as tax increases and nationalisation of their interests¹¹. The compensation for which PDVSA affiliates would be liable, however, was not open-ended and unlimited. Instead, the foreign parties would be deemed not to have suffered *any* economic damage when the (inflation-adjusted) price of a benchmark crude oil (Brent) in the international market exceeded a certain threshold. In the case of Cerro Negro, this price was 27 USD/B (in 1996 dollars) while for Petrozuata and Hamaca it was 25 USD/B (in 1994 dollars) and 21 USD/B (in 1996 dollars), respectively. Any cash flows generated at prices beyond these thresholds (which might look modest nowadays, but were perceived as unattainable when negotiated¹²) that were to be appropriated by the government would *not* be compensable by PDVSA affiliates, regardless of how such appropriation occurred. Thus, the income of the projects was, in effect, subject to a cap, whose activation was entirely at the discretion of the government.

Conclusion

When seen through the prism of documents produced

in fulfillment of the procedures contemplated in Article 5 of the Nationalisation Law, the picture that emerges of the actions of the Venezuelan government is at sharp variance with the COP and XOM accounts of them. According to these companies, their legal proceedings were prompted by a commitment to uphold the principle of sanctity of contract. However, the documentary record shows that all OOB projects were authorised by the Venezuelan Congress subject to the express and essential condition that the State was to reserve all of its sovereign powers, including the power to enact and change laws and taxes. Precisely because of this broad reservation of sovereign rights, COP and XOM bargained with PDVSA to obtain protection for their investments through specific compensation mechanisms, which made explicit reference to a limitation of liability on the part of PDVSA, and provided that foreign investors would be deemed not to have suffered any adverse economic consequences from government measures when the price of crude oil exceeded a certain threshold level. Thus, the bargains that COP and XOM insist they are defending are nowhere to be found within the four corners of the agreements that they actually signed. The COP and XOM ICSID arbitrations, therefore, amount to an attempt on their part to use international arbitral tribunals to re-draft contracts and provisions which they themselves had negotiated, so as to secure a windfall (for which they never bargained) upon their exit from Venezuela.

Author

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Notes

1 In 2004, before any changes to the fiscal regime were adopted, gross revenues for the exploration and production segments of the upgrading projects came to around 25 USD/B (per barrel), with royalties of 0.25 USD/B (1 per cent of gross income) and no income tax payments at all. This fiscal income is comparable (at suitably deflated prices) to the one generated eighty years previously by the General Asphalt concession (gross income in 1924, at 2004 prices, 11.32 USD/B; fiscal income 0.35 USD/B, or 3.1 per cent of gross income).

2 As Investment Treaty News was going to press, a decision on jurisdiction and merits was rendered in the dispute between ConocoPhillips and Venezuela. In that decision, a majority of the tribunal upheld ConocoPhillips' claim of unlawful expropriation, while dismissing the claimant's other claims. The next phase of the proceedings will focus on damages.

3 Juan Carlos Boué, *Enforcing Pacta Sunt Servanda? Conoco-Phillips and Exxon-Mobil versus the Bolivarian Republic of Venezuela and Petróleos de Venezuela* (Cambridge, University of Cambridge Centre of Latin American Studies, Work Paper Series 2(1), 2013).

4 Steve Coll, *Private Empire. ExxonMobil and American Power*. London, Allen Lane, 2012: 426.

5 ICC Case No. 15415/JRF: *Mobil Cerro Negro Ltd. v. Petróleos de Venezuela S.A. and PDVSA Cerro Negro S.A.*; Final Award Dated 23 December 2011: ¶¶5, 18.

6 “Law that Reserves to the State the Industry and Trade of Hydrocarbons”, *Official Gazette*, No. 1.769 (Extraordinary), published August 29, 1975: article 5.

7 British Petroleum continues to be a partner of PDVSA in the mixed enterprise that succeeded Cerro Negro.

8 “Congressional Authorisation of the Framework of Conditions for the Cerro Negro Association Agreement”, *Official Gazette No. 36.224*, published June 10, 1997, Eighteenth Condition. Due to considerations of space, the equivalent conditions in the other association agreements cannot be cited. Readers are referred to Boué, *op. cit.*

9 Cable 06CARACAS1445 (confidential) dated 19 May 2006, “Temperature Rises for Strategic Associations”: ¶¶3, 5.

10 Cable 08CARACAS1246 (confidential) dated 5 September 2008, “Venezuela: ConocoPhillips Negotiations Stall”: ¶3.

11 In the Cerro Negro Association Agreement, among the events deemed to constitute a compensable “Discriminatory Measure” was “the expropriation or seizure of assets of the Project or of a Foreign Party's interests in the Project”.

12 Bernard Mommer, “Venezuela, política y petróleo”, *Cuadernos del CENDES*, 16, no. 42, (September-December 1999): ¶4.3.5.

Threat of Pharmaceutical-Related IP Investment Rights in the Trans-Pacific Partnership Agreement:

An *Eli Lilly v. Canada* Case Study

Brook K. Baker

feature 3



After losing two patent cases before the appellate courts of a Western democracy, should a disgruntled foreign multinational pharmaceutical company be free take that country to private arbitration claiming that its expectations of monopoly profits had been thwarted by the courts' decisions? Should governments continue to negotiate trade agreements where expansive Intellectual Property-related investor rights and investor-state dispute settlement (ISDS) are enshrined into hard law? Should we be concerned about the impact of billion dollar arbitral judgments on the willingness of governments to regulate pharmaceutical companies and to corral their efforts to expand their patent and data protection monopolies? Ultimately, should policy makers be concerned about the impact of investor rights on the affordability and accessibility of medicines both in rich and low- and middle-income countries?

The answers to these questions become more urgent given proposed IP and Investment Chapters in the Trans-Pacific Partnership Agreement (TPP)¹ and the recent NAFTA investor dispute notifications by Eli Lilly against Canada.² The Eli Lilly case clarifies the risks of including IP rights in investment chapters and the boundary-pushing claims that can be brought on behalf of foreign pharmaceutical companies.

IP investor rights in the draft Trans-Pacific Partnership

The definition of investments in the draft TPP is certainly broad enough to cover pharmaceutical-related Intellectual Property Rights (IPRs) (i.e., patents, regulatory data, and other trade secrets) in that it only requires “*commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk (emphasis added).*”³ More to the point, the proposed definition directly includes “*intellectual property rights [which are conferred pursuant to domestic laws of each Party].*”⁴

With respect to treatment of IP and other investment rights, Article 12.6.1 of the Draft TPP Investment Chapter requires that, as a *minimum standard of treatment*,

“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.” Subparagraph 2(a) interprets “fair and equitable treatment” to include “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” The most elastic interpretations of this requirement suggest that minimum standard of treatment protects all “reasonable expectations” of an investor even in the absence of direct representations.⁵ In the pharmaceutical context, foreign investors might claim that the minimum standard of treatment covers their reasonable expectations for profits arising from the granting or even filing of IP claims. Thus, changing or re-interpreting substantive IP standards or guidelines judicially, administratively deciding patent oppositions in favor of challengers, or adjudicating limitations and exceptions to granted rights might all be interpreted as violating a minimum standard of treatment.

Article 12.12 of the Draft TPP Investment Chapter also prohibits *direct and indirect expropriation* of a covered investment, which includes failure to pay full market value upon expropriation. Although there is an exception in subparagraph 5 with respect to “compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement,” this exception would not appear to cover exceptions to data exclusivity nor many other patent-related limitations and exception. Even the broader bracketed portion of subparagraph 5, which includes an exception to the expropriation rule for “the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter __ (Intellectual Property Rights),” does not give rights to create novel exceptions to intellectual property rights in the absence of full remuneration. Pursuant to the indirect expropriation rule, it would become unlawful, arguably, to create a public health exception to data exclusivity or to adopt stricter standards for inventions as the US Supreme Court has recently done in the *Myriad* case.

Possible meanings of indirect expropriation are addressed further in proposed Annexes 12-B, C, and D and clarify the duty to protect investor expectations. Annex 12-C requires a case-by-case, fact-based inquiry that considers subparagraph 4(a) factors:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which government action interferes with *distinct, reasonable investment-backed expectations* (emphasis added); and
- (iii) the character of the government action.

Subparagraph (b) places some loose boundaries on those expectations:

Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect the legitimate public welfare objectives [23 For greater certainty, the list of legitimate public welfare objective in this subparagraph is not exhaustive] such as public health, safety, and the environment, do not constitute indirect expropriations.

Although this public welfare exception is helpful, it does not confer an absolute privilege. Investors can still claim that: (1) decisions adversely affecting their IPRs do not advance legitimate public welfare objectives; (2) their rights are rare instances where non-discriminatory regulation is not allowed; and (3) the challenged regulatory actions are discriminatory, for example by specifically targeting pharmaceutical investors.

In addition to supporting unfair treatment and expropriation claims, the Draft TPP Investment Chapter also has typical provisions on national treatment (treating foreign investments and investors no less favorably than domestic ones) and most-favored nation (treating foreign investment and investors of any Party no less favorably than investments or investors of any other Party or non-Party).⁶

Eli Lilly v. Canada – investor claims unbound

The potential impact of the TPP's proposed rights to foreign investors can be seen in pending claims against Canada. On November 2, 2012, Eli Lilly filed a North American Free Trade Agreement (NAFTA) notice of intent to arbitrate claiming \$100 million CAD against Canada. The dispute centers on a decision by Canada's Federal Court of Appeal that invalidated Eli Lilly's patent on Strattera, an attention-deficit hyperactivity disorder medicine; an appeal of that decision was dismissed by the Supreme Court of Canada. Subsequently, following the invalidation of a different patent on the psychiatric medicine Zyprexa, its affirmance by the Federal Court of Appeal, and a denial of a subsequent appeal to the Supreme Court, Eli Lilly filed a second notice of intent to arbitrate, now claiming \$500 million CAD with respect to the two medicines. In ruling against Eli Lilly, the Federal Court of Appeals in both cases held that the utility of a patent is determined by inventive promise that the applicant has made either directly or by "sound prediction" and that such a promise or prediction must be disclosed in the patent application.

In essence, Canadian courts have interpreted the industrial applicability/utility element of patentability to require that a patent claim must disclose a claimed utility. If there is no specific promise of utility, there must be at least a "scintilla of utility" discernable in the application. However, if the applicant goes further and directly or indirectly predicts or promises a specific utility, then that prediction or promise must be supported by evidence disclosed in the patent application. Since Eli Lilly

essentially claimed or "promised" long-term therapeutic benefits with respect to Strattera and both long-term and reduced side effects with respect to Zyprexa, the courts reviewed the applications for evidence of the same and found them wanting.

Eli Lilly asserts that both the Canadian promise doctrine and the related disclosure requirement go well beyond normal practice in the United States and European Union, and that these additional requirements are not found in the Patent Cooperation Treaty (PCT), an international patent law treaty.⁷ In essence, Eli Lilly seeks to challenge both the invalidation of its two patents and the Canadian promise/disclosure utility doctrine in its entirety.⁸ To accomplish this, Eli Lilly claims violations of minimum standard of treatment, indirect expropriation, and national treatment norms.

With respect to minimum standard of treatment, Eli Lilly claims that its expectations of profit were unjustly upset by Canada's judicial adoption of novel utility and disclosure standards. Eli Lilly claims that this judge-made law, different from that used elsewhere, altered the legal framework governing its investments and violated its "most basic and legitimate expectations of a stable business and legal environment."⁹ It argues that it "could not have anticipated that the requirement for utility at the time of its investment (a "mere scintilla") would be so drastically altered by the adoption ... of the doctrine of 'promise of the patent'"¹⁰ As of the time of its investment, Eli Lilly argues that it "reasonably relied on disclosure obligations that were enshrined in domestic law through incorporation by reference of PCT requirements and could not have anticipated that non-statutory, new and additional disclosure obligations adopted years later would be retroactively applied to invalidate the Strattera Patent."¹¹ In sum, Eli Lilly asserts: "The measures ... violated the 'full protection and security' requirement of Article 1105(12), which likewise includes basic requirements of legal security."¹²

With respect to expropriation, Eli Lilly claims both direct and indirect expropriation.¹³ The direct expropriation claim seems preposterous given unanimous jurisprudence limiting that concept to governmental seizure of real property. The indirect expropriation claim, on the other hand, is more subtle. Here Eli Lilly claims: "The judicial decisions invalidating the Strattera and Zyprexa Patents are illegal *from the perspective of international law* and therefore constitute an expropriation (emphasis added)."¹⁴ It claims further: "The Government of Canada has a positive obligation to ensure Canadian law complies with Canada's international treaty obligations, as well as the reasonable investment-backed expectations of the investor."¹⁵

Despite a clause sheltering NAFTA-compliant patent revocations from expropriation disciplines, similar to a comparable clause in the TPP, Eli Lilly has made claims not just based on NAFTA's IP chapter but on IP rules imported from outside the text. In particular, Eli Lilly alleges that Canada's promise/disclosure rules

violate: (1) the TRIPS Agreement, which was not even operative when NAFTA was negotiated,¹⁶ (2) the PCT, which expressly covers procedural elements of patent applications, not substantive patenting standards,¹⁷ and (3) the Paris Convention for the Protection of Industrial Property,¹⁸ which literally has no relevant provision on standards for deciding utility.

Eli Lilly's last major investment claim charges national treatment discrimination. It is here that Lilly's efforts to incorporate foreign IP norms reaches its apex. Instead of comparing treatment accorded to foreign and domestic firm under Canadian law, Eli Lilly draws on utility and disclosure standards used in the US and EU. Thus, Eli Lilly states:

The measures in issue *de facto* discriminate against Lilly, a U.S. investor, when compared to domestic investors, by requiring the Strattera patent (which was filed on the basis of an international application) to meet elevated and additional standards for utility and disclosure that are not required by the laws of *the United States of America, the European Union, or the harmonized PCT* [Patent Cooperation Treaty] rules. The measures in issue disadvantage foreign nationals and render their patents especially vulnerable to attack by insisting on proof of utility and disclosure of evidence that is not required by the foreign applicants' own *national jurisdictions* or international rules. (Emphases added.)¹⁹

As a final feature of this topsy-turvy national treatment analysis, Eli Lilly argues that Canada's patent invalidations somehow advantage Canadian generic companies that can now freely produce and market generic versions of Strattera and Zyprexa thereby being able to reap the economic benefits associated with Lilly's investments, thus destroying Lilly's [exclusive] market share and associated profits.²⁰

Under the logic of Eli Lilly's investor-state claim, foreign investors' expectations have now become unbound. Even the doctrine of legitimate expectations, which is itself a huge stretch of operative minimum standard of treatment principles, is no longer tethered to operative due process (minimum standard of treatment) or to promises of regulatory coherence (indirect expropriation) or to equal treatment compared to domestic firms (national treatment). Instead Eli Lilly hitches its investment expectation to the best deal on IP achieved anywhere else. Moreover, it suggests that its expectations tolerate movement on IP policy in only one direction—upward. Any prudent diminution of patent or data right expectations could result first in the loss of a ISDS claim and second in reduced access to affordable medicines.

Conclusion

There are many reasons to strike the Draft TPP Investment Chapter, a chapter that restricts government sovereignty to regulate business activities while

simultaneously ceding *de facto* regulatory power to foreign investors and private arbitrators. Moreover, far too little attention has been given to the grave risks that the Investment Chapter poses to access to medicines. Big Pharma has had a big hand in the US's proposed TPP IP Chapter and now is pushing the Investment Chapter as well. TPP Parties should reject both TRIPS-plus IP and investment provisions that will ill advisedly restrict their ability to safeguard the health of their people. Accordingly, the best solution with respect to IP-specific investment claims, and to the broader risks of investor-state claims altogether, is to delete the Investment Chapter entirely—a second-best solution is to more explicitly and effectively exclude coverage of intellectual property rights and their enforcement.

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Notes

¹ See generally US sources on the TPP available at <http://www.ustr.gov/tpp>; Trans-Pacific Partnership, Intellectual Property Rights Chapter September 2011 Draft (Selected Provisions), available at <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificIP1.pdf>; Draft TPP Investment Chapter, available at <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tpinvestment.pdf>;

² *Eli Lilly and Company v. The Government of Canada*, Notice of Intent to Submit a Claim to Arbitration under NAFTA (Nov. 7, 2012) (*Eli Lilly I*), available at <http://italaw.com/sites/default/files/case-documents/italaw1172.pdf>. More recently a second notification of intent to claim arbitration has been filed (June 13, 2013) (*Eli Lilly II*), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/eli-02.pdf>.

³ Article 12.2.

⁴ Article 12.2(g).

⁵ See Fiona Marshall, *Fair and Equitable Treatment in International Investment Agreements*, Institute for Sustainable Development (2007), available at http://www.iisd.org/pdf/2007/inv_fair_treatment.pdf.

⁶ See Articles 12.4 and 12.5.

⁷ *Eli Lilly II*, *supra* note ii, at ¶¶ 56-66, 79-84, 98, 104.

⁸ *Id.* at ¶ 99.

⁹ *Id.* at ¶ 111.

¹⁰ *Id.* at ¶ 112.

¹¹ *Id.* at ¶ 113.

¹² *Id.* at ¶ 114.

¹³ *Id.* at ¶¶ 102-103.

¹⁴ *Id.* at ¶ 103.

¹⁵ *Id.* at ¶ 106.

¹⁶ *Id.* at ¶¶ 6, 9-11, 17, 27-28, 30, 32, 42, 49, 52, 60, and 104.

¹⁷ *Id.* at ¶¶ 19-21, 23-26, 28, 33, 56-57, 60, 63, 65, 79, 104, 113, 117.

¹⁸ *Id.* at ¶¶ 34, 104.

¹⁹ *Id.* at ¶ 117.

²⁰ *Id.* at ¶ 118.

Online Statements by National Investment Boards or Agencies and their Potential Legal Effects

Makane Moïse Mbengue and Deepak Raju

feature 4



National investment boards or agencies operate in several countries with a view to attract foreign investment. Towards this objective, they often maintain websites highlighting the advantages of investing in their country. This article surveys some common categories of representations and promises made on the websites of national investment boards and discusses their potential legal implications. The article suggests that, under certain circumstances, such online statements may be viewed by tribunals as unilateral acts of states that create commitments under international law.

Unilateral acts of states and their value in international law

Various rulings of the International Court of Justice (ICJ), and its predecessor the Permanent Court of International Justice (PCIJ), have acknowledged that states can assume obligations on the international plane through unilateral statements.¹ In the *Eastern Greenland* case, the PCIJ held Norway to be bound by the 'Ihlen Declaration,' a statement by its Foreign Minister, in response to a query from a Danish diplomat, that Norway would not object to the Danish settlement of Greenland.²

Elaborating on the law in this regard, the ICJ stated in the *Nuclear Tests* case, with reference to the French statements that no further tests would be carried out in the South Pacific:

"It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of

a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made."³

Distilling the key principles from the pronouncements of the ICJ and the PCIJ, the International Law Commission (ILC) has formulated a set of 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.'⁴ The ILC clarifies that "to determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise."⁵ Additionally, the ILC highlights the requirement that the statement must be made by an authority vested with the authority to bind the state internationally.

Against this background, it may be argued that statements made by national investment boards on their websites may, in certain circumstances, be categorised as unilateral acts/declarations of states and obligations may arise for the states concerned as a result. As recognized by the ICJ, "with increasing frequency in modern international relations other [natural or legal] persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview."⁶ As detailed below, the legal implications of online statements by national investment agencies depend on whether the statements are attributable to the state and whether the statement demonstrates an intention by the state to assume international obligations towards foreign investors/investment.

The effect of online statements – the experience so far

In *Brandes Investment Partners v. Venezuela*⁷, the claimant attempted to source the consent of Venezuela for ICSID arbitration to statements published on the websites of various embassies of that country.⁸ The arbitral tribunal rejected the submission and refused to construe these as a submission to ICSID jurisdiction. However, unfortunately the tribunal's treatment of the issue was cursory and it did not supply reasons for this finding.⁹ However, the fact that the tribunal examined the statements at issue in detail and did not dismiss them as inadmissible suggests that statements on websites may be an effective way of creating a commitment to submit to jurisdiction or a means of creating other commitments under international law.

A survey of statements by national investment board websites

A survey of the websites of various national investment boards identifies some of the representations and promises made to investors in a bid to attract foreign investment. Below are the main categories of statements

that appear on these websites along with examples for each:

1. General statements about economic conditions

Several national investment boards make statements on their websites about the state of the economy, growth projections, availability of labour and natural resources, infrastructure, growth projections, etc. Some examples are listed below:

National Investment Board	Statement
Afghanistan Investment Support Agency	<p>“Afghanistan is a fast growing emerging market of strategic importance close to some of the largest and fastest-growing markets in the world”</p> <p>“Afghanistan is rich in natural resources”</p> <p>“Even smaller investments may generate high profits in a short period of time.”</p> <p>“Security risk factors have been reduced to a manageable level in much of Afghanistan. The country has forged a new constitution and freely elected its president and parliament.”</p> <p>Statements on limited availability of power, water, infrastructure, etc.</p>
National Agency of Investment Development (Algeria)	<p>Availability of natural resources</p> <p>Economic stability</p> <p>Access to regional markets</p> <p>Young and competitive work force</p> <p>Competitive production factors costs</p> <p>Infrastructure</p> <p>Opportunities for financing through public banks, investment funds & financial institutions</p>

Prosperar (Argentina)	<p>“One of the fastest-growing countries worldwide: leader in Latin America for the past decade.”</p> <p>“Proven ability to sustain the economic growth cycle from the on-start of the global crisis, exceeding the average of emerging countries.”</p>
Board of Investment Bangladesh	<p>“Bangladesh offers a truly low competitive cost base. Wages and salaries are still lowest in the region, a strong business advantage. Yet this is an increasingly well-educated, adaptive and peaceful population with many skilled workers.”</p>

2. General statements about the regulatory climate

Several national investment boards publish statements of a general nature on their websites about the legal and regulatory framework of the country. Some examples are provided below.

National Investment Board	Statement
Afghanistan Investment Support Agency	<p>“The principles of a free market economy are incorporated in the new Constitution {art. 10} just as the growth of the private sector is a cornerstone of the National Development Strategy. Consequently the President as well as the Government have focused intensely on removing obstacles to private sector development.”</p> <p>“Afghanistan is still recovering from a period of nearly three decades of war and devastation. Unsurprisingly, many issues of state building still remain on the agenda. While the international community helps with financial and technical assistance to push for major reforms in many sectors, respective law-making has been slow. Much of the legislation that will affect your business and is urgently needed to foster investment and growth is still under discussion.”</p>

Invest Barbados	“Barbados has established a strong regulatory framework for its international business sector. Clear and strong legislation provides stringent guidelines for good governance which are in turn enforced by regulators in each sector. Barbados’ approval by the OECD speaks to the strength of this regulatory system.”
Investment Promotion and Major Works Agency (Senegal)	“L’attractivité de la Destination Sénégal en termes d’investissement est soutenue par un programme de réformes majeures de l’environnement des affaires décidées en concertation avec les acteurs des secteurs public et privé concernés.”
National Investment Promotion Agency of Mauritius	<p>“Commercial law in Mauritius is a combination of the English Common Law and the French Code Napoléon.”</p> <p>“Employment rights and obligations in Mauritius are now governed by the new Employment Right Act 2008. This relatively new piece of legislation has been designed to cater for the needs of the modern employment environment in Mauritius which now embodies a substantial percentage of foreign workers at all levels of the work stratum.”</p>
Cyprus Investment Promotion Agency	<p>“Pro-business, based on common law, Accounting and Legal transparency”</p> <p>“The legal system is based on the U.K. Common Law principles and aligned with the EU laws and regulations (Acqui Communautaire).”</p>

3. Specific statements on laws and regulations

Some national investment boards provide statements of a specific nature about certain laws and regulations. Some of them merely reproduce the text of existing laws in key areas of interest to the investors. Some examples are provided below.

National Investment Board	Statement
Prosperar (Argentina)	Provides an introduction to the employment law, tax law and environmental law with references to the titles of legislations.
Board of Investment Bangladesh	Provides links to various key national legislations
Investment Promotion and Major Works Agency (Senegal)	“Non, il n'existe pas de limite au rapatriement des bénéfiques engendrés par une entreprise au Sénégal”.

4. Specific statements on incentives to investors

In certain cases, the websites of national investment boards provide details of incentives such as tax breaks available to investors. Some examples are listed below.

National Investment Board	Statement
Prosperar (Argentina)	Provides details of various sector specific, location specific, employment-related and other incentive schemes for investors.
Board of Investment Bangladesh	<p>“Bangladesh offers some of the world’s most competitive fiscal non-fiscal incentives. BOI can advise further on this matter.”</p> <p>Provides introductory details of: Remittance of royalty, technical know-how and technical assistance fees; Repatriation facilities of dividend and capital at exit; Permanent resident permits on investing US\$ 75,000 and citizenship on investing US\$ 500,000; Tax holidays; Depreciation allowance; Cash and added incentives to exporting industries.</p>

Malaysian Investment Development Authority	Provides sector-specific details of incentives available to the investors.
National Investment Promotion Agency of Mauritius	Also provides sector-specific details on investment incentives, such as a 50% annual allowance on declining balance for the purchase of electronic and computer equipment.
Kuwait Foreign Investment Bureau	<p>“1. What are the criteria for granting incentives under the current law for FDI projects?”</p> <ul style="list-style-type: none"> • Modern technology and administration as well as practical, technical and marketing expertise. • Extending and activating the role of the Kuwaiti private sector. • Creating job opportunities for national labor force and training them. • Economic development plans and the targeted sectors. • Location”.
InvestHK (Hong Kong)	Details of incubator programmes, loan guarantees and funds for marketing are provided.
Botswana Export Development and Investment Authority	Details of industrial rebate concessions, general rebates, customs duty draw back facility, etc., are provided. For example, the website states: “Machinery and equipment: All machinery and equipment for purposes of manufacturing is imported duty-free.”

National Investment Board	Statement
Algeria	<p>“An intensified protection and international arbitration agreements</p> <p>- Membership to international conventions for the protection of investors, relating to guarantees and international arbitration.”</p>
Invest Barbados	<p>“Barbados has entered into treaties for the promotion and protection of investment with Canada, China, Cuba, Germany, Italy, Mauritius, Switzerland, the UK and Venezuela. Investment treaties with the Belgium-Luxembourg Economic Union and Ghana are awaiting ratification. Under these agreements, Barbadian entities that invest in the other contracting state benefit from provisions offering protection including guarantees of non-discriminatory treatment of their investments, the transfer of investments and returns held in the host state and recourse to international arbitration to settle disputes with the host state.”</p>
General Investment Authority (Yemen)	<p>“In the event of any dispute between the investor and the government with regard to the project, the dispute may be referred to arbitration in accordance with the following rules:</p> <p>The arbitration rules and procedures of any national or regional approved arbitration center; or</p> <p>The applicable arbitration rules and procedures of the United Nations Commission on International Trade Law (UNCITRAL)”.</p>

5. Statements about availability of international investment arbitration

In certain instances, statements on the websites of national investment boards deal with the availability of dispute settlement mechanisms including access to domestic courts or investment arbitration. Some examples are listed below:

Jordan Investment Board	“At the international level, Jordan has acceded to numerous bilateral and multilateral investment treaties, many of which provide for structured dispute settlement methods, such as the Treaty on the Settlement of Investment Disputes in the Arab Countries which provides for the settlement of disputes through conciliation and arbitration, and the Treaty between Jordan and the Government of the United States of America on the Mutual Encouragement and Protection of Investment. Also, there is the Washington Convention on the Settlement of Investment Disputes.”
DR Congo Investment Promotion Agency	“CIRDI membership (Investment Dispute Settlement International Centre) based in Washington City ensures the settlement through arbitration of all disputes regarding investments in DRC”.

“ Under certain circumstances, online statements may be viewed by tribunals as unilateral acts of states that create commitments under international law. ”

Legal effect of the statements

There are two key elements to determine the legal effect, if any, of statements by national investment boards on their websites. First, it will need to be determined whether the statements are attributable to the state in question so as to create international obligations binding on that state.¹⁰ If the statement can be attributed to the state, then the statement needs to be interpreted in accordance with the principles applicable to unilateral declarations of states to determine its legal effect.

While dealing with the first aspect of this examination, the nature and domestic characterisation of the investment board in question, as well as the functions performed by it, attain a crucial role. Firstly, in accordance with the general rules of international law on attribution of responsibility to states¹¹, as codified in the ILC Articles on State responsibility, the conduct of all organs of a state are to be attributed to the state.¹² Accordingly, it will need to be examined whether a national investment board is part of the state machinery in such a manner as to warrant its classification as an organ of the state. If the investment board is a state organ, online statements by that board that constitute clear commitments under international law might be automatically considered as unilateral acts of the state to which the investment board is linked.

Secondly, the conduct of entities which are not organs of the state, but which exercise elements of governmental authority and are empowered by the state to do so, are also attributable to the state.¹³ For instance, if the national investment board is in charge of the foreign investment policy of a state, one can deduce that the board in question is exercising some elements of governmental authority. Accordingly, an examination of the powers and functions exercised by the national investment board and the source of those powers will need to be examined in order to establish whether online statements by the said board can be considered as unilateral commitments of the state where the board is operating.

Thirdly, the statement of the national investment board may also be attributable to the state if it can be established that the maintenance of the website or the making of the statement was *de facto* controlled or directed by the state¹⁴ or that the state has acknowledged and adopted the statement as its own.¹⁵

Once the question of attribution is decided, one can proceed to determining the legal effects of a given statement which is attributable to a state.

Where the statements are of a specific nature, for example statements relating to incentives to investors, specific representations on legal provisions, or submission to investment arbitration, it may be argued that the statement amounts to a unilateral act which creates binding legal commitments for the state under international law. In such circumstances, the statement may be treated as a promise (i.e. a standing unilateral offer) that the state is obligated to uphold. In order to determine such a legal effect for an online statement by a national investment agency, one must examine its actual content as well as the circumstances in which it was made.¹⁶ In other words, the online statement can create legal obligations “only if it is made in clear and specific terms”.¹⁷

General statements may, depending on the context, contribute to shaping the expectations of the investors.¹⁸ Where these expectations are legitimate,¹⁹ they may be protected through invocation of the fair and equitable treatment (FET) rule as current investment jurisprudence has highlighted.²⁰

In both the cases, the language will need to be examined closely to determine whether the statement was of such a nature that, (i) the state's intent to be bound by a commitment was expressed²¹ and (ii) investors could reasonably base their expectations on the same. The general patterns of conduct followed by the state, representations by the state elsewhere, etc. could be relevant in making this determination.²²

“National investment boards, in their zeal to woo foreign investors, should not lose sight of these potential legal implications of the statements on their websites.”

Conclusion

Investment arbitral tribunals are yet to develop a comprehensive jurisprudence on the legal effects of statements made by national investment boards on their websites in order to attract foreign investment. However, there is no logical ground to treat statements made on the internet any differently from statements made offline. Thus, whether a statement on the website of a national investment board creates international obligations for the state depends on whether (i) the statement is attributable to the state and (ii) whether the statement is of such a nature that it may qualify as a unilateral act binding the state under international law, when seen in its context.

National investment boards, in their zeal to woo foreign investors, should not lose sight of these potential legal implications of the statements on their websites. Close attention needs to be paid to the content on such websites and the boards need to proceed with caution in this regard. Addition of adequate disclaimers or an advice to consult other official sources may be in order.

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Notes

1 See M. M. Mbengue, "Investment National Legislation and Unilateral Acts of States", in E. de Brabandere and T. Gazzini, *International Investment Law. The Sources of Rights and Obligations*, Martinus Nijhoff Publishers, 2012, pp. 183-214.

2 *Legal Status of Eastern Greenland (Norway v. Denmark)* [1933] P.C.I.J. Ser. A/B, No. 53, p. 71.

3 *Nuclear Tests Case (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 472, para. 46.

4 ILC, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, *Yearbook of the International Law Commission*, 2006, vol. II, Part Two ("Guiding Principles").

5 *Ibid.*, Article 3.

6 *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 27, para. 47.

7 *Brandes Investment Partners, LP v. The Bolivarian Republic Of Venezuela* (ICSID case No. Arb/08/3), Award, 2 August 2011.

8 *Ibid.*, para 50.

9 The Tribunal merely stated in para. 100 of its award: "The Tribunal has analyzed those references thoroughly and has failed to find in them any express manifestation by the Respondent of its consent to ICSID jurisdiction".

10 As explained by the ICJ, "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments" (*Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 27, para. 46). Thus, a national investment board is not generally deemed to represent a state and because of that it is necessary to prove on a case-by-case basis whether in the performance of a specific act it is representing or not a state.

11 Generally, the law of state responsibility applies for the purpose of attributing an internationally wrongful act to a state, i.e. when a potential breach of international law by the said state is alleged by another state. However, we consider that the rules on attribution can be relevant and applicable in order to determine in which circumstances online statements by national investment boards can be qualified as unilateral commitments of a state as such.

12 ILC, Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two ("ARSIWA"), Article 4.

13 ARSIWA, Article 5.

14 ARSIWA, Article 8.

15 ARSIWA, Article 11.

16 See by analogy, *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 269-270, para. 51; *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, pp. 573-574, paras. 39-40.

17 See by analogy, *Nuclear Tests (Australia v. France) (New Zealand v. France)*, I.C.J. Reports 1974, p. 267, para. 43; p. 269, para. 51; p. 472, para. 46; p. 474, para. 53.

18 See generally, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Separate Opinion of Professor Thomas Walde, para. 37 (December 2005); *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, para. 307 (17 March 2006); Abhijit PG Pandya and Andy Moody, 'Legitimate Expectations in Investment Treaty Arbitration: An Unclear Future' (2010-11) 15 *Tilburg L Rev* 93, 105.

19 See generally, *EDF (Services) Limited v. Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, para. 219.

20 *Metalclad Corporation v. United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, paras. 37-59, 74-101.

21 See generally, *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, I.C.J. Reports 1952, p. 93.

22 See generally, Pandya & Moody, *supra* note 9.

news in brief

South African trade minister confirms denunciation of EU BITs

South Africa's Minister of Trade and Industry, Rob Davies, confirmed that his government was terminating investment treaties with Belgium, Luxembourg and Spain because they contained "serious flaws."

Responding to a parliamentary question on the reason for terminating these agreements, Minister Davies explained that they were "poorly drafted" and "play little, if any, role in investors' decisions to invest or not in any country."

Minister Davies explained that South Africa was instead focusing on strengthening its "national investment protection regime."

In total, South Africa has 13 treaties with EU member states, and ITN understands that the country intends to terminate other treaties, in addition to those with Belgium, Luxembourg and Spain.

The South African government concluded a review of its BITs in 2010, which was largely critical of the approach to treaty-making that followed the country's democratic transition in 1994.

Renco v. Peru dispute to be transparent and administered by ICSID

An UNCITRAL arbitration involving a US lead producer and the government of Peru will be administered by the World Bank's International Centre for Settlement of Investment Disputes (ICSID). This marks the first time that ICSID will maintain a procedural record of an arbitration using the UNCITRAL arbitration rules on its website.

The controversial dispute, which pits Renco Group against Peru, centers on a metal smelting and refining business which have left the Peruvian town of La Oroya badly polluted.

It is the first arbitration under the US-Peru Trade Promotion Agreement (PTPA). In accordance with the PTPA's transparency requirements, the tribunal's first procedural order, dated August 22, 2013, states that hearings will be open and documents related to the arbitration published.

Investors threaten arbitration against Serbia for alleged failures in the provision of land for the construction of a solar park

A group of renewable energy investors has announced that it will file for arbitration against Serbia at The London Court of International Arbitration in a dispute over the world's largest solar power park, according to the information service *Global Arbitration Review*.

The investors, Securum Equity Partners, complain that Serbia breached an umbrella agreement concluded between both parties by failing to locate and specify appropriate land for the construction of the OneGiga solar park.

According to lawyers for the investors, the agreement with Serbia stipulated the procurement of at least 3,000 hectares of land, under a minimum sixty-year lease, in an area located no further than one kilometer from an electrical transmission network.

The Serbian government has denied breaching the agreement and accused the investors of bad faith. Serbia asserts it provided the company with 30,000 hectares in total—ten times the amount agreed with investors for developing the project.

In a July 25, 2013, letter to the investors' law firm, the Serbian State Secretary said the government "has undertaken to use its best efforts and do everything in its powers" to procure suitable land for the construction of the OneGiga Solar Park.

The project, valued at €1.75 billion, was due to be completed by the end of 2015.

Mali faces claim over tax adjustments

Randgold Resources—a company registered in Jersey, Channel Islands—is challenging Mali through international arbitration in a US\$ 46.5 million tax dispute.

The company complains that the government of Mali breached an agreement by demanding tax adjustments for the years 2008 to 2010 on the salaries of foreign employees. Société des Mines de Loulo, a subsidiary of Randgold Resources, had its case registered on July 18, 2013, at ICSID.

Reuters has reported that Mali reduced the amount it was claiming in taxes, but failed to reach an agreement with the company. Precious metals mining companies are under pressure to cut costs since prices plunged this year. Randgold announced a 62 per cent fall in second-quarter profit to US\$ 54 million and pledged to cut costs, including at its Loulo-Goukoto mine in Mali.

ICSID updates statistics for 2013 fiscal year

The International Centre for Settlement of Investment Disputes recently released a new edition of its online publication *ICSID Caseload – Statistics* (Issue 2013-2), providing an overview of the cases registered or managed by the Centre as of June 30, 2013.

The new edition provides an updated profile of the ICSID caseload, historically and for Centre's fiscal year 2013 (July 1 – June 30).

ICSID registered 14 new cases in the first half of 2013. Last year the Centre registered 50 new cases, the largest number in its history and considerably higher with respect to the previous years (38 cases in 2011, 26 in 2010 and 25 in 2009).

Similar to the past year, in the 2013 fiscal year Eastern European and Central Asian countries topped the list of respondents with 26 per cent of cases, followed by countries in South America (24 per cent) and the Middle East and North Africa (10 per cent). Venezuela faced the highest number of claims, with 9 new cases introduced in 2013, same number of cases as in the 2012 fiscal year.

As in the 2012 fiscal year, the greatest number of cases in the 2013 fiscal year was in the oil, gas, and mining sector.

In the 2013 fiscal year, jurisdiction was granted mainly through bilateral investment treaties (74 per cent), followed by investment law of the host-state (16 per cent), investor-state contracts (8 per cent), and the Energy Charter Treaty (2 per cent). This is close to the historical average of 65 per cent under BITs, 19 per cent under investor-state contracts, 7 per cent under host-state investment law, 4 per cent under the ECT, and 3 per cent under NAFTA.

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

awards & decisions

Claim against Turkmenistan dismissed for lack of jurisdiction; claimant failed to abide by domestic litigation requirement

Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1

Damon Vis-Dunbar

A Turkish claimant's case before an ICSID tribunal has been dismissed for failing to first pursue the dispute before Turkmenistan's domestic courts.

In a decision dated July 2, 2013, arbitrators Mr. J. William Rowley and Professor Philippe Sands declined jurisdiction, while the claimant's appointee, Professor William W. Park, issued a separate opinion.

The claimant, Kilic, is a Turkish construction company with investments that soured in Turkmenistan. It made no secret of the fact that it bypassed Turkmenistan's courts on its road to international arbitration—but argued that this was permissible due to the Turkey-Turkmenistan BIT's Most Favoured Nation (MFN) clause.

Specifically, Kilic sought to “borrow” the dispute resolution provisions in the Switzerland-Turkmenistan BIT, a treaty that does not require that investors litigate in the host state's domestic courts as a pre-condition to accessing international arbitration. In the event that the tribunal rejected that argument, the claimant also claimed that recourse to Turkmenistan's courts would have been “ineffective and otiose.”

Recourse to domestic courts deemed a pre-condition to accessing arbitration

The tribunal began by considering if the BIT did in fact demand that the dispute be brought to Turkmenistan's courts as a condition of the state's consent to arbitration.

That decision was complicated by the fact that the BIT existed in different languages, and the disputing parties disagreed over which texts should be considered official—as well as how they should be translated. Ultimately, the translation of the official Russian version into English would convince the majority that domestic litigation was a jurisdictional requirement. That conclusion was drawn in an earlier, May 7, 2012 decision.

Tribunal rejects jurisdiction vs. admissibility distinction

Referring to the *Abaclat vs. Argentina* decision on jurisdiction, the claimant argued that the domestic court requirement should be considered an issue of “admissibility” rather than “jurisdiction.” On that basis, the claimant asserted that the tribunal could suspend the proceedings while allowing it to ‘perfect’ the admissibility requirements by pursuing its case before Turkmenistan's courts.

However, this line of reasoning held little sway with the tribunal, which reasoned that the *Abaclat*

tribunal “fell into legal error.” Rather than a question of admissibility, the tribunal determined that the critical issue was the contracting state's consent to arbitration—and any conditions placed on that consent.

The tribunal pointed to Article 26 of the ICSID Convention, which “explicitly recognises that a Contracting State may impose conditions on its consent to arbitration under the ICSID Convention.” In the majority's view, the domestic litigation requirement of the Turkey-Turkmenistan BIT was best understood in this light.

MFN deemed not to extend to dispute settlement

As noted, the claimant's first line of argument hinged on the BIT's MFN clause, which it backed up with reference to a number of cases in which tribunals have ruled that an MFN clause allows claimants to access more liberal dispute resolution provisions in treaties with third parties.

The tribunal prefaced its consideration of these cases by stressing that dispute resolution provisions should not “be *presumed* to fall within the scope of MFN clauses.” Rather, the tribunal would consider the treaty's broader context, and how the MFN provision “fits into the BIT as a whole.”

The tribunal gave importance to the treaty's structure, which separated “substantive rights in relation to investments, and remedial provisions in relation to those rights.” In the tribunal's opinion, this “distinction suggests strongly that the ‘treatment’ of ‘investments’ for which MFN rights were granted was intended to refer only to the scope of the *substantive* rights ...”

The tribunal also noted that Turkey had signed numerous BITs prior to its agreement with Turkmenistan, some of which did not require that disputes be submitted to local courts as a condition to its consent to arbitration. It would have made little sense, the tribunal reasoned, for Turkey to have intended the MFN clause to extend to dispute resolution in its treaty with Turkmenistan. Doing so would mean that the “carefully crafted jurisdictional preconditions” in the Turkey-Turkmenistan BIT could be immediately by-passed by a claimant.

Placing the treaty in historical context—it was signed in 1992—the tribunal concluded that it had most likely never crossed the negotiators' minds that the MFN clause could extend to dispute resolution provisions in the treaty. It was not until the *Maffezini v. Spain* decision on jurisdiction in 2000 that an investment tribunal first ruled that linking an MFN clause to dispute resolution was appropriate.

Turning to the decisions relied on by the claimant to bolster its claim that the MFN should extend to dispute resolution, the tribunal highlighted how the MFN clauses in those cases differed from the one

found in the Turkey-Turkmenistan BIT. The treaties in these cases tended to have broader MFN clauses—for example, clauses in which MFN encompassed “all matters subject to this agreement”—compared to the clause found in the Turkey-Turkmenistan BIT.

Tribunal fails to see ‘evidence’ of futility

The claimant also failed to convince the tribunal that pursuing its claim in local courts would have been “futile.”

The claimant argued that Turkmenistan lacked an independent judiciary and had a poor track record of respecting human rights. However, in the tribunal’s view, these allegations missed the point. The relevant questions are whether: a) Turkmen courts were available; and b) whether particular failings by those courts would have made the claimant’s case futile.

In the tribunal’s words, the claimant “has apparently not taken a single procedural step [to initiate proceedings in Turkmenistan’s courts] prior to submitting this dispute to ICSID,” nor had it offered evidence to suggest that it had even investigated its options. As such, the tribunal determined that the claimant failed to prove the futility of pursuing domestic litigation in Turkmenistan.

Costs

The claimant claimed costs of approximately US\$1.8 million, while Turkmenistan’s were substantially higher at US\$4.2 million.

The tribunal found it reasonable for the claimant to bear some of Turkmenistan’s costs, given its lack of sufficient regard for the possibility that its failure to abide by the domestic litigation requirement would undermine the tribunal’s jurisdiction.

However, the tribunal sympathised with the claimant’s concern that Turkmenistan’s legal fees—based on a reported 13,415 hours of time spent by its legal team—seemed high given that the case had so far focused on relatively discreet jurisdictional issues.

The tribunal ultimately decided that US\$2 million was a more reasonable cost for Turkmenistan’s expenses, and that 50 per cent of this cost should be paid by the claimant. With respect to the costs of the tribunal and ICSID’s fees, the claimant was ordered to pay 75 per cent, and Turkmenistan 25 per cent.

William W. Park’s separate opinion

In Professor Park’s opinion, the tribunal should have suspended the proceedings to allow time for the claimant to file a case with Turkmenistan’s courts. In his words: “If a timely judgement proves acceptable to the investor, proceedings end. If the investor remains aggrieved, arbitration resumes for claims falling within the scope of the BIT.”

Professor Park noted that the English translation of the BIT was clumsily translated, which made it unclear if the domestic litigation was mandatory or optional. To oblige the claimant to bear the costs of a failed arbitration, despite the poorly drafted treaty, runs “counter to the BIT terms and purpose,” wrote Professor William.

“Six months means six months”

Professor Park emphasized that the BIT clearly states that disputes “can be” submitted to arbitration “within six months following the date of the written notification.” That would suggest that pursuing domestic litigation for a year is not a hard-and-fast jurisdictional requirement, wrote Professor Park.

Professor Park also anticipated a problem in cases where a dispute has been submitted to a domestic court, and a decision is rendered quickly *within* a year (i.e. given that the treaty states that a dispute may go to arbitration if a final award by a domestic court “has not been rendered within one year.”)

The best way to resolve these conflicts, according to Professor Park, is to interpret the text on domestic litigation as a procedural—rather than jurisdictional—requirement designed to give local courts an opportunity to resolve the dispute. That would allow the tribunal to accept jurisdiction, but only allow the proceedings to proceed to the merits if certain conditions are met. In this case that would mean giving Turkmenistan’s legal system a reasonable opportunity to address the dispute.

If Turkey and Turkmenistan intended that domestic litigation was tied to their consent to arbitration, they should have used for more direct language, wrote Professor Park. A statement like “investors are entitled to arbitrate only after going to local courts,” would have delivered a clear message to arbitrators.

The award is available here:
http://www.italaw.com/sites/default/files/case-documents/italaw1515_0.pdf

Professor William W. Park’s separate decision is available here: http://www.italaw.com/sites/default/files/case-documents/italaw5002_0.pdf

Tribunal accepts jurisdiction over claim brought by a UK investor against Turkmenistan by the operation of MFN clause *Garanti Koza LLP v. Turkmenistan, ICSID case No. ARB/11/20*
Oleksandra Brovko

The majority of a three-member tribunal has granted a UK investor access to ICSID arbitration by importing more flexible dispute resolution provisions contained in the Turkmenistan-Switzerland BIT.

The decision on jurisdiction, dated July 3, 2013, centers once again on the contentious question of

whether a most-favoured-nation (MFN) clause may be used to by-pass restrictions on dispute resolution. In this case the UK-Turkmenistan BIT's MFN clause expressly extended to dispute settlement. In the majority's view, that allowed the claimant to avoid the BIT's competing demand that the parties settle disputes via UNCITRAL arbitration, unless they agree to another arbitration process (such as ICSID).

Background

The claimant, Garanti Koza LLP, a limited liability company incorporated in the United Kingdom, was contracted by the state-owned Turkmenautoyollari (Turkmen Road) to construct highway bridges and overpasses. Garanti complains that Turkmenistan employed state powers to force changes to the contract, leading to losses and the eventual confiscation of its assets.

Turkmenistan counters that it terminated the contract due to Garanti's failure to complete the work according to the agreed schedule.

Given that the proceedings were bifurcated, the present decision addresses Turkmenistan's objections to the tribunal's jurisdiction. Turkmenistan asserted that it did not consent to ICSID jurisdiction under the UK-Turkmenistan BIT and, moreover, such consent cannot be imported from a different BIT in the absence of the express consent in the basic BIT.

BIT stipulates that UNCITRAL arbitration is the default

The tribunal focused on the interpretation of paragraphs (1) and (2) of Article 8 of the UK-Turkmenistan BIT. Article 8(1) concerns the host state's consent to settle disputes by means of international arbitration, and Article 8(2) provides options for the arbitration process. Notably, UNCITRAL arbitration is the default selection, while ICSID and ICC are available upon the consent of the parties.

The tribunal clarified that Article 8(1) deals with Turkmenistan's consent to participate in international arbitration and Article 8(2) concerns the arbitration systems that may be used if the conditions of Article 8(1) are met. Giving notice to the words "shall" and "may" in Article 8(1) and 8(2) respectively, the majority of the tribunal decided that only Article 8(1) deals with the issue of consent.

As explained below, Professor Boisson de Chazournes differed on this point, concluding that Article 8(2) also concerns the host-state's consent to arbitration. That conclusion would contribute to her decision to part-ways with the majority on the issue of whether the MFN clause could be used to access alternative dispute resolution options found in Turkmenistan's other BITs.

Consent to ICSID arbitration via MFN clause permitted by the majority

In deciding whether the MFN clause encompasses dispute-resolution provisions—and thus would allow the claimant to by-pass the UNCITRAL-only condition in Article 8(2)—the tribunal turned to the wording of the MFN clause at stake and its coverage. Article 3(3) of the basic BIT states that the MFN clause is applicable to the provisions of Articles 1 to 11. As such, the tribunal decided that the MFN clause clearly applied to the dispute resolution provisions contained in Article 8.

The tribunal therefore entitled the claimant to invoke more favourable dispute resolution provisions (i.e., those allowing for ICSID arbitration) which were found in Turkmenistan's treaties with Switzerland, France, Turkey, India, and under the Energy Charter Treaty.

In doing so, the tribunal rejected Turkmenistan's argument that the application of the MFN clause to the dispute resolution provision would deprive the basic BIT of its *effet utile* (practical effectiveness). Turkmenistan noted that in 1995 (the date of signature of the UK-Turkmenistan BIT) the UK was already a party to other treaties that provided consent for ICSID arbitration. As such, a conscious decision to extend the MFN clause to dispute settlement, while simultaneously carefully restricting consent only to UNCITRAL arbitration, would have been contradictory.

However, the tribunal stated that the MFN clause's own 'practical effectiveness' was at stake. In the tribunal's words "the MFN clause itself would be deprived of *effet utile* if it could never be used to override another provision of the treaty."

A choice is better than no choice

Finally, the tribunal considered whether the Switzerland–Turkmenistan BIT, on which the claimant relied upon in particular, did in fact provide for more favorable treatment than in the basic BIT by providing a choice between ICSID and UNCITRAL arbitration.

The tribunal did not delve into the procedural differences between UNCITRAL and ICSID rules, but instead decided that the mere fact that a treaty provides a choice is more favourable than one that does not.

Laurence Boisson de Chazournes' dissent

In Professor Boisson de Chazournes' view, the function of the MFN clause is to guarantee balanced and coherent treaty relations between the members of the international community. She asserted that BITs were never concluded by sovereign states with the idea to allow "consent shopping." Therefore, the primary task of the tribunal is to establish, without any presumptions, whether consent to ICSID arbitration

is provided under the UK-Turkmenistan BIT. If not, the lack of consent cannot be remedied by importing consent from a different treaty.

Interpretation of Article 8 of the UK-Turkmenistan BIT

Professor Boisson de Chazournes disagreed with the majority's interpretation of Article 8 of the UK-Turkmenistan BIT. In her view, the conditions that Article 8(1) sets with respect to consent to international arbitration must be read in light of the specific conditions listed in Article 8(2). In other words, it is not only Article 8(1) that deals with the issue of consent; the initiation of investment arbitration in a chosen forum is also subject to consent under Article 8(2).

MFN clause and dispute settlement provision of the UK-Turkmenistan BIT

The dissenting opinion states that the MFN clause only applies if a foreign investor is already in a dispute-settlement relationship with the host state; if that relationship has not been formed, there is no ground to raise the question of more or less favorable treatment.

On this basis, Professor Boisson de Chazournes emphasized that the application of MFN clause is subordinated to the prior application of Article 8(2) of the UK-Turkmenistan BIT. Given that Turkmenistan had not provided its consent to ICSID arbitration as required by Article 8(2), Professor Boisson de Chazournes concluded that the claimant should not be entitled to invoke more favorable treatment with regard to ICSID arbitration under other BITs agreed to by Turkmenistan.

In Professor Boisson de Chazournes's opinion, the MFN clause is not "a form of acceptance through which ICSID jurisdiction can be satisfied."

There award is available here:
<http://www.italaw.com/sites/default/files/case-documents/italaw1541.pdf>

The dissenting opinion of Laurence Boisson de Chazournes is available here:
<http://www.italaw.com/sites/default/files/case-documents/italaw1540.pdf>

Arbitrator in sovereign bonds claim suggests majority decision exceeded jurisdiction *Ambiente Ufficio S.p.A. and others (Case formerly known as Giordana Alpi and others) v. Argentine Republic, ICSID Case No. ARB/08/9, Dissenting opinion* **Diana Rosert**

An arbitrator has made a strong case for why an ICSID tribunal should not have assumed jurisdiction in one of several claims over security entitlements

related to Argentina's sovereign debt restructuring. Mr. Santiago Torres Bernárdez's 160-page dissenting opinion in *Ambiente Ufficio S.p.A. and others vs. Argentine Republic*, filed on May 2, 2013, critiques the interpretative approach adopted by his two colleagues on the tribunal, Judge Bruno Simma and Professor Karl-Heinz Böckstiegel.¹

At the outset, Mr. Torres Bernárdez stated that the majority decision showed "an excessive zeal in the protection of the interests of alleged foreign investors (noticeable also in several other investor-host State arbitral decisions)." He maintained that his co-arbitrators incorrectly interpreted the ICSID Convention and crucial parts of the Argentina-Italy bilateral investment treaty (BIT), and thereby overstepped the tribunal's jurisdictional limits.

Mr. Torres Bernárdez considered that the majority decision departed from a "good faith" interpretation of the BIT as prescribed by the Vienna Convention on the Law of Treaties (VCLT) in that provisions were misread or omitted and case law selectively cited. More generally, Mr. Torres Bernárdez stressed that investment tribunals were "international tribunals of *limited jurisdiction*" and that, as a default rule, they should reject jurisdiction where doubts existed concerning a state party's consent. He saw it as the role of states, but "not the task of individual ICSID arbitral tribunals, established to adjudicate a given case, to assume general legislative tasks."

The majority decision's "special relationship" with Abaclat and others v. Argentina

Mr. Torres Bernárdez criticized his co-arbitrators for "endorsing from the outset to the end the conclusions of the *Abaclat* majority decision independently of its objective law merits." The *Abaclat* case involves over 60,000 Italian claimants with similar grievances against Argentina over the country's sovereign debt restructuring. As in the present case, the majority of the *Abaclat* tribunal accepted jurisdiction, while the third member of the tribunal delivered a fierce dissent.

However, Mr. Torres Bernárdez emphasized that the similarity between the disputes deserved scrutiny, even though both cases related to sovereign bond instruments and were brought under the same BIT. In his opinion notable factual differences existed between the two cases that called for an autonomous assessment, as required by the ICSID Convention in any case. Besides the number of claimants (90 in the present and some 60,000 in the *Abaclat* case), differences also included the type of economic transactions involved, the role of the respective third party and the claimants' fulfillment of jurisdictional preconditions.

Sovereign bond instruments not a "protected investment"

In the first place Mr. Torres Bernárdez found that the ICSID tribunal had no jurisdictional basis to adjudicate the case because neither sovereign bond instruments or any “of the economic transactions at stake qualified as a protected investment under the ICSID Convention and/or the Argentina-Italy BIT.”

He considered that, independent of the wording of the BIT and the question of the parties’ consent, the ICSID Convention provided objective “outer limits” for the Centre’s jurisdiction. He deemed that the present case involved “mere commercial transactions,” not protected investments under the ICSID Convention. Furthermore, Mr. Torres Bernárdez held that the transactions in the primary and secondary markets did not constitute a “single economic operation” or a single investment, as alleged by the majority, but were “unconnected” and created different financial instruments.

Mr. Torres Bernárdez also disagreed with the finding of the majority that the so-called Salini criteria were fulfilled. In his view, the Salini criteria were of jurisdictional nature and determined whether or not a “protected investment” under the ICSID Convention existed. He insisted that the security entitlements met “none of those criteria.” Amongst other reasons, he considered that security entitlements related to bonds did not possess the characteristic of “duration” necessary to manifest the existence of an investment operation due to the “speeded placement and circulation of the bonds in the markets” and their nature as “volatile capital transactions.”

Mr. Torres Bernárdez further opined that his co-arbitrators “misread” the relevant BIT provision (Article 1) when they decided that the BIT covered the claimants’ sovereign bonds instruments. He explained that the majority found “bonds” to be among a non-exhaustive list of examples provided in an unofficial English translation of the BIT supplied by the claimants. Mr. Torres Bernárdez not only contended that the words used in the original Spanish and Italian versions were incorrectly translated into English, he also maintained that the tribunal overlooked the chapeau of the provision, a crucial element requiring that the listed examples constituted an “investment” in the first place. Based on the “correct good faith interpretation” of the term “investment” as used in the BIT, the security entitlements fell outside its coverage, Mr. Torres Bernárdez asserted.

He confirmed Argentina’s claim that the provision contained a clear requirement for protected investment to be made in the country’s territory and in accordance with its laws and regulations. Since Mr. Torres Bernárdez was of the opinion that “[s]overeign bonds are intangible capital flows without physical implantation in a given host country’s territory,” he considered that they did not constitute investments made in Argentina’s territory. He found it even more difficult to see how the security entitlements at issue in the case fulfilled the territorial requirement.

Mr. Torres Bernárdez did not agree that Argentina was the beneficiary of the alleged investment in its territory or that the entitlement had contributed to its economic development, as had been asserted by the majority. He criticized Judge Simma and Prof. Böckstiegel for applying these criteria to establish territoriality while disregarding the “ordinary meaning” of the territory requirement. Furthermore, he maintained that since “the Respondent has not hosted anybody or anything” the requirement for investment to be made in accordance with host state laws and regulations could not have been fulfilled.

He also considered that sovereign debt restructuring was “not *prima facie* an internationally wrongful act.” It was therefore “unjustified and premature” of his co-arbitrators to rule on the issue in favour of the claimants. In his words, the majority disregarded that “Argentina’s 2005 restructuring of its sovereign debt follows the principles, steps and methods generally applied at the relevant time by the international community to this kind of sovereign financial operation with international overtones.”

Multi-party proceedings “fall outside” the tribunal’s jurisdiction

Mr. Torres Bernárdez agreed with the majority decision that the case was best characterized as a multi-party proceeding rather than a “mass claim,” and it was therefore “not unmanageable” for the tribunal. However, he contended that the ICSID Convention nonetheless required explicit consent by the respondent state for such proceedings. As such, he did not share the majority’s finding that the Convention provided scope for allowing the proceeding through its silence on the matter. Rather, he insisted that, based on general rules contained in public international law, the default rule in case of silence should be to not assume jurisdiction.

He further argued that the arbitration offer contained in the BIT did not contain consent to multi-party proceedings. Mr. Torres Bernárdez noted that, on the contrary, the “Respondent manifested its opposition from the very outset.” In his view it was a “fallacy” to decide that Argentina’s consent was provided in this specific case.

He also challenged his co-arbitrators’ interpretative approach, alleging that they made selective use of case law to show that multi-party arbitration was a generally accepted practice that did not require the respondent’s explicit consent.

*Majority “prejudged” on *ratione personae* jurisdiction*

Mr. Torres Bernárdez considered the nationality of the claimants to be another crucial jurisdictional issue, yet he argued that it should have been assessed at the merits stage in a thorough and definite way, not at the preliminary phase. According to Mr. Torres Bernárdez the majority “prejudged” when it confirmed to have *prima facie* jurisdiction over the claimants.

In particular, the majority's finding that the claimants met the nationality requirement on a prima facie basis should be seen as a "presumption in favour of Claimants in matters of nationality and domicile," since at that point the tribunal had not verified the nationality of individual claimants. He took it as another sign of the majority's lack of neutrality that it had partly shifted the burden of evidence away from the claimants to Argentina, while in his opinion "by the operation of international law" the complete burden of proof related to nationality and consent should lie with the claimants.

In addition, Mr. Torres Bernárdez drew attention to the territoriality requirement that existed for investors, but was allegedly omitted by the majority. For Mr. Torres Bernárdez this was "but one example of the Majority Decision tendency to sidestep jurisdictional requirements as much as possible or to keep them in the dark."

"Crystal clear" conditions for Argentina's arbitration offer

Mr. Torres Bernárdez noted that Argentina's consent to arbitration contained two mandatory preconditions—prior amicable consultations and 18 months of recourse to domestic courts—that foreign investors had to meet before they could initiate international arbitration. He argued that there was no jurisdiction over the matter, because the claimants failed to fulfill either condition; a fact the claimants admitted in their arbitration request. He rejected the claimants' attempt to import more favourable dispute settlement provisions from other treaties through the BIT's most-favoured-nation clause, since he deemed that the clause did not extend to such matters.

The majority had ruled that despite the absence of consultations, the claimants did not violate the requirement for amicable consultations because no prospects for actual settlement existed. It further determined that an exception to the 18-month domestic court requirement was justified because the effort would have been "futile."

Mr. Torres Bernárdez countered that, as a general rule, foreign investors had no right to alter or waive the conditions for states' offers of consent to arbitration. More specifically, he found that there was no legal basis for a "futility exception." The majority decision was said to be based on "speculative" arguments advanced by the claimants.

In addition, Mr. Torres Bernárdez asserted that the claimants' arbitration request was "*vitiated by incongruity* in many essential respects" which rendered it inadmissible. Not only did the request for arbitration miss the signatures of the claimants, but in his opinion it also lacked factual evidence to prove the existence of a prior "legal dispute" in the sense of the ICSID Convention and the BIT. Overall, Mr. Torres Bernárdez agreed with "most of the preliminary objections submitted by the Respondent."

The dissenting opinion of Santiago Torres Bernárdez is available here: <http://www.italaw.com/sites/default/files/case-documents/italaw1487.pdf>

Philip Morris passes the jurisdictional test in a claim against Uruguay *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No.ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)*
Yalan Liu

In a decision dated July 2, 2013, an ICSID tribunal has affirmed its jurisdiction over claims by Philip Morris against Uruguay in a high-profile dispute over restrictions to the marketing of tobacco products.

Background

The dispute arises out of three regulations by Uruguay relating to tobacco packaging and marketing:

1) a requirement that tobacco packages include "pictograms" to illustrate the adverse health effects of smoking; 2) a requirement that each cigarette brand have a "single presentation" which prohibits marketing more than one tobacco product under one brand; 3) and finally a requirement to feature health warnings on 80 per cent of the front and back of tobacco packages.

Philip Morris argues that these requirements are not intended to promote legitimate health policies, but rather are designed to undermine its legally protected trademarks, causing substantial losses to its investment in Uruguay.

Specifically, Philip Morris is alleging that Uruguay breached the Switzerland–Uruguay bilateral investment treaty (BIT) by subjecting its investments to "unreasonable" measures, expropriating its trademarks, and failing to provide fair and equitable treatment. In addition, Philip Morris alleges that Uruguay failed to observe its commitments under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights and the Paris Convention for the Protection of Industrial Property, which, it argues, amount to treaty breaches byway of the BIT's umbrella clause.

Pre-arbitration requirements: six-month amicable settlement and eighteen-month domestic litigation

The BIT stipulates that, prior to initiating international arbitration, disputes shall be subjected to amicable settlement for 6 months and subsequently to domestic litigation for 18 months.

With respect to the 6-month settlement requirement, the tribunal found the claimants' compliance on the grounds that Abal Hermanos S.A. (Abal), Philip Morris' Uruguayan subsidiary, had sought to challenge the disputed regulations through administrative channels. Regarding the 18-month litigation requirement,

Uruguay raised jurisdictional objections based on two grounds: 1) despite the fact that the claimants sought annulment of the regulations in a local court, this did not involve the “same dispute” as the one brought to international arbitration; 2) even if considered the same dispute, the 18-month period had not yet expired when the arbitration was initiated. Uruguay emphasized that the 18-month domestic litigation requirement was a jurisdictional precondition that must be fully met before initiating arbitration. In other words, non-compliance at the moment of instituting arbitration should result in the deprivation of the tribunal’s jurisdiction over the claim.

As for the first objection, the tribunal stated that the domestic litigation does not need to have the same legal basis or cause of action as the dispute brought in arbitration. Rather, it need only be based on “substantially similar facts and subject matter as the BIT claim subsequently submitted by the investor to arbitration.” In this case, the tribunal was satisfied the dispute brought before Uruguay’s courts was sufficiently aligned with the dispute being arbitrated at ICSID.

Uruguay’s second objection, based on the fact that Philip Morris had not litigated the dispute for a full 18-month period before initiating arbitration, was also turned down by the tribunal.

Here the tribunal decided that while the domestic litigation requirement was not satisfied at the time of instituting arbitration proceedings, the requirement could nonetheless be met subsequently. Turning to the facts, the tribunal found that a Uruguayan court rendered decisions after the expiry of the 18-month period but before the tribunal decided on its jurisdiction. Taking into account the objective of this requirement (i.e. to give the domestic court system an opportunity to consider the dispute), the tribunal considered that “to require Claimants to start over and re-file this arbitration now that their 18 months have been met would be a waste of time and resources.”

Lastly, in response to the claimants’ invocation of the MFN clause, the tribunal, having found the satisfaction on both requirements, held no need to further examine the MFN clause.

Public health measures not excluded from the scope of the protections afforded investors

Uruguay contended that Article 2 (1) of the BIT excluded public health measures, to which the challenged regulations belonged, from the scope of investment protection.

However, the tribunal determined that Article 2 (1) only applied to the pre-establishment phase of an investment (i.e. the carve out permitted Uruguay to block new investments based on public health considerations, but did not extend to investments that were already in place). As a result, the tribunal ruled

Article 2 (1) did not create an exception to the BIT’s substantive obligations with respect to investments that had already been legally admitted.

The claimants’ activities in Uruguay constitute an “investment”

Uruguay, insisting on the *Salini* test, argued that the claimants’ activities should not be considered an “investment” on the basis of their alleged failure to contribute to the economic development of Uruguay. Specifically, the direct health-care costs incurred from the consumption of tobacco products outweighed their contribution to the country’s economic development, according to Uruguay.

The tribunal dismissed this objection by holding the contribution-to-development criterion was not a mandatory legal requirement of an investment under the ICSID Convention. The tribunal noted that the four constituent elements of the *Salini* test were merely the “typical features of investments under the ICSID Convention,” but not “a set of mandatory legal requirements.” Therefore, they could “assist in identifying or excluding in extreme cases the presence of an investment,” but should not be used to defeat the broad and flexible notion of the term investment under the ICSID Convention. The tribunal noted that the relevant treaty could place limits on the definition of investment, but in this case the Switzerland-Uruguay BIT did not feature definitional restrictions that posed a problem to the ‘investment’ that Philip Morris referred to in its claim.

Jurisdiction over the denial of justice claim upheld

In its counter-memorial, Philip Morris raised an additional claim, arguing that a decision by a Uruguayan court to reject its request for annulment of one of the challenged regulations and the subsequent request to correct the previous decision amounted to a denial of justice in breach of the BIT’s provision on fair and equitable treatment. In determining its jurisdiction over this claim, the tribunal held three conditions had to be met pursuant to Article 46 of the ICSID Convention: 1) be present no later than in the reply; 2) arise directly out of the subject matter of the dispute; 3) be within the scope of the consent of the parties and within the jurisdiction of ICSID.

The tribunal swiftly found that Philip Morris satisfied the first two conditions of time limit and subject matter. With respect to the question of consent, the tribunal considered whether Philip Morris needed to abide by the two pre-arbitration requirements (i.e., the 6 months of amicable settlement and 18-months domestic litigation). The tribunal concluded that referring the court’s decision to 6-months of amicable settlement was futile, given that the executive had no power to revoke the court’s decision. As such, there was “no real prospect for an amicable settlement of the dispute.” The same conclusion was drawn with respect to the 18-month domestic litigation

requirement due to the fact that any decisions by this Uruguayan court were final and non-appealable. Therefore, the tribunal ruled that the denial of justice claim, having met the pre-arbitration requirements, fell within the scope of Uruguay's consent and ruled in favour of its jurisdiction accordingly.

The arbitrators in the case are Prof. Piero Bernardini (president), Mr. Gary Born (claimant's nominee), and Prof. James Crawford (respondent's nominee). The decision is available here: <http://www.italaw.com/sites/default/files/casedocuments/italaw1531.pdf>

Canadian pharmaceutical company loses NAFTA investment claim against the United States; claimant lacks an investment in the United States
Apotex Inc. v. The Government of the United States of America, UNCITRAL
Damon Vis-Dunbar

An UNCITRAL tribunal has accepted all three jurisdictional objections raised by the United States, therefore dismissing two NAFTA Chapter Eleven arbitrations initiated by a Canadian producer of generic drugs.

In siding with the United States, the tribunal would ultimately determine that the claimant lacked an "investment" in US territory, and was better understood as a Canadian-based exporter to the United States.

The claimant, Apotex, was frustrated in its efforts to sell two types of drugs to the US market as it navigated the complicated procedures that govern the introduction of generic drugs in the United States.

The two arbitrations were held concurrently, but were not consolidated. The first relates to Apotex's efforts to bring to market a generic version of the antidepressant medication commonly known as Zoloft, or sertraline hydrochloride by its generic name. The second relates to a similar attempt to market pravastatin sodium, a heart medication that has been sold under the name brand Pravachol.

In both cases, Apotex applied for an "Abbreviated New Drug Application" (ANDA); essentially an application to market a generic version of a drug that has already been approved by the Food and Drug Administration (FDA).

Part of the process can include initiating an 'artificial' act of patent infringement, in an effort to draw the patent holder into a dispute that would provide a judgment, one way or the other, on the legality of introducing a generic version of the drug in question.

In the case of the sertraline dispute, Apotex filed for a declaratory judgment—a common legal tactic in patent litigation. However, U.S. Federal Courts refused to rule on the matter, citing a lack of "reasonable apprehension" that the copy-right holder (in this case

Pfizer) would launch a suit for patent infringement. Apotex's efforts to convince the Supreme Court to overturn the Federal Court decisions have also failed. The scenario played out somewhat differently in the pravastatin dispute, although the end result was the same: a lack of legal certainty over whether it could market the drug.

Is Apotex an 'investor' with an 'investment'?

The United States challenged Apotex's assertion that it was an investor with an investment in the United States, as defined by NAFTA's investment chapter. The US described Apotex as, essentially, a Canadian exporter of generic drugs—a characterization that would ring true for the tribunal.

Based on Apotex's submission, the tribunal surmised that the claimant asserted three distinct 'investments': the development and manufacture of approved generic drugs for sale in the United States; the preparation of ANDAs (and related expenses); and various other expenditures in the US, such as the use of a US affiliate and the purchase of raw materials.

On the first, the tribunal concluded that Apotex's development, manufacture and testing of generic drugs was wholly a Canadian activity, and therefore could not be considered an investment in the United States.

On the second, Apotex argued that the expense of preparing an ANDA, and the ANDA itself (as an item of property) could be considered a protected investment under NAFTA. The tribunal would respond, however, that Apotex prepared its ANDAs in Canada, and in any case is this an exercise that either an 'investor' or 'exporter' would need to perform in order to market generic drugs in the US. The tribunal added that regulatory costs, "however extensive," could not transform the costs of developing the regulated products into investment in the United States. As a final point, the tribunal noted that regulatory costs do not fall within NAFTA's list of investments.

The tribunal also reject Apotex's assertion that its ANDA submissions could be considered "property" in the United States. NAFTA considers an investment to include "property ... acquired in the expectation or used for the purpose of economic benefit or other business purposes." In the tribunal's view, an ANDA is basically an application to sell a product in the United States—and as such does not fall within the scope of what NAFTA considers "property." The tribunal would also emphasise that the ANDAs "were only tentatively" approved by the FDA. "Whether or not each of Apotex's ANDAs would have been granted final approval is by no means certain on the evidence," wrote the tribunal.

Apotex's claims to "other significant" investments in the United States would also fail to convince the tribunal. These included costs associated with

its US affiliate, which it used as a conduit for its correspondence with FDA. The tribunal agreed with the United States that this was essentially a “commercial contract for the sale of ... services.” Nor could Apotex’s purchase of raw materials in the US amount to an investment, given that these were used for manufacturing in Canada.

Having not made an “investment” in the United States under NAFTA, the tribunal concluded that Apotex could also not claim to be an “investor.” While that conclusion shut the door on Apotex’s claims, the tribunal nonetheless considered two other jurisdictional objections raised by the United States. These two objections related only to the pravastatin claim.

Apotex failed to fulfill judicial finality

In contrast to the sertraline claim, in which Apotex sought a review by the U.S. Supreme Court, Apotex did not pursue all available judicial avenues for its pravastatin claim. Apotex and the United States agreed that NAFTA required that a claim related to a judicial act required that the claimant had exhausted all judicial remedies (i.e. judicial finality) before resorting arbitration, unless doing so was “obviously futile.”

Apotex argued that its remaining judicial options in the pravastatin dispute should be considered futile—while the United States disagreed.

Setting a high bar for what it considers “obviously futile,” the tribunal stated that the issue hinges on whether judicial options were available, not whether they “would have granted the desired relief.” Given that judicial options were available—such as a petition to the Supreme Court—the tribunal was not satisfied that Apotex had proven judicial finality.

Claimant over-reaches NAFTA’s three-year time bar

Under NAFTA an investment claim must be made no more than three years “from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor incurred loss or damage.”

In this case, a key decision by the FDA occurred more than three years before Apotex filed its notice of arbitration. Apotex attempted to link the FDA decision together with subsequent court cases, to paint a picture of a “single, continuous set” of events that led to the alleged breach of NAFTA.

However, the tribunal made clear that any claim based solely on the FDA decision was time barred, and that the claimant could not buy more time by resorting to court proceedings. “Any conclusion otherwise would provide a very easy means to evade the clear rule in NAFTA Article 1116(2) in most cases (i.e. by filing any court action, however hopeless).”

The tribunal accepted that claims related to the decisions by US courts were not time barred, as these occurred within three years of Apotex’s notice of arbitration. Thus the tribunal distinguished between two types of claims—one linked to the FDA decision, and a second linked to US court decisions—which may have had implications for Apotex’s case had it proceeded to the merits stage.

Apotex must reimburse the United States for legal expenses and half of the arbitration costs

Apotex was ordered to pay the United States’ legal expenses (amounting to US\$ 525, 814) and 50 per cent of the cost of the tribunal.

In explaining that decision, the tribunal wrote that the United States “raised entirely appropriate objections, and ... ought never to have been embroiled in this process.”

The arbitrators in the case are Mr. Toby T. Landau QC (president), Hon. Fern M. Smith (respondent’s nominee), and Mr. Clifford M. Davidson (claimant’s nominee).

The award on jurisdiction and admissibility is available here: <http://www.italaw.com/sites/default/files/case-documents/italaw1550.pdf>

Notes

¹ A summary of the majority’s decision is available here: <http://www.iisd.org/itn/2013/06/26/awards-and-decisions-12/>

resources and events

Resources

The BRIC States and Outward Foreign Direct Investment

By David Collins, Oxford University Press, 2013

This book examines the relatively recent and under-explored phenomenon of outward foreign direct investment from the large emerging market countries, focusing on the four BRIC states (Brazil, Russia, India, and China) and on the services sector, meaning primarily telecommunications, finance, and transport. It considers the international legal framework governing FDI, discussing the nature and extent of the bilateral and regional investment treaty commitments undertaken by each of the BRIC states, including their commitments under the WTO General Agreement on Trade in Services, as well as their obligations as members of the International Monetary Fund and the World Bank. The book is available to order here: <http://ukcatalogue.oup.com/product/9780199652716.do>

Investment Law within International Law: Integrationist Perspectives

Edited by Freya Baetens, Cambridge University Press, 2013

Developments within various sub-fields of international law influence international investment law, but changes in investment law also have an impact on the evolution of other fields within international law. Through contributions from leading scholars and practitioners, this book analyses specific links between investment law and other sub-fields of international law, such as the law on armed conflict, human rights, sustainable development, trade, development and EU law. In particular, this book scrutinises how concepts, principles and rules developed in the context of such sub-fields could inform the content of investment law. Solutions aimed at resolving problems in other settings may provide instructive examples for addressing current problems in the field of investment law, and vice versa. The underlying question is whether key sub-fields of public international law, notably international investment law, are open to cross-fertilisation, or, whether they are evolving further into self-contained regimes. The book is available to order here: <http://www.cambridge.org/asia/catalogue/catalogue.asp?isbn=9781107038882>

Liberalization or Litigation? Time to Rethink the International Investment Regime

By Simon Lester, Cato Institute, July 2013

This policy brief argues that current international investment rules are not well calibrated to liberalizing foreign investment. Instead of offering a simple and direct policy of liberalization, they incorporate vague legal principles that provide numerous opportunities for litigation, and in doing so they undermine the more basic principle of treating foreign and domestic investment equally. If international rules are to be used at all in this area, a focus on non-discrimination, and a more flexible legal framework, would be preferable to the existing system. In response the paper proposes the following reforms to the system: any rules in this area should be multilateral, not bilateral or regional; the core principle should be non-discrimination, with some of the broader principles currently in effect taken out; and state-state dispute settlement should be used, rather than investor-state. Rules along these lines would better reflect the current state of foreign investment flows, promote foreign investment, and maintain domestic regulatory autonomy. The paper is available here: http://object.cato.org/sites/cato.org/files/pubs/pdf/pa730_web.pdf

Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policymaking

United Nations Conference on Trade and Sustainable Development, July 2013

This UNCTAD *IIA Issues Note* was originally prepared for a 2013 investment seminar organized by Finland's Ministry for Foreign Affairs. The note discusses a recent paradigm shift in investment policymaking that has come about as a result of changing economic realities and multiple crises, and has resulted

in inclusive growth and sustainable development becoming increasingly prominent objectives for IIA stakeholders. The note addresses the multiple issues facing international investment policymaking, and identifies four main challenges: how to strengthen the sustainability dimension of international investment agreements; how to preserve appropriate regulatory space for host countries; how to deal with the complexity of a fragmented treaty regime characterized by overlaps and incoherence; and how to address serious deficiencies in investor-state dispute settlement. The paper is available to download here: [http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=576&Sitemap_x0020_Taxonomy=Investment+and+Enterprise;#607;#International+Investment+Agreements+\(IIA\);#20;#UNCTAD+Home](http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=576&Sitemap_x0020_Taxonomy=Investment+and+Enterprise;#607;#International+Investment+Agreements+(IIA);#20;#UNCTAD+Home)

Events 2013

October 10-11

INTERNATIONAL INVESTMENT AGREEMENTS – BALANCING SUSTAINABLE DEVELOPMENT AND INVESTMENT PROTECTION,

Free University of Berlin, Berlin, Germany, http://www.jura.fu-berlin.de/en/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Berlin_Oct__2013

November 4-5

BRIDGING THE GAP BETWEEN INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT,

Dutch Ministry of Foreign Affairs, the Dutch Ministry of Infrastructure and the Environment, the School of Law of Utrecht University and the Center for Sustainability of Nyenrode Business University, The Hague, Netherlands, <http://www.iilconference.com/>

November 4-6

SEVENTH ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS,

International Institute for Sustainable Development, South Centre, and the government of Indonesia, Jakarta, Indonesia, <http://www.iisd.org/investment/dci/>

November 7

SALIENT ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION,

American University, Washington College of Law, Washington, DC, United States, <https://www.wcl.american.edu/arbitration/symposium.cfm>

November 8

THE ROLE OF THE STATE IN INVESTOR-STATE

ARBITRATION, World Trade Institute and University of Bern, Bern, Switzerland, <http://www.wti.org/news-archive/call-for-papers-the-role-of-the-state-in-investor-state-arbitration/>

November 14

INVESTMENT INCENTIVES - THE GOOD, THE BAD AND THE UGLY: ASSESSING THE COSTS, BENEFITS AND OPTIONS FOR POLICY REFORM,

Columbia University, New York, United States, <http://www.vcc.columbia.edu/content/eighth-columbia-international-investment-conference-investment-incentives-good-bad-and-ugly->



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